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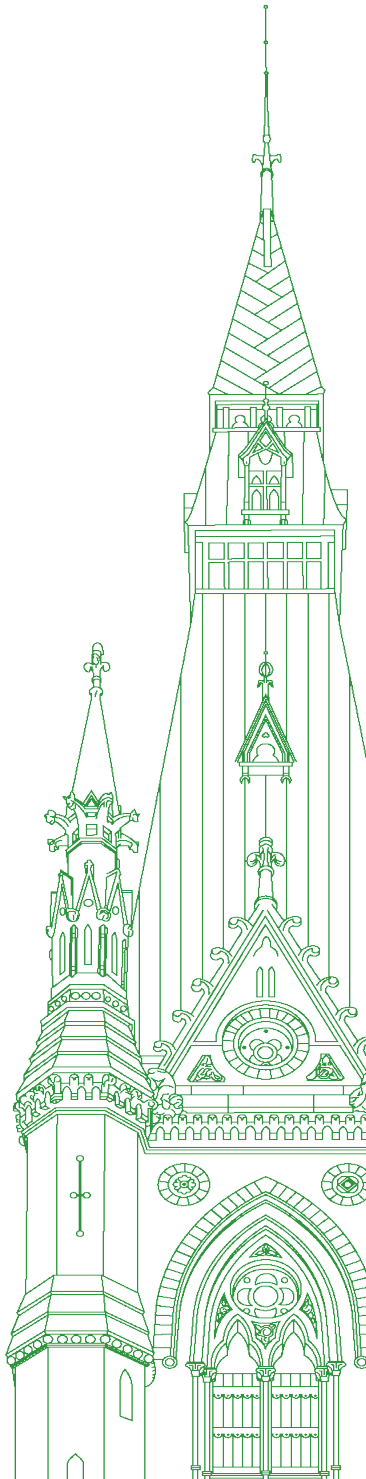

Chair: The Honourable John McKay

Standing Committee on National Defence

Wednesday, February 14, 2024

● (1640)

[*English*]

The Chair (Hon. John McKay (Scarborough—Guildwood, Lib.)): I bring this meeting to order. I thank colleagues for being here as timely as can be. We're only about 10 minutes behind, which is pretty good for us.

We have with us today an old friend of the committee, Monsieur Drapeau, who has been here many times, as has Mr. McSorley. We appreciate both of you being here.

We also have Richard Shimooka, senior fellow at the Macdonald-Laurier Institute, by video conference. I appreciate you joining us today.

All of you are familiar with the proceedings of the committee. We give five minutes for opening statements, and then we move to questions. Since we have a 90-minute session, I'm going to propose going three rounds in sequence.

With that, given that video conferences are inherently unstable—we don't trust them—I'm going to ask Mr. Shimooka to proceed with his five-minute opening statement. Then I'll proceed to Mr. Drapeau and Mr. McSorley.

Mr. Richard Shimooka (Senior Fellow, Macdonald-Laurier Institute, As an individual): Thank you very much for letting me speak today to the committee on the topic of transparency within the Department of National Defence and the Canadian Armed Forces. It is of great relevance for me for a variety of reasons, but none so much as it deeply affects my ability to undertake research in defence policy and strategy in Canada. The most effective tools I possess are the Access to Information Act system and interviews with policy-makers.

I'm going to focus my discussion on how these areas have changed over the past 20 years and affected transparency overall.

Why is this research important? The traditional and most immediate view is that this is a critical form of independent accountability and oversight on government. However, there are other benefits. Our system of governance lacks institutional knowledge. The history that has guided policy creations is frequently forgotten, even if the policies remain in place. Filling that gap can assist policy-makers craft better policies in the future.

Finally, such research can benefit the government to better communicate policies to domestic and foreign audiences. Even the most talented ministers will be limited in their opportunity to explain these contextual factors. Analysis by outside researchers can be an important communication source to help advance policy goals.

Unfortunately, undertaking public policy research has become increasingly challenging over the past two decades. I started around 2002, when transparency and oversight were heavily influenced by the fallout of the Somalia inquiry. It revealed systemic efforts by the department to obfuscate aspects of the crisis, which extended to ATI. The lack of transparency forced the department to reform how it operated for the next decade.

Over the past 20 years, ATI has become an increasingly ineffective system to obtain useful information on a timely basis. In 2002, a relatively straightforward ATI query would generally provide a good return of documents. A set of ATIs I used to examine the 1996 intervention in Zaire provided over 2,000 documents with a very high level of complexity, including a large number of foreign confidences, advice and sensitive information. The original request took about a year to be released and provided an in-depth view of what occurred during that operation. This would be unheard of today.

The number of pages has decreased year on year, and officials frequently employ highly restricted interpretations in an effort to suppress the disclosure of some documents, or claim that no such records have been found. In other cases, requesters are advised that the scope of their request is too broad and are forced to truncate their query. Finally, requests frequently take years to be fulfilled, severely diminishing ATI's value as a research tool.

Not all of the reasons for this situation are necessarily intentional. The ATI system today relies heavily on departmental staff to assess documentation for release, the same staff who are already overburdened with their day-to-day work. It is far from an ideal approach to handling ATI requests.

Concurrent to the ATI system's enfeeblement, there's been a consistent effort to curtail the ability of officials to discuss policies with interested parties. In the years after the Somalia inquiry, DND employed a fairly liberalized communication policy, and access to officials was fairly good. One of the most helpful aspects was that departments made available subject matter experts to discuss specific areas.

However, in 2005, the policy changed dramatically, in part due to the belief that the war in Afghanistan required message discipline, and a preference by the Harper government to centralize communication strategies. Access to information was curtailed and replaced by superficial media response lines from public affairs representatives.

Furthermore, the ability to maintain working relationships with officials has become increasingly strained. One of the most serious ruptures occurred after 2015, when Vice-Admiral Mark Norman was charged with a breach of trust and members of the future fighter capability project were forced to sign a gag order. These events had a serious chilling effect on the bureaucracy, as individuals felt fear towards the potential consequences of talking outside of government. While we have recently witnessed a greater engagement by defence officials in the past year, there remains a significant reluctance to speak with candour on issues.

Where are we today? Overall, I believe that the poor state of transparency in defence has largely been counterproductive for the government. Public understanding of the military is at an all-time low and contributes to the lack of support. This is in part due to the lack of open information available and the adversarial relationship that has developed between government and outside bodies over access to information.

Unfortunately, I don't have an easy solution to this problem. There is a deep-seated view that the current approach is the only way to successfully manage public relations. Seeing past the immediate situation to a radically different future is a tough sell for any government. I fear that it will require another Somalia-scale scandal to impel a government to shift its behaviour, which will benefit no party or the country as a whole.

Thank you.

● (1645)

The Chair: Thank you, Mr. Shimooka.

Go ahead, Mr. Drapeau.

Colonel (Retired) Michel Drapeau (Professor, As an Individual): Thank you. It's an honour for me to appear before this committee.

Let me open briefly by outlining my background.

I first served in the Canadian Armed Forces for 34 years, retiring in 1993. At the time of my retirement, I was acting as the corporate secretary of the National Defence headquarters. Soon after, I attended law school. After articling in the Federal Court of Appeal, I was called to the Ontario bar—exactly 22 years ago today.

On this day in 2002, I opened the first law practice in Canada specializing in military law. In 2009, the University of Ottawa appointed me as an adjunct professor in the faculty of law, where I taught military law and access to information and privacy. I've since co-authored a number of legal texts, including one on federal access to information and privacy and another on Canadian military law.

As part of my law practice, I use the access regime on a regular basis on behalf of my clients—individuals and corporates—in order to gain access to information and public records in the pursuit of their individual claims. To give you an idea of the scope of my reliance on the access and privacy law, suffice it to say that since September 2007, my firm has submitted a total of 4,645 access requests under the federal access law and some provincial access laws to over 250 federal institutions. We did not hit them all, but we hit a number of them. As you may well imagine, in the process, we have come across every frustration possible.

In my experience, the federal access and privacy processes are bogged down by long delays, which are made even worse—I don't think this part has been discussed by your committee yet—by the Office of the Information Commissioner and the Office of the Privacy Commissioner. They are tasked with investigating complaints and take, on average, a minimum of one year to complete their investigations. This is enough to test the quality of perseverance and patience of most users in the access regime.

I want to cover three other aspects.

The first one is grievances. Also as part of my law practice, we regularly represent military clients whose submission is grievances. In a six-page brief that I prepared for distribution to members in both English and French, I've provided you with examples that we have come across over the last 90 days in the office, specifically on this subject and others.

The grievance system's malfunction at the moment is due, I think, in large part to the extraordinary time taken by the final authority in a grievance process. Who is the final authority? It's the chief of the defence staff.

In my experience, it is not unusual for the CDS to take between four and five years to issue a final decision. Such a prolonged delay leads to great frustration and a feeling held by grievers of being unappreciated and unvalued. Only when the chief of the defence staff signs the final decision is a griever able to go to the Federal Court for a judicial review to get justice.

Finally, I want to talk about the Military Police Complaints Commission. As part of my practice, I also submit complaints to the MPCC on behalf of clients. I have no quarrel with the MPCC. However, as part of the MPCC complaint process, complaints are first sent to the provost marshal in the section called the office of professional standards to examine the complaint. That process takes months and years. By way of example, yesterday I wrote to the chair of the MPCC, explaining that one of the complaints has been sitting with professional standards for two years and four months and the complainant is waiting for a decision by the MPCC.

On that, I'll conclude. I will be happy to take your questions.

● (1650)

The Chair: Thank you, Mr. Drapeau.

Mr. McSorley, you have the final five minutes.

Mr. Tim McSorley (National Coordinator, International Civil Liberties Monitoring Group): Thank you, Chair and members of this committee, for the invitation to speak with you today for your study on transparency at the Department of National Defence.

I'm the national coordinator of the International Civil Liberties Monitoring Group, a coalition of 45 Canadian organizations that, since 2002, has worked to address the impact of national security and anti-terrorism laws on civil liberties in Canada and internationally.

As you can imagine, working in this field has meant that we often come up against issues of secrecy and transparency. A large part of our work has been to push back against the ever-growing creep of secrecy and the ongoing erosion of transparency under the guise of protecting national security.

Transparency itself is key for accountability and the protection of fundamental rights and freedoms enshrined in the Canadian charter. Secrecy breeds unaccountability, which invariable leads to abuses. This is especially troubling when it comes to areas like national security and national defence, which engage some of the most complex issues and often run the risk of the gravest rights violations.

Given our specific mandate, our work has focused on the Communications Security Establishment, which falls under the mandate of National Defence. We have also monitored recent developments regarding National Defence's intelligence-gathering operations and Canada's past actions in Afghanistan.

While CSE is just one piece of the Department of National Defence, it carries out a wide range of activities, including intelligence collection, surveillance, and active and defensive cyber-operations. As per its mandate, CSE also provides support across National Defence and to other government departments. It also happens to be one of the most secretive bodies, not just within DND but within the entire Canadian government.

Given that our concern is transparency and accountability, I would like to direct your attention to the CSE and DND's relationship with national security review bodies—the National Security and Intelligence Committee of Parliamentarians and the National Security and Intelligence Review Agency. Both are relatively new bodies. Their raison d'être is to provide the kind of accountability that ostensibly cannot be provided directly to the public because CSE, DND intelligence, and other national security agencies work in secret. These review bodies are essentially stand-ins for the ability of these national security agencies to be accountable directly to the public.

These review and oversight bodies are sworn to secrecy and work in secure facilities. Much of the work itself is redacted when it is released publicly. Given all of these precautions, a person would assume and expect that CSE, the Department of National Defence and other bodies would co-operate fully with the review bodies. Unfortunately and shockingly this isn't the case.

Both NSICOP and NSIRA have reported strongly and on multiple occasions that the CSE in particular is slow to provide information, does not provide access to files in a way that allows for independent research and verification, and fundamentally obstructs these bodies in their ability to carry out their work.

For example, NSICOP reported that the departments it reviews, including the CSE, have refused to hand over information based on reasons that are not allowed for by the law, or have simply decided to refuse to provide relevant information based on their own decisions. NSIRA has reported that CSE has failed to establish a system to grant it independent access to information, resulting in CSE staff themselves determining what information to provide to NSIRA, making it impossible to ensure the independence of a review. NSIRA also reported significant delays in CSE providing it with information, thereby disrupting the progress of reviews and violating the CSE's legal requirements towards NSIRA.

We've raised these issues on multiple occasions, but time and again, there has been no action, no accountability, for this obstruction.

These concerns go further than the CSE. It is important to remember that one of the events that led to the creation of NSICOP is the never-resolved controversy of the transfer of Afghan detainees from Canadian Force's custody to the Afghan army, despite credible allegations and accounts of torture and abuse. These review bodies are in place, imperfect as they may be—and we can discuss ways that they may be improved—to help ensure that such abuses cannot pass in secret.

When national security agencies unlawfully withhold information and obstruct and delay reviews, and when there are no consequences for doing so, it poses a grave risk, not just to fundamental freedoms but to the safety and lives of individuals around the world.

My time is limited. I have other recommendations we can discuss.

I'll just leave with the point that both the legislation enacting NSICOP and the legislation enacting NSIRA and the CSE—the National Security Act, 2017—have expired the statutory deadline for review by parliamentary committees. Engaging in those reviews might be one way to further explore ways to get to the problems and address the issues at hand.

Thank you.

● (1655)

The Chair: Thank you, Mr. McSorley.

We'll now go to our six-minute round.

We're starting with Mr. Kelly.

Go ahead, Mr. Kelly.

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

Thank you, Mr. Drapeau.

When I was a rookie member of Parliament, shortly after this government was elected on a promise of openness by default and to be the most open and transparent government in history, I was at an ethics committee meeting where you were a witness. During that meeting, you talked about the motivation and lack of motivation to fully respond to requests within government. You said:

> It's because they understand, they read the signals. They read the signals from the centre, the Clerk of the Privy Council, the deputy minister, the assistant deputy minister, or director general.
>
> There's a higher penalty to be paid if you're zealous in releasing records that you know are being requested and proceeding with them sharply, and only excluding what needs to be excluded, where you have the discretion not to exempt certain parts, and having the information out there, than in saying no, and delaying or invoking exceptions and letting the requesters go through the complaint mechanism.

It has been eight years. How much has changed?

Col (Ret'd) Michel Drapeau: I haven't changed my mind on it. I would say exactly the same words.

Mr. Pat Kelly: We're here eight years later, and we still have—

Col (Ret'd) Michel Drapeau: As I said, Mr. Kelly, there is no penalty. If a request is not met with a disclosure of documents or not answered—both of them happen—the requester can file a complaint. If he files a complaint, he has to wait a minimum of a year—normally it's two years—before he gets a decision, which may or may not go in his favour. The complaint mechanism, in fact, is at fault.

At the same committee, I said that perhaps we should have the audacity to give the Information Commissioner a deadline so that she has to come up with a decision on a complaint, say, within a year.

Mr. Pat Kelly: The Commissioner has testified at multiple committees that her office is hopelessly under-resourced to do what you have described because they are overwhelmed with complaints.

Col (Ret'd) Michel Drapeau: I disagree.

At the same committee, I said that it's one of the tribunals with the heaviest senior management. They have three assistant commissioners and many DGs for a staff of 90 people at the expense of having investigators.

Mr. Pat Kelly: Does a culture of secrecy still pervade at DND and within the CAF?

Col (Ret'd) Michel Drapeau: I wouldn't call it a culture of secrecy—that's too nasty—but it's inefficiency. Call it what you want; the system doesn't work. I think you would be faulted if you only looked at the defence department or the organization. They try to do the best they can with the resources they have.

Let me tell you, the system of access to information I think costs taxpayers $90 million per year, if I look at the budget over the past year or so. It's the only system of that particular value that I know of in Canada that has never had a system audit or an AG examining whether or not the various ATIP offices in various organizations have the staff and procedures required and examining the manner in which they can deliver the product. They are left to their own devices, and it's a problem.

Mr. Pat Kelly: Thank you.

I would love to keep going. I want to get Mr. Shimooka into it too, though.

Mr. Shimooka, you published a report through Macdonald-Laurier in 2019, “The Catastrophe: Assessing the Damage from Canada's Fighter Replacement Fiasco.” You spelled out how the political persecution of retired Vice-Admiral Norman by this government put a chill on DND.

Can you describe the depths of the chill on would-be whistle-blowers, please?

Mr. Richard Shimooka: Certainly. I wouldn't even say it's would-be whistle-blowers.

As I said in my prepared remarks, I think there was a general decrease in regular staff members' willingness to talk about day-to-day issues. Much of it may not be controversial, but certainly the twin events—as I said, Mark Norman's charges and the gag order that was put in place, which was pretty substantial and was not well received at all within DND—made individuals reassess whether they should be talking about it and ask whether it could come up in some sort of review. I think that really caused trouble for a lot of researchers, whereas previous contacts had been willing to talk or discuss—

● (1700)

Mr. Pat Kelly: You mentioned the problem within the CAF itself. How does a lack of transparency affect morale within the CAF?

Mr. Richard Shimooka: I think it is significant. I could talk to you about specific cases where individuals were aghast at what occurred. We entrust these individuals in a lot of cases—

Mr. Pat Kelly: Is it a contributing factor to the crisis of retention and recruitment?

Mr. Richard Shimooka: Absolutely. I can think of specific cases where individuals left because of the gag order.

Mr. Pat Kelly: Thank you.

Do you have any outstanding ATIPs from 2019 or earlier?

Mr. Richard Shimooka: I do. I have one that was filed early in 2019, specifically to do with the Super Hornet purchase. I never received a reply.

Mr. Pat Kelly: Is this common? At our meeting on Monday, it looked like Mr. Bezan might have been the only person in Canada with an outstanding ATIP, but you have one.

Are you aware of anyone else? Do any of your colleagues at Macdonald-Laurier have outstanding ATIPs from 2019?

Mr. Richard Shimooka: I would have to take a look. I heard the minister's response, and maybe these are the only five that exist out there, but I'd be surprised if they were.

Mr. Pat Kelly: He has six and you have one.

The Chair: Thank you, Mr. Kelly.

Mr. Fillmore, the floor is yours for six minutes.

Mr. Andy Fillmore (Halifax, Lib.): Thank you, Mr. Chair.

Thank you to the witnesses.

I'd like to direct my question to Mr. Drapeau and Mr. Shimooka, if I could.

Everyone around this table wants to ensure transparency, wants to ensure accountability and wants to reduce wait times. We're trying to get to the underlying causes of those things, and we want to make sure we're solving the right problem.

If I could set the table for a moment, I think everyone around the table probably remembers the time when it seemed like almost overnight, compact computers equipped with email appeared on all our desks in all our workplaces with the promise of making things more efficient, with faster communication and a better exchange of information. I think we all know that with the advent of that was a proliferation of information—too many emails, too much communication—and we quickly realized that this apparatus of emails and computers on everybody's desks made more work, not less work.

I'm trying to get at the idea that one of the causes of the delays we're seeing, which is sometimes perceived as lack of transparency, is the unbelievable amount of data. When someone requests a bit of communication between folks, it turns into a spidery email trail that goes into all different directions, and it understandably takes a great deal of time to uncover all of that.

Mr. Shimooka, you said that you had a great experience in 2002 with a very quick turnaround that would be unheard of today. Again, we're in a place where there is so much more data.

I wonder if either of you, Mr. Drapeau or Mr. Shimooka, would reflect on the preponderance of information being part of the problem we're dealing with here.

Col (Ret'd) Michel Drapeau: It's part of the problem, but some of the problems can be divided into segments. For instance, there's no reason on this earth why an access request that is put in legally for five dollars cannot be accepted and cannot be acknowledged. In fact, I could give you numbers on some of our requests. For three of them made this past September, we're still waiting for an acknowledgement. There's no excuse for that.

Despite all the requests, there aren't all that many, come to think of it, with a population of 40 million. If you compare yourselves with agencies in the United States and the hundreds of thousands of requests they receive, it can be managed, but you have to have a certain discipline. Accepting and recognizing them is one thing.

In terms of the 30-day system we have in place, I'm not particularly wedded to it. Perhaps we need to change that. We need to say 60 days and then enforce it, as opposed to having 30 days and people abuse it.

The Office of the Information Commissioner doesn't have a God-given right to continue working in the manner in which it does. In the United States, if you put a request in to the agency, you also complain to the agency, and if you don't receive a response by a certain time, then you go to court.

Many of my clients—some of them corporate—are frustrated by the fact that when they ask legally, not through a brown envelope but through the access regime, to have access to records, they're not getting a response, or if they do get a response it's exempted. They put the complaint to the Information Commissioner, and then they have to wait a year or two or three. Maybe some large corporation says, “We're eager to go to court so the court can decide on it,” but they can't until the Information Commissioner issues a report. That has to be changed.

Perhaps we also need to change whether or not we have an Information Commissioner. Is it required under the circumstances?

● (1705)

Mr. Andy Fillmore: Thank you, Mr. Drapeau.

If I have another moment—

Mr. Richard Shimooka: Could I give a quick response?

Mr. Andy Fillmore: Yes, I was going to invite you. Please go ahead.

Mr. Richard Shimooka: Look at the statistical information that's put out by the office about how many documents have been released over the past decade and a bit. The number of documents hasn't changed. About 10,000 pages have been released, and the number of requests has roughly stayed the same. There have been fewer questions the past couple years.

To your question about whether or not there has been.... I agree with you a hundred per cent that there have been far more documents. The information society we have produces more documents, but that hasn't really been reflected in the number of documents being produced or released at this time.

I'm not too sure what it is. I know there have been issues with WhatsApp discussions, text messages or what the information law captures. Those are other challenges, as well, that I don't think the current law fully gets at or is fully able to accept.

On the American side, far more individuals are available to undertake this level of discussion. They don't have to go to the line staff to do the redactions. There are individuals who are able to do that outside of the policy-making process.

Mr. Andy Fillmore: Thank you both.

I've heard that the preponderance of data is present in the problem, but it's not the problem, so we need to understand how to deal with data better. There are other things. We've been hearing from a number of witnesses about the importance of modernizing the systems we use. This could be technological modernization or hiring more people.

Ending where I began with the footing of trying to find solutions, to any of the three panellists, are there specific recommendations to improve transparency and timelines? That would be greatly appreciated.

Col (Ret'd) Michel Drapeau: We've heard at a number of committee meetings that a number of requests from 2019 have yet to be satisfied. There's no reason for that. I also have some from 2019. We're already waited five years. There are also some from 2021. Why? There are some failures in the bureaucracy that are attached to the management requests. I don't think the volume is to be blamed.

The Chair: Thank you, Mr. Fillmore.

[*Translation*]

Ms. Normandin, go ahead for six minutes.

Ms. Christine Normandin (Saint-Jean, BQ): Thank you very much, Mr. Chair.

I'd like to thank the witnesses for their opening remarks.

Mr. Shimooka, you talked about how access to information has evolved over the past 20 years. I'd like to hear your thoughts on how requests are formulated.

For example, has there been a change in the wording that should be used to obtain a specific document? Is it becoming increasingly difficult to get your hands on exactly what you want? Do you need specific file numbers? Do you have to do some preliminary research, which is increasingly difficult to do, in order to establish what you're looking for so you can obtain it correctly? In short, has it been basically the same for the past 20 years or so?

I also invite Mr. Drapeau and Mr. McSorley to add their comments, if necessary.

[*English*]

Mr. Richard Shimooka: I think that is much more complex. In my experience, and Colonel Drapeau can probably elaborate much better than I can, it often requires a very clear understanding of what you're trying to find, even the document name and number. Even then, I've seen exclusions occur that require a grievance because we know it exists.

This goes back to the point that we have developed a more adversarial view of ATIP. It's clear that the government internally does not want to release in certain areas, and you have to know exactly what you're looking for to obtain what you need.

That's my personal experience.

Col (Ret'd) Michel Drapeau: The information you request has to be detailed enough so that an experienced member of the department can understand and act on it.

When I teach access to information, I inform students what is required. I tell them not to play cat and mouse, say exactly what their after and then put in a request. Put a background on it: “Once upon a time, there was a study. I'm interested in this.” Then there's no hesitation as to what records you're after.

A skilled requester will know how to get those records. Info Source, which is produced by Treasury Board on a yearly basis, provides a mountain of information on programs and so on so that you as a requester can inform yourself and can have a deliberate explanation to what you were after.

● (1710)

[*Translation*]

Ms. Christine Normandin: Thank you.

Let's take the example of ordinary citizens who can't afford to go and see a specialist. Should there be a more simplified mechanism for people who want access to information?

Should there be a more universal way of doing things, rather than having a process reserved for a certain group of employees who are familiar with the process and know how to use the Access to Information Act?

Col (Ret'd) Michel Drapeau: The legislation already stipulates that the coordinators of each access to information team have a duty to assist requesters who can't express themselves properly.

Ms. Christine Normandin: Thank you very much.

With respect to the responsibility of public servants who handle access to information requests, there seems to be a tendency to avoid disclosing too much information, for fear of reprisals. In addition, they are often not particularly well trained to deal with access to information requests. It's a small part of their job, which is much broader.

Should there be some form of impunity in cases where too much information is disclosed, so that people don't feel incited to keep as much information as possible?

I'm talking about the people on the ground, the ones who process the requests right from the start. Should this situation be fixed in order to ensure that public servants don't fear reprisals if they disclose too much information?

Col (Ret'd) Michel Drapeau: I don't think that's a problem at the moment. The teams that handle access to information requests do a tremendous job, given the number of requests and the lack of support they receive from their respective departments.

That's why I'm saying it's absolutely essential that the Auditor General carry out a review to determine whether these teams have the right tools, the right number of employees, and so on. That has never been done, and it should be done.

Ms. Christine Normandin: Thank you.

Mr. Shimooka, would you like to add anything?

[*English*]

Mr. Richard Shimooka: I would agree with that.

I would say that utilizing staff resources generally for policy-making doesn't help. It is an onerous burden for the departmental staff, who are, as I said, overburdened. There are not enough individuals who can undertake this. In their day-to-day work, they are going to err on the side of caution, especially if it's a side job they're doing in addition to their main duties.

To the point of having an audit, maybe put more resources into the ATI system in order to get better responses.

[*Translation*]

Ms. Christine Normandin: Would it be a good idea to assign people exclusively to processing access to information requests as a way to ensure that this is never done by anyone who also has other duties?

Col (Ret'd) Michel Drapeau: I think most of the people doing this work right now, at least those who work in access to information offices, are dedicated exclusively to this task.

Ms. Christine Normandin: Mr. McSorley, my next question is about the National Security and Intelligence Committee of Parliamentarians, or NSICOP, and the National Security and Intelligence Review Agency, or NSIRA.

Last summer, David McGuinty mentioned that there were problems related to the government withholding a number of documents. I'd like to hear your thoughts on solutions that could be considered, perhaps from a legal standpoint, to give NSICOP the power to request these documents. Unless I misunderstood you at the beginning of your opening remarks, there isn't really any such mechanism at present.

My time is up, so you can answer in the second round of questions.

[*English*]

The Chair: Thank you, Madame Normandin. I appreciate your respect for the clock.

Mr. McSorley, you have a few minutes to think about that question now.

Madam Mathyssen, you have six minutes.

Ms. Lindsay Mathyssen (London—Fanshawe, NDP): Maybe it's a little less than a few minutes, because it's my question, as per usual.

Mr. McSorley, I think it's part of the recommendations you mentioned you didn't have time to give in your opening remarks. In terms of the review mechanism that's required and needing more of the parliamentary oversight that's granted, could you talk about that to answer both of our questions?

Mr. Tim McSorley: I think there are a few ways.

It's definitely our opinion that both NSICOP and NSIRA should be given more teeth to request documents. Right now, it's legally binding that agencies need to provide documents as soon as feasible and to provide access, but there are no repercussions. We'd like to see an examination of possibly going for these agencies, similar to the Privacy Commissioner, in enforcing their work. This means going to the courts to have legally binding orders to provide the documents that agencies have or to ensure they follow the guidelines that are there.

For NSICOP, in particular, one thing that was at issue when it was created was that it's a committee of parliamentarians, not a committee of Parliament, and they have restrictions on their ability to speak out in Parliament and on their parliamentary privilege. In fact, it's the subject of a court case that's happening right now. There's a constitutional challenge. We believe that changing it to be a committee of Parliament would allow members to have a greater ability to speak out and a greater range to raise these issues.

Right now, if we look at NSICOP's reports in particular, they're even limited in what they can say in terms of who is withholding what kind of information and what they're getting at. We think changing the nature of the committee and reviewing it would be another way of addressing this.

Finally, the other aspect is around the resources they have. Both NSICOP and NSIRA could be provided with more resources to work even more closely with agencies to develop these relationships. They've said that sometimes it feels like obstruction, and other times it's about building up the relationships within national security agencies to have better access to those documents. More resources could also help alleviate this issue.

● (1715)

Ms. Lindsay Mathyssen: Mr. McSorley, you mentioned in your opening remarks the horrible time we had with the transfer of Afghan detainees—the torture and secrecy and the lack of transparency around that. We then saw it repeated in the Somalia affair. There were a lot of parallels there.

The documents about that Afghan detainee transfer still haven't been released. Somalia led to calls for an independent civilian oversight body to be created with the power to summon documents and, again, to report to Parliament.

I would love to hear from all three witnesses, because you've all talked and written about the need for greater civilian oversight of the military. What do you think about the creation of an independent oversight agency?

Mr. Tim McSorley: We would definitely support the creation of a new civilian oversight agency for the Department of National Defence.

The mandates of NSICOP and NSIRA are restricted to national security, and there are obviously broader issues of defence that don't fall under those mandates, even though there's an intersection. There would have to be some work on how they can interact around access to information.

Even right now, we believe that NSICOP would be better able to address a situation like the Afghan detainee transfer scandal, but at the same time, there remain restrictions both on their mandate and on what kind of information they're able to access. That may even prohibit or inhibit them from being able to fully investigate even if something like that were to happen today. It would be much better and much more clear.... It wouldn't result, I don't think, in the same kinds of politics and political wrangling that happened at that time, but there are still gaps that a civilian oversight body for DND would be able to fill.

Ms. Lindsay Mathyssen: Go ahead, Monsieur Drapeau.

Col (Ret'd) Michel Drapeau: The Somalia inquiry report prepared by my friend Justice Létourneau recommended the creation of an inspector general. He also recommended the creation of some oversight bodies: the military external grievance committee and the Military Police Complaints Commission.

Those organizations have been created, but over the past couple of years, instead of seeing them as independent civilian organizations, the heads of each one of those two organizations are retired judge advocate general officers. Whether or not they maintain their independence, it's not the way I would have liked to see it done.

Most certainly, we need to have an independent oversight body reporting to Parliament as an officer of Parliament, and that is an inspector general. You can call it by any other name, but that's what has been recommended and I still stand by that recommendation.

● (1720)

Ms. Lindsay Mathyssen: Go ahead, Mr. Shimooka.

Mr. Richard Shimooka: I'll take a different view of this, quickly. What body you create or how it is organized isn't necessarily the issue. I think the issue is what kind of teeth you give that body.

Look at the United States, let's say, and how congressional committees work there, and how effective they are at getting answers out of departmental representatives. Obviously, Congress has a lot more power than these bodies, but you get a much more clear and decisive answer, whereas in Canada I've seen several examples of departmental representatives coming to a committee—to this one or to the government operations committee—and they somewhat obfuscate the issue at hand that they're being asked about or don't provide the answers they should be required to.

For any oversight body, it's really about the ability for them to gain information, to have teeth and to provide repercussions for not answering in a straightforward way.

The Chair: Thank you.

We're now on the second round.

Madam Gallant, you have five minutes.

Mrs. Cheryl Gallant (Renfrew—Nipissing—Pembroke, CPC): Mr. Drapeau, happy anniversary.

I'm going to call upon your experience dealing with sexual assault cases.

The government—the Liberals—has done an about-face on Justice Arbour's recommendation that all sexual assault cases be handled in the civilian courts. That being said, I was wondering about your experience insofar as the casework being transferred from the MP—military police—to the civilian courts and when that's done. In any cases involving the military, have the MP investigators ever excluded parts of interview transcripts of the victim or the defendant?

Col (Ret'd) Michel Drapeau: No, I'm not aware of it. It might have happened.

I have an opinion—a strong opinion—on the transfer of sexual assault cases to civilians. I've been arguing for this for 13 years.

Mrs. Cheryl Gallant: With respect to the quality of videos for sexual assault cases, has it ever been your experience that a video of the interview of either the victim or the defendant had parts missing, that it was not complete when it was handed over to the other lawyers?

Col (Ret'd) Michel Drapeau: I don't know. I suspect there was, but it's difficult unless you have it. If you don't have that portion and it's been redacted, you have no way of knowing if this was reprehensible or was not required.

Mrs. Cheryl Gallant: I'd like you to check with your partners, too, who may be involved in these cases. Are there instances where you know there's been a cut in the video and it's been pieced together or pieces have been taken out of a video?

Col (Ret'd) Michel Drapeau: I don't know.

Mrs. Cheryl Gallant: In your experience, are you aware of any times DNA swabs were not taken after a sexual assault?

Col (Ret'd) Michel Drapeau: Yes.

Mrs. Cheryl Gallant: Do you know of any instances where the DNA swabs were not compared to the DNA of the person who was accused of the assault?

Col (Ret'd) Michel Drapeau: I cannot answer the second question.

Mrs. Cheryl Gallant: Do you know of any instances when no test was done on the accused for sexually transmitted diseases?

Col (Ret'd) Michel Drapeau: I'm not aware.

We have a case right now that I'm representing—a victim of a rape—and there was no DNA swab taken because there were no such tests available to them on deployment overseas.

Mrs. Cheryl Gallant: Okay. That was when deployed, not necessarily at a training centre within Canada.

In cases involving the military, in your experience have pseudonyms or code words ever been used to obscure evidence?

Col (Ret'd) Michel Drapeau: I suspect they were. Certainly in the case of Vice-Admiral Norman, that came out in the news, so I'm anything but surprised by it. It's common parlance for the military to be using code words in various operations in various circumstances, so it doesn't shock my conscience that they're being used. It shocks it to use them improperly or illegally.

Mrs. Cheryl Gallant: How should service members be protected from reprisals from their superiors when they request access to information?

Col (Ret'd) Michel Drapeau: They should seek a lawyer.

Mrs. Cheryl Gallant: Very good.

What are some of the challenges that members in DND and/or CAF face when they want to expose wrongdoing?

● (1725)

Col (Ret'd) Michel Drapeau: Again, they should seek a lawyer.

First of all, the legislation protecting wrongdoing—I forget what it's called—excludes members of the military. They have no protection if they want to denounce something. By culture, he or she in the military has to go through the chain of command. The chain of command may in fact be the culprit. In this case, I don't mean to be joking about it: They should seek legal advice as to how to go about it.

Mrs. Cheryl Gallant: Should it really be necessary for a member of the Canadian Armed Forces to seek out legal advice and pay to expose?

Col (Ret'd) Michel Drapeau: It's increasingly so. Some of the things I've written in the brief suggest just that. A member is left to his own devices in the military...or the forces morale and services and so on, unless you have legal advice to argue for your rights. There's no union to speak for you; there's no organization. They are left to their own devices, and the only device available to a serving member is to put in a grievance, and the grievance has to go through the chain of command.

The Chair: Thank you, Mrs. Gallant.

Madam Lambropoulos, you have five minutes.

Ms. Emmanuella Lambropoulos (Saint-Laurent, Lib.): Thank you, Chair.

I'd like to thank all of our witnesses for being here with us today to answer some questions.

I'll start with Mr. Drapeau.

You spoke a bit about the CAF grievance process. We've heard several times at committee that this is an issue, that it takes a long time and that if it were to be improved, transparency and trust within the CAF would also be improved.

I'm asking you if you have any very specific recommendations or suggestions—not necessarily having to do with the Information Commissioner and other commissioners, because I will be asking a question about that next—on how to improve the grievance process as it relates to access to information or resources.

Col (Ret'd) Michel Drapeau: If you're asking about improving the grievance process in relation to access to information, I don't think the two are connected. I mean, they're not. As a requester, you don't have to be a military person. If you're not a military person, you don't have access to the grievance process. You have access only through the complaint process. The two are not related.

Let's say I was the deputy minister of the defence department for a day and I wanted to try to come in with some examination of resilience. I'd certainly follow my own advice to have an auditor of some sort examine it. What's being done? What is the workload? How do we best do this? What system needs to be changed? What authority levels need to be provided to the ATI staff? It would be all of that, including whether or not you need to process five-dollar access fees. Is that really required? It creates bureaucracy and expenses and so on.

I think we need to go back to basic principles. It cannot be done within an organization or an institution. It has to be done systemwide. Do we really need to insist in 2024 on 30 days' release time? Is that reasonable today? I would rather have 60 days and live by it than have 30 days extended to 90 days or 120 days. We need something as simple as that.

It will also improve the morale of ATIP staff. You can imagine those people, good people, going into work knowing they have impossible work to satisfy their boss, their clients, the OICs and so on, because maybe they have an impossible task to try to obtain documents, go through them and release them within 30 days.

Ms. Emmanuella Lambropoulos: You also mentioned that one of the main issues is that the Office of the Information Commissioner and the Office of the Privacy Commissioner take up to a year or more to complete an investigation.

Col (Ret'd) Michel Drapeau: I'm being generous when I say a year. Often it's two years or more.

Ms. Emmanuella Lambropoulos: It's upwards of a year.

You suggested something that I'm not sure I agree with. I would like to pick your brain to see what you mean or what alternative solutions you think there could be.

You said that the Office of the Information Commissioner is not a necessary office. I'm wondering if you've considered other ways the government could have an accountability—

Col (Ret'd) Michel Drapeau: A 1997 green paper by Parliament on access to information examined various options. Should we have an ombudsman-type commissioner or should we do like the States did? We elected to have an Information Commissioner.

The Office of the Information Commissioner of those days, with Mr. Grace and John Reid and so on, was a different organization from what we have today. In those days, almost 90% of the staff were investigators. They investigated. They went to the organizations to look at the documents and to see if they were there and properly released. Then we moved the Information Commission to Gatineau. They do everything by email or phone. Most of the staff are now doing administrative material. It's a very heavy-set management structure that takes away the number of investigators. I would look at that also.

● (1730)

Ms. Emmanuella Lambropoulos: There are some good suggestions in there. Do you have any specific suggestions? If we were to write recommendations on how to improve this process, what would you say?

Col (Ret'd) Michel Drapeau: The first thing I would do if I could just snap my fingers—and it could be done by snapping your fingers by a small change to the act—is provide the Information Commissioner with the task of issuing their decision within a year. If we ask organizations to release documents in 30 days, surely we can ask the Information Commissioner to do their job within a year. If a year goes by and you don't have a decision, then you get a free pass to go to the Federal Court if you need to.

The Chair: Thank you, Madam Lambropoulos.

Madam Normandin, you have two and a half minutes.

[*Translation*]

Ms. Christine Normandin: Thank you very much.

Mr. Drapeau, I'd like to come back to the questions Ms. Lambropoulos asked, because I may have misunderstood something. Correct me if I'm wrong.

My understanding is that, when a grievance has been filed, it can take years, because it is the Chief of the Defence Staff who makes the decision. During that time, however, it's impossible to submit an access to information request on the file.

Is that right?

Col (Ret'd) Michel Drapeau: No, it is possible to submit an access to information request on that file.

Ms. Christine Normandin: Okay, thank you.

Can we assume that, in the context of the transfer of requests to the civilian system for sexual misconduct cases, the fact that the case is before a civilian court will also not prevent access to information requests?

That should not be a problem. Is that right?

Col (Ret'd) Michel Drapeau: That's right.

Ms. Christine Normandin: Okay, thank you. I misunderstood. I wanted to make sure I had the correct information.

Mr. Shimooka, I would like to hear your thoughts on the level of declassification that exists in other countries compared to what is happening here. For older cases, some jurisdictions have a 50-year rule.

Can we compare Canada to other Five Eyes countries? Where do we stand in that regard? Is there any catching up to do? Can you make any recommendations in that area?

I'd like to hear your thoughts on this issue more broadly.

[*English*]

Mr. Richard Shimooka: One point I want to make is that I agree a hundred per cent with Colonel Drapeau's comment about 30 days versus 60 or 90. I believe that 30 is supposed to be one of the quickest mandated responses. When you are getting extension after extension, I would rather, as you've said, have the documentation be...to get it right at a certain point than just having this ad hoc process.

One point that I think we've seen in the discussion, especially in the United States surrounding what happened with Snowden and other individuals, is whether all this stuff is required to be classified. How much of the documentation really should be classified?

I know that the Finnish system specifically says that nothing is classified unless it has to be specifically identified as classified. That changes the dynamics of what the burden is on ATI. I think Canada in theory has a very far-out liberal process in this. I don't say that in a negative sense but in the sense that it should very much provide documentation quickly, and in practice it really doesn't. It has these issues we've discussed today.

The Chair: Thank you, Madam Normandin.

Some of us don't think “liberal” is a negative word.

Mr. Richard Shimooka: It wasn't intended as such.

The Chair: Yes, I know. I'm teasing.

Madam Mathyssen, you have two and a half minutes.

Ms. Lindsay Mathyssen: Mr. Drapeau, I think Mrs. Gallant was starting to ask some questions on the transfer of criminal sexual offence cases handled by the military to the civilian system. The minister has promised legislation to solve this problem. I have a piece of legislation that could be quickly adopted to do that.

Can you tell the committee what legislative changes you think are needed to maintain the independence of these investigations and to ensure transparency for them?

Col (Ret'd) Michel Drapeau: To change it to civilian court jurisdiction, amend section 70 of the act by adding just one line where they don't have jurisdiction. It can be done in three minutes. It's simple.

The moment it's done, victims would be able to call 411. If she were to be the subject of an assault and reported the crime, we'd let the civil authorities at the federal, provincial or municipal level investigate and the courts would take care of that. It's not black magic. Up until 1999, the forces did not have jurisdiction over sexual assault. Overnight, as a result of and in the wake of the Somalia inquiry, in the act that was enacted in 1998 and put into force in 1999, DND accepted the responsibility for sexual assault.

At that time, when they did, the military police were not trained at all in this sense. The judges had never received any training. The prosecution staff had never argued any cases of sexual assault. It was a type of learning episode they went through over a number of years. In the process, victims lost confidence in the independence and skill of the military police and the prosecution staff.

I think time has shown—and Justice Fish and Justice Arbour have been quite eloquent on it—that it has to be transferred, and the sooner the better.

● (1735)

Ms. Lindsay Mathyssen: One problem has been left, though. For cases now starting within the civilian system.... Those that were started within the military justice system are now being lost. This lack of legislation has been seen as part of that problem. Have you seen that in your practice?

Col (Ret'd) Michel Drapeau: It is. We have clients at the office basically pulled between the two systems. It doesn't work.

Ms. Lindsay Mathyssen: Legislation is needed to clear that up.

Col (Ret'd) Michel Drapeau: Yes, but there are other aspects we don't discuss. If a sexual assault victim's case is tried by the military system, she will appear in a court martial. The court martial takes place in the unit lines of the unit the accused belongs to. When she testifies before the public, the public is made up of her colleagues in uniform with whom she will continue to serve for the rest of her career. There is no privacy over what happens and how she acts and reacts to it. You wouldn't want this to happen to anybody.

The Chair: Thank you, Ms. Mathyssen.

Mr. Bezan, you have five minutes.

Mr. James Bezan (Selkirk—Interlake—Eastman, CPC): Thank you, Chair.

I want to thank our witnesses for joining us today.

I just want to run a through a couple of things here.

Colonel Drapeau, you served, you said, in the corporate office in HQ at the end of your military career. One of my outstanding access to information requests was something as easy as the policy change of "Chapter 205—Allowances For Officers and Non-Commissioned Members" of the "Compensation and Benefits Instructions". How difficult would that be? I filed this on October 13, 2017.

Col (Ret'd) Michel Drapeau: When the office had asked you what time you wanted it....

Mr. James Bezan: There's no reason that this should never have been handed over.

Mr. Shimooka—

Col (Ret'd) Michel Drapeau: It's possible that if this publication you're referring to is public, then access to information wouldn't provide for it.

Mr. James Bezan: Our understanding at the time was that it was not public when we asked for it. It may be public now, but they still haven't turned it over. They did acknowledge that it was still outstanding on January 17 of this year, so we're talking six and a half years after the fact.

Mr. Shimooka, you described the information environment around the fighter jet file as unprecedented with gag orders. You also wrote a report on the draft of the Auditor General's third report, "Canada's Fighter Force—National Defence". I made an ATIP request to get all the memos, emails, correspondence and briefing notes concerning the AG's report and draft report on Canada's fighter fleet. That was received on March 6, 2019. I still haven't heard an acknowledgement that they still have it and it's still outstanding.

Can you go into detail as to whether you did any ATIPs based on that report, the study you did and ultimately the gag order, and how that impacted your work as a policy analyst?

Mr. Richard Shimooka: I did not, and I won't go too far in depth on this topic.

I think this area, especially with the gag order—and I'll expand a bit on it—was unprecedented in the sense that most members of the Canadian Forces who operate in these areas already know and have a very good sense of what they can or cannot speak to. We entrust them with highly sensitive technical classified information, and to have a whole policy put on top of them to prevent them from speaking affected how individuals saw their job and their relationship to their position. I think in general, a lot of these individuals have a high level of belief in what they do and the importance of their role, based on their long service careers or their long service within government.

In the specific case of the fighter file and some of the events that occurred surrounding it, which I detail in the report, it was seen as unprecedented. As Colonel Drapeau has discussed several times, members had no ability to go outside of their chain of command. I think that's where you start seeing issues arise with individuals and how they see their positions. In Canada, we just don't have that culture, really, of releases of leaks.

● (1740)

Mr. James Bezan: We have a situation where we already have the Security of Information Act and the National Defence Act. There are different levels of classification and secrecy that members of the Canadian Armed Forces and people at National Defence have to acquire, so why are we using non-disclosure agreements?

I put this to Mr. McSorley and Mr. Drapeau. Are those gag orders? Is it necessary for national security? Doesn't the existing legislation already provide that type of protection and the ability for those we trust with our national security to discern and make those types of decisions on their own?

The Chair: We're down to about 30 seconds.

Col (Ret'd) Michel Drapeau: It's pretty much what you said. Members, upon enrolment, swear an oath of loyalty to the Crown and everything else—

Mr. James Bezan: The NDA is not necessary, then.

Col (Ret'd) Michel Drapeau: —with the security clearance.

Mr. James Bezan: Mr. McSorley, do you see using NDAs as a gag order?

Mr. Tim McSorley: That's how it appeared to us. As Colonel Drapeau just said, on top of what you said, there are the oaths they take. There are already so many restrictions on what can be shared that an NDA just seems like a gag order.

The Chair: Thank you, Mr. Bezan.

Mr. Collins, you have five minutes.

Mr. Chad Collins (Hamilton East—Stoney Creek, Lib.): Thanks, Mr. Chair.

Welcome to the witnesses.

Mr. Drapeau, for almost a quarter of a century, I worked under the umbrella of the FIPPA legislation in Ontario. One of the biggest complaints there was that it hadn't been updated in decades. The same complaint has been levelled at the federal level. I'm interested in your opinion because you're a frequent flyer with those processes. How often should the information be updated?

Col (Ret'd) Michel Drapeau: I don't think it's required. Structurally, the original bill was one of the better pieces of legislation I've seen. Some key aspects, like the 30-day rule and whether or not the Information Commissioner would be subject to a time, can be looked at, but I'd keep the bill as simple and basic as it can be. It is a quasi-constitutional statute, and ordinary people should be familiar with it and able to use it. At your kitchen table, you should able to ask for a request, pay the five dollars and go through with it. I don't think we need to complicate it; we need to simplify it.

Mr. Chad Collins: In terms of the frequency of updating it, there are references, I think, in the provincial legislation that talk about CD-ROMs and some outdated—

Col (Ret'd) Michel Drapeau: There is normally in the legislation a clause that says it has to be reviewed every five years or so, but I don't think we need to complicate it. The act is now becoming almost cumbersome because of its complexity.

Mr. Chad Collins: Understood.

There have been many references today to international comparisons with similar acts in other countries. Are there any lessons to be learned from those who are dealing with the same challenges related to access to information and those who are doing it right?

Col (Ret'd) Michel Drapeau: I think so. Our act, at least following your deliberations, doesn't work. It doesn't produce the results, on a quasi-constitutional basis, that you expect as a requester. We need to go back to the drawing board and see what needs to be changed—not a wholesale change, but some basic aspects that need to be changed.

I'll come back to the 60 days. That may be a better way to serve the public than 30 days, and not only serve the public but make a goal that is attainable by those in the ATIP office.

Mr. Chad Collins: Sir, you've referenced many times the importance of timely and unfettered access to information. For the entire time that I've been in office at two levels of government, I've see the importance of getting that information out. Open data is very important, but especially these days as we try to find ways to support legacy media. Journalists, of course, have a job to do in holding government to account and providing information to the public to reinforce our democracy and reinforce faith in government. If it's not timely and it's not unfettered....

I find that as technology is changing, more and more people are turning to other sources of information. They're turning to social media, which we know isn't media.

Can I get your thoughts on how important the timeline piece is that you've emphasized many times here today? Why is that so important for ensuring that legacy media has the ability to get information out to the public?

● (1745)

Col (Ret'd) Michel Drapeau: It is absolutely essential. If you want to protect the rule of law, that's one main aspect of it. We don't want to return to what it used to be, having brown envelopes and people feeling compelled to leak information to get attention to it. Someone exercising his quasi-constitutional right to put a right of access to documents should have it, if not in 30 days then very close to it, and that should be the rule, not the exception. At the moment, it's not.

A couple of weeks ago, we received an answer to four of our requests, a decision that authorized the organization 1,000 60-day extensions. What do you do? We had to submit a complaint to the Information Commissioner. It will take two or three years before we get it.

There's no disclosure there. It's creating a parallel avenue for getting access to information. That's what will happen.

Mr. Chad Collins: I have one last question, very quickly, on cost. I know you've made past recommendations on revising the fee structure for those participating in the process. Can you provide recommendations in that regard?

Col (Ret'd) Michel Drapeau: I'm not so sure we should be having any costs at all if it's a quasi-constitutional right, as there are only a few of them. I think you shouldn't be asking for it. Government should be paying the freight. It does in any event, as five dollars does not cover the cost of a single request. In fact, it's probably creating five dollars' worth of costs to handle the cheque and process it.

Mr. Chad Collins: I think you're right.

The Chair: Thank you, Mr. Collins.

That completes the second round. For the third round, we have MPs Fast, Lalonde, Normandin, Mathyssen, Bezan and Fisher.

Mr. Fast, you have five minutes. Welcome to the committee, by the way.

Hon. Ed Fast (Abbotsford, CPC): It's good to be with you.

Mr. Shimooka, in 2019, the Macdonald-Laurier Institute published a report entitled “The Catastrophe: Assessing the Damage from Canada’s Fighter Replacement Fiasco”. You were the author. You spelled out how the political prosecution of retired Vice-Admiral Mark Norman put a chill on DND and CAF leadership speaking out about the decisions on the fighter jet file that could irreparably damage the fighter force.

Could you describe in depth the chill that might have been felt by whistle-blowers within DND and CAF?

Mr. Richard Shimooka: I covered this somewhat before. It goes back to the discussion I had with Mr. Bezan earlier and the answers that Colonel Drapeau suggested. CAF members certainly know their rights. They know what their position entails and they're pretty fastidious about it. As I was trying to answer earlier, we don't really have a culture of brown envelopes and leaks compared with how it is in other countries, such as the United States or the United Kingdom, where you see a significant leakage of documentation to affect policy or public perceptions.

I think the onerous nature of the gag order made a lot of people within the department question the trust that's been placed in them, given that they have unlimited liability to serve the country, and they really had a negative view of what had occurred. I think that was very much apparent in my discussions with people who were either under the gag order or who may not have been covered by it but saw it as unreasonable that other people had to face that sort of requirement.

Hon. Ed Fast: The gag order you're referring to is the NDA. Is that right?

Mr. Richard Shimooka: No, this referred to people who were part of the future fighter capability program, which was to replace the CF-18s and ultimately ended up purchasing the F-35s. I believe it also included individuals who were part of the interim buy with the Super Hornets and then later on the surplus Australian Air Force F/A-18As.

● (1750)

Hon. Ed Fast: Okay.

Professor Drapeau, you mentioned something about whistle-blowers. You suggested that whistle-blowers should be contacting legal counsel to pursue their complaints, which of course entails legal costs.

What do you suggest should be done to address this disincentive—in other words, the legal costs—which would cause whistle-blowers not to come forward when they probably should?

Col (Ret'd) Michel Drapeau: I don't know, unless legal counsel has a source of alternate funding to pay for these costs.

Hon. Ed Fast: To me, it seems counterproductive to impose a cost on a whistle-blower that would prevent or discourage a whistle-blower from coming forward with serious allegations about conduct within DND or CAF.

Col (Ret'd) Michel Drapeau: The whistle-blower in those conditions has a choice to make. He has a career and reputation to maintain and defend. He can act alone or he can act with the chain of command, which by training he is required to do. There are risks involved. It's hypothetical depending on the circumstances, but he certainly would need legal counsel.

Now, whether or not legal advice is successful in achieving his aim, in the process, being able to obtain some type of reimbursement for legal expenses spent by him is a different scenario.

Hon. Ed Fast: Mr. McSorley, you mentioned that CSE and DND often obstruct oversight bodies like NSICOP for reasons perhaps not allowed by law. You also mentioned that you had some additional recommendations to make. What are those recommendations, or have you canvassed them already in your subsequent remarks?

Mr. Tim McSorley: I covered a few of those recommendations. There are a few more that we could make.

I think right now there are no repercussions for those who avoid their legal obligations to NSICOP or NSIRA. Providing the legislation for it to be an offence not to provide the information or to obstruct their work would give some accountability and responsibility to those who do obstruct their work.

There's also the question—

The Chair: Unfortunately, Mr. Fast's time is over. I'm sure you'll be able to work those answers back in.

Madam Lalonde, you have five minutes, please.

Mrs. Marie-France Lalonde (Orléans, Lib.): Thank you very much.

[*Translation*]

Thank you to all the witnesses for being here today.

[*English*]

I think I'll build a bit on the questions from my colleagues and go deeper, if I could.

There was mention of the trust between agencies and NSIRA and NSICOP. As most of you know, these are fairly new agencies. I certainly commend our government for that, but they can be entrenched in their ways sometimes as we proceed, and certainly in the department.

Can you provide this committee with a recommendation on how agencies like CSIS or CSE should work with these newly formed agencies?

Mr. Tim McSorley: I can try to make some recommendations.

One of the things we've seen is that multiple departments have developed good working relationships, and it isn't every department where there are these concerns. In CSE in particular, time and again, these issues have come up, so there's a question of whether it is about building a deeper relationship or about concerns around over-classification and a culture of secrecy that need to be addressed internally, especially at CSE but to a degree at CSIS as well. From speaking with members of NSIRA in particular, I know they've been working closely to develop those relationships, and we recognize that it takes time to build them.

One thing that could be done better.... For example, there's the national security advisory committee on transparency. There could be a role for them to work more closely with these agencies to talk about the importance of transparency, and even to possibly look at training to better ensure there's an openness there.

It's true that it does take time, but we have seen differences among agencies, so there's a question as to why it has taken some agencies less time to be open to this culture of review and others have remained entrenched in not sharing information.

● (1755)

Mrs. Marie-France Lalonde: Would anyone else like to speak? I have another question otherwise.

On this I think we can all agree. In order to build trust—and I think this goes back, Mr. McSorley, to what you're saying—organizations have to pull back the curtains on how they work while still protecting highly classified information and the sensitive nature of their work. We've seen, during the war in Ukraine, allies like Britain and the U.S. classifying information almost in real time.

I would certainly appreciate it if any of you could give us some recommendations on how Canadian agencies could do this better.

Mr. Tim McSorley: For our part, just briefly, we've been looking at the Finnish example and the idea that instead of classifying by default, there's an overt and conscious process of classification. That would go a long way. It's obviously a change in culture, but we think it's necessary in order to address this over-classification we've seen. Recently, in the commission on foreign interference, that was a key part of the discussions, and we saw very clearly that there are concerns around over-classification. That needs to change.

The Chair: Mr. Shimooka, go ahead.

Mr. Richard Shimooka: I would say that one of the biggest things I've noticed when comparing Canada to, let's say, the United States or other countries is that any information connected to foreign sources or anything that is even remotely within that area immediately gets classified or is subject to much greater scrutiny for classification. In some cases, this has led to over-classification for stuff that's very routine. It's stuff that's routinely published in the media in the United States by the U.S. Department of Defense, but in Canada it's classified for foreign....

The Chair: You have 30 seconds.

Mrs. Marie-France Lalonde: Mr. Drapeau, You brought some information that unfortunately we have not yet seen due to translation. Do you have any thoughts to share quickly on those briefs?

Col (Ret'd) Michel Drapeau: My thought is on the grievance process. A member of the military's only avenue of redress is to put in a grievance, whether that member is demoted, released prematurely or something happens to his allowances or his performance evaluation report. His life comes to a standstill until the grievance process is looked after through three levels, and only at the end of three levels is he entitled to go to the Federal Court. When he goes to the Federal Court, he has to hire legal counsel to do that, so it's a long process.

As a Canadian, he is denied the rights that every other Canadian has. When suffering from some type of prejudice, you can go to court to seek relief because of a decision made by whomever, but the military member cannot.

The Chair: Thank you, Mrs. Lalonde.

You have two and a half minutes, Madame Normandin.

[*Translation*]

Ms. Christine Normandin: Thank you, Mr. Chair.

Mr. Drapeau, my next question has to do with the decisions made by people who work in the disclosure of information. I imagine that these decisions are considered administrative in nature.

I'd like you to talk about the degree of motivation needed to respond to decisions concerning a time extension or a refusal to provide documents, for example.

Is there any obligation to specify the reasons for refusing to provide documents? If so, is that obligation being respected?

Col (Ret'd) Michel Drapeau: There are very few.

In my brief presentation, I mentioned the case of an individual who is subject to disciplinary measures that could result in their compulsory discharge in the near future.

However, a video recorded during a social event at a golf club could exonerate this person of the misconduct of which he was accused. So we asked for a copy. A week or two after we submitted our request, we received a letter saying that the entire video was excluded from the file and that we couldn't have it. No other explanation was provided. It's astonishing.

This person's career is on the line.

● (1800)

Ms. Christine Normandin: Does that mean we should increase the requirements for written reasons to justify refusals?

Col (Ret'd) Michel Drapeau: By the time the results of the complaint have been received, the person will probably be the subject of a compulsory discharge and will have to deal with everything else.

That's how the decision is made. Our only recourse is not to go to court, although that's what we would like to do, but rather to follow the complaint process.

[*English*]

The Chair: Madam Mathyssen, you have two and a half minutes.

Ms. Lindsay Mathyssen: Before my time begins, just so I'm clear, the briefs that Colonel Drapeau mentioned have been sent to the clerk but haven't been distributed yet. Is that correct?

The Chair: Yes. They're in translation.

Ms. Lindsay Mathyssen: Okay. That's great. I just wanted to make sure.

I want to go back to the Afghan detainee files and the mismanagement of that entirely and the transparency of the government at the time with the public and with parliamentarians.

What changes should have been made then that we still don't see now? What would you both, Colonel Drapeau and Mr. McSorley, recommend from that going forward now?

Mr. Tim McSorley: That's a good question.

I think we touched on that with the independent civilian oversight. Looking at the review bodies as they currently exist, there are exclusions for some kinds of information. For example, both NSIRA and NSICOP have restrictions around being able to access information that may prove injurious to national security or defence, and what could be excluded is incredibly broad. Also, in terms of access to information that relates to ongoing investigations, there's an incredibly broad exclusion.

There are ways to solve this. If it would be injurious to a criminal prosecution, restrict it to that. If it's an investigation that's time-limited and it's necessary for Defence, for example, to come back to the committee and say it is no longer injurious to its ongoing investigation so that others can resume their investigation....

Right now, those are the kinds of gaps and issues that we're concerned would still hinder the ability of these committees to fully investigate something like the Afghan detainee scandal.

Ms. Lindsay Mathyssen: Go ahead, Mr. Drapeau.

Col (Ret'd) Michel Drapeau: I agree.

Ms. Lindsay Mathyssen: You agree, and those documents need to be released.

Col (Ret'd) Michel Drapeau: Yes.

Ms. Lindsay Mathyssen: Okay.

Thank you, Mr. Chair.

The Chair: Thank you.

Mr. Bezan, you have five minutes.

Mr. James Bezan: Thank you.

Colonel Drapeau, in your earlier comments, you were talking about the use of code names. In the Vice-Admiral Mark Norman case, they called him the “Kraken” to get around access to information requests. Would you call that illegal?

Col (Ret'd) Michel Drapeau: Yes.

Mr. James Bezan: What type of reprimand should have been brought forward against the commanding officers who were responsible for it?

Col (Ret'd) Michel Drapeau: The act doesn't provide for any punitive measures, but there should certainly be disciplinary measures for taking against an act of Parliament.

Mr. James Bezan: We received information in articles that were published after this came to light that the commanders who were responsible said, “this isn't our first rodeo”. The suggestion is that it is a routine proceeding within the Department of National Defence and the Canadian Armed Forces to use code words as a way to ensure that documentation isn't released through access to information.

Col (Ret'd) Michel Drapeau: The Canadian Forces has a whole program of remedial measures, from a warning to counselling and probation, for any deficiency in conduct and the like, so it had, in fact, the ability to sanction such a performance and protect both the rule of law and the constitutional principle of being able to request information and have access to it.

Mr. James Bezan: You've written in the past that freedom of information “serves both as a ‘silent auditor’ guaranteeing accountability, checking corruption, improving in many areas of human rights, as well as an ‘open microphone’ encouraging participation in government by every sector of society”. When you think about transparency versus national security, under transparency you get accountability. You get policy analysis like Mr. Shimooka does. You get media access and availability to the general public. It supports us as parliamentarians in making sure our democracy is strong.

Is there any check on that versus national security? There are the regular classifications of secret, top secret or unclassified information, as well as the responsibility under the National Defence Act of those who take the oath to serve this country and work in the Department of National Defence and the Canadian Armed Forces. Aside from those, are there changes we need to be making in the legislation to ensure that democracy is the ultimate winner?

● (1805)

Col (Ret'd) Michel Drapeau: The only possible change is to provide the Information Commissioner with the capacity to monitor and, where required, to inspect, visit and review some of those things that would be accessible to her—the files, the complaints and everything else.

Mr. James Bezan: Mr. Shimooka, is there anything you want to add to that as a policy analyst? How has the cloud of secrecy that's developed over the last eight years impacted your ability to do your work and provide advice to Canadians, parliamentarians and others on the programs being run, especially on procurement for the Canadian Armed Forces?

Mr. Richard Shimooka: As I said, it's become significantly more difficult. We're able to get less and less documentation or don't have the ability to access it.

I'd go back to honourable member Collins' comment about media in general. We've seen that a lot of the institutions that are critical for the oversight of government are becoming weaker. Again, departmental representatives not really answering questions directly in some cases, or forthrightly, is really weakness.

I think we need to look not just at ATIP but holistically at all these different components of what we look at with accountability to ensure that we get a more—I won't say honest sense—accurate portrayal of what is occurring. I think in a lot of cases we have real challenges with governmental programs. We are watching right now what's going on with ArriveCAN. Oversight is required.

Mr. James Bezan: Thank you.

Mr. McSorley, with regard to your role in standing up for civil liberties, I'd go back to the comment by Mr. Fillmore that electronic communication is making this impossible to do. Do you think electronic communication should make it easier to get the information that Canadians are asking for?

Mr. Tim McSorley: It should be easier to interact with the government and access that kind of information. It should be easier for the government to document, research and collect the information that it needs to share with Canadians. It's true that we are producing more information, vast amounts of information, but there's also technology at hand to better sort that information, access it and share it with the public.

Mr. James Bezan: Thank you.

The Chair: Thank you, Mr. Bezan.

Mr. James Bezan: I have a point of order, Mr. Chair, before we move on.

The Chair: All right.

Mr. James Bezan: On Wednesday of last week, we passed two motions that were timely and that needed to be reported back. One, of course, was the crisis of housing and the lack thereof for members of the Canadian Armed Forces who are unhoused. This is particularly in Halifax, where they're living under multiple feet of snow, potentially. The other one was the motion to provide our CRV7 rockets to Ukraine to help them push back the Russian invaders. They are asking to get these rockets as expeditiously as possible.

I ask, Mr. Chair, why those haven't been tabled in the House. If you're unable to do it, I'm more than willing as vice-chair to table those on behalf of the committee.

The Chair: I'm informed that they only came out of translation today. That's why they haven't been tabled in the House.

Mr. James Bezan: I know the minutes take time, but these are short and sweet motions. I would hope they would be done quicker than that.

The Chair: We can only move as fast as translation moves around here. I'm sorry.

Mr. Fisher, you have the final five minutes.

Mr. Darren Fisher (Dartmouth—Cole Harbour, Lib.): Thank you very much, Chair.

It's been a fascinating panel. I want to thank our witnesses.

Thank you very much, Colonel, for your service to our country.

Mr. Shimooka, you were talking about, to use Mr. McSorley's quote, the “ever-growing creep of secrecy”, but you touched on the access to information changes starting in and around the time of Harper. Can you give us just a bit of an outline of when you started to see changes happen or begin?

Mr. Richard Shimooka: It's hard to say.

You saw a creep. It wasn't as dramatic as, let's say, the discussion with officials and our ability to access through public affairs... Rather, I saw over time that the requests I made.... There's no way to quantify this in an empirical manner to show that there's been a policy change. You saw with the requests you made from 2002 through various governments—there were four major governments through this period—that there was an increasing reluctance to provide information in large-scale releases. You had to be more and more adept at trying to get the information you wanted in your requests.

● (1810)

Mr. Darren Fisher: Thank you very much for that.

I want to go to the colonel for a really quick question.

Is the term “kraken” a nickname for the commander of the Royal Canadian Navy? My understanding is that it's a nickname of love and respect given to the commander. I believe Commander Topshee is currently considered to be the kraken.

It's not a top secret, underworld type of thing, is it?

Col (Ret'd) Michel Drapeau: I'm an army officer—that's my background—so I cannot comment on any naval expression of this type, but I've never heard of it before.

Mr. Darren Fisher: My understanding is it's a term of endearment rather than something secretive.

Mr. Chair, I'm going to pass my remaining time to MP Mathyssen.

The Chair: This is really lovely.

Mr. Darren Fisher: It's Valentine's Day.

Ms. Lindsay Mathyssen: Thank you.

Colonel Drapeau, in the time that I have left, because of your expertise on this, I wanted to ask what reforms you believe are still needed to support survivors of sexual misconduct and trauma in getting the justice they need.

Col (Ret'd) Michel Drapeau: Just table legislation to make it happen so there is no hesitation or confusion. At the moment, there is. Some cases are transferred to civil authorities while others remain within DND, and there's some confusion in people's minds about where this will place them. At the moment, I know the military police, among other things, are asking victims which of the two systems they prefer. Madam Arbour is against that and I'm against that.

Victims are not in a position to do that. It puts them on the spot by asking them whether or not they would like to have their abuser prosecuted before a military tribunal as opposed to a civil court. Being part of the military and responsible to the chain of command, they don't know if this will put their loyalty into question.

Victims are not the ones to decide. They don't know what the differences are between the two systems, and they are huge differences.

Ms. Lindsay Mathyssen: They aren't legal experts.

Col (Ret'd) Michel Drapeau: That's right, exactly, and the vast majority of them don't have access to legal counsel to be making that kind of decision.

Ms. Lindsay Mathyssen: Thank you so much.

Mr. McSorley, you had a final recommendation for Ms. Lalonde that was cut off. Do you want to finish it?

Mr. Tim McSorley: I'm trying to remember which one that was.

What I will say is we can't emphasize enough the need for these statutory reviews to happen. We have our information and what we've been able to observe, but having a statutory review of both NSICOP and NSIRA to better understand this and having parliamentarians and the public able to debate and discuss what changes need to be made are really crucial to getting to specifics.

I've shared some today, but I think that's the main one that I'd like to emphasize.

The Chair: Thank you, Ms. Mathyssen.

Colonel Drapeau, I just want to congratulate you on your 22 years in the practice of law. As a “brother in law”, I've been sitting here thinking about adverse presumptions. If timelines are not met, an adverse presumption follows.

Is that a useful thought for lighting a fire under those who, for whatever reasons, don't respond in a timely sort of way?

Col (Ret'd) Michel Drapeau: I think so.

The Chair: If you have a specific idea around adverse presumption, particularly in certain categories of inquiry, I think that would be useful.

Col (Ret'd) Michel Drapeau: If a department claims an extension in excess of, say, 60 days, not the 1,000 days that I was referring to or the 300 to 500 we see—because that is a complete denial—we should be using such a presumption and then going to the bank with it. You don't even have to go to the Information Commissioner if you are able to go to the Federal Court.

Most of the time what we are requesting—and what we've requested in the four requests put to the department—is significant enough, but we won't get a decision. If that is the case, a judicial decision would be required. That should bypass the normal and complete mechanism of going through the Information Commissioner, which takes forever to do.

It could be a ceiling that an organization cannot claim more than—and I'm using an artificial figure—100 days. If it does more than that, the requester would have the ability to bypass the established review mechanism through the Information Commissioner and go to a judicial review in a civil court. If that happens, we're going to see a significantly lower number of extension requests beyond whatever days.

● (1815)

The Chair: The very existence of the presumption would potentially speed up the response.

Col (Ret'd) Michel Drapeau: It's the same token. If the Information Commissioner doesn't issue a report in a year, you get the green light to go to a judicial review. It doesn't mean that everybody would, but if you are so inclined and you can afford it, you should be able to do so.

The Chair: Thank you.

With that, colleagues, I want to bring this session of our time together to a close and thank the presenters. This has been a rich discussion. We appreciate it.

I'm going to suspend, and we are going in camera for a few minutes to discuss committee business.

The meeting is suspended.

[*Proceedings continue in camera*]