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Thursday, September 29, 2005

Chair

Mr. David Chatters

Standing Committee on Access to Information, Privacy and Ethics

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● (1105)

[*English*]

The Chair (Mr. David Chatters (Westlock—St. Paul, CPC)): I call the meeting to order.

Before we start the presentation from the Information Commissioner's office—

Mr. Paul Zed (Saint John, Lib.): A point of order, Mr. Chairman.

The Chair: Go ahead.

Mr. Paul Zed: Mr. Chairman, I wanted to say that we're very glad to welcome the chair back and we are pleased to see you here. We're looking forward to continuing working with you, sir.

The Chair: You are very kind. I really appreciate that.

Some hon. members: Hear, hear!

The Chair: I'm not completely out of the woods yet, but I see the light at the end of the tunnel. Things are coming along well, so I appreciate that.

Before we get started, on behalf of the committee, I want to thank the Office of the Information Commissioner and all the staff for the tremendous work they did in preparing this draft legislation. While many of us were enjoying the summer, you people had to be very hard at work to get this done within the timeline, and we do appreciate it.

As I understand it, the document is now a public document, but because of the delays we're facing between the release of the document and the appearance of the Information Commissioner before the committee to make his presentation, the committee would ask and appreciate it if the Office of the Information Commissioner would refrain from doing media interviews until after the commissioner appears before the committee. I think it would be appropriate to do that.

With that, we'll turn it over to you, and we look forward to your presentation.

[*Translation*]

Mr. J. Alan Leadbeater (Deputy Information Commissioner, Office of the Information Commissioner of Canada): Thank you, Mr. Chairman.

I am delighted to have this opportunity to discuss with you somewhat informally the specifics of the Information Commissioner's recommendations regarding the reform of the Access to Information Act.

I will be speaking in English, for the sake of clarity and because English is my first language. However, I understand French quite well, so please feel free to put your questions in your preferred language.

[*English*]

In the spirit of thank yous, I would also like to pay tribute to the staff of the House who assisted us in this process: the legislative counsel, Greg Tardi; the legislative draftsperson, Doug Ward; and the translation services of the House were indispensable in transforming ideas for reform into real legislative language. I thank them for their professionalism and their dedication to the task.

I'm assisted today by the director of legal services for the Office of the Information Commissioner, Mr. Daniel Brunet; the director general of investigations and reviews, Mr. Dan Dupuis; and Ms. Jennifer Francis, who is a legal counsel who played a key role in assisting with the development of these recommendations.

The goals that guided us I think were simple ones: to maximize the transparency of government consistent with the legitimate needs for secrecy in running a country like Canada. We wanted to have the strongest and best legislation, certainly in Canada if not the world, with the goal of ensuring that there is a maximum amount of accountability of governments into the future to the citizenry.

● (1110)

The Chair: As you make your presentation, would you prefer that any questions that pop up wait until after the presentation, or would you prefer the questions as you go along? I ask this because we're not using our regular format for the meeting.

Mr. J. Alan Leadbeater: I'm kind of in your hands about timing. What I could do, and was proposing to do, was two rounds. Round one would be the key things, the big things, and then we could have some questions. I could then do the housekeeping and administrative things, if there's time for that, and then we could have questions. Does that make sense?

The Chair: Yes. I think we've got lots of time to do that, so we'll do it that way.

Mr. J. Alan Leadbeater: All right. Good.

You will have in front of you a binder that has a side-by-side version with the existing legislation and the proposed changes. You can follow along with that or you can follow the document that has, on each page, the proposal with a little explanatory note. I leave it to you to decide how best to do it, and if at any time someone is lost about what provision I've jumped to, please just stop me and we'll clarify that.

I think the goal I mentioned is probably typified in symbolic form right in section 1 with changing the title of this legislation from the Access to Information Act to the Open Government Act. That's not a new proposal. That proposal was in both the Bryden and Martin bills, and I think it is reflective of the proposals you see in the amendment with respect to subsection 2(1), to actually introduce words into the purpose section to make it clear that the purpose is to make government institutions fully accountable to the public and to make the records under the control of those institutions fully accessible to the public.

That term, “fully accountable”, is not a new term either. It exists in the Nova Scotia legislation. I think in your explanatory notes you'll see where that's even been considered by the courts, the Nova Scotia Court of Appeal leave denied to the Supreme Court of Canada where the court decided that those words had meaning.

“Accountability” is used in other jurisdictions, and the use of the term “fully accountable” means that Nova Scotia has greater access than any other jurisdiction in Canada. I think if we want the best act federally, we need to pay attention to the direction of the court on that.

The underpinning, of course, of a good freedom of information statute is that there be records, and I think over the past recent years we've had lots of discussion about the need to create government records and what happens for accountability and openness when those records aren't properly created.

So at proposed section 2.1 you will see we're recommending that it be made mandatory by statute that every officer and employee of a government institution create such records as are reasonably necessary to document their decisions, actions, advice, recommendations, and deliberations.

I really want to draw your attention to the note on that because it is not something that public servants in the federal government are unused to. That is currently, since 2003, the written policy of the Government of Canada in the management of government information policy, and it has been somewhat more honoured in the breach, as we're learning from the Gomery commission, so our recommendation is that this now be enshrined.

We are also anxious to ensure that all of the reasons for secrecy in this act, which I'll come to—the exemptions—are subject to a public interest override. That you'll see at proposed section 2.3. If the public interest in disclosure clearly outweighs in importance the need for secrecy as articulated in any of the exemptions of this act, there will be an obligation on the head of a government institution to disclose the record. That would apply equally to cabinet confidences, which, as we'll see as I go along, we're recommending be an exemption rather than an exclusion from the legislation.

In order to make this act a complete code, we will also be recommending a comprehensive inclusion of institutions that will be subject to it, and I'll come to that. How do we get a system that's comprehensive? I think we have arrived at a scheme that will work and not be subject to the caprice of any particular government at any particular time.

You'll also see in the definition section that we're amending the definition of “government institution” to make it clear that this includes the “office of the head thereof”. That would mean ministers' offices and the Prime Minister's office would be covered by this legislation. That's not to say that the personal and political papers of any minister or the Prime Minister would be covered, any more than the personal papers of public servants are covered when they bring their taxes to the office. It simply means that to the extent there are records in ministers' offices and in the PMO that relate to the duties of the head with respect to their departments, they would be covered by the legislation.

● (1115)

I'd also like to draw your attention to section 4. Again to make this a comprehensive act consistent with other modern acts, we're recommending that the right to request access be given to “any person”. That would be any person in the world, without respect. As it now stands, it's Canadian citizens and landed immigrants and any person who's present in Canada.

Under court decisions, any person in the world can now apply but using an agent in Canada; it's mainly in the immigration field. All of our own experience and the experience of other jurisdictions in the world.... The United States, for example, allows any person in the world to apply; Ireland allows any person in the world to apply. It does not increase, with any significance, the workload.

I would also like to draw your attention to section 11 of the act. We've included some incentives for compliance. Over the years there have been some concerns about long delays in answering access requests, so we've built in a few incentives. One of these is at subsection 11(6), a requirement to waive or refund fees when answers have not been given either within the 30 days or the extended timeframe government institutions are allowed to claim.

I'm going to leap us to the exemption sections. In the exemption sections, sections 13 to 23, the key is we're proposing that all exemptions be discretionary, with the exception of section 19, which has a type of discretion built in that we'll discuss, and with respect to section 69, cabinet confidences, which we're recommending be mandatory. It will have a discretion in the context of the public interest override.

For the others, we've built in and suggested injury tests, where they don't exist. I'll give you an example.

If you look at section 13, which now concerns records provided in confidence by other governments, the injury test we're recommending you'll see at paragraph 13(1)(b): if "disclosure of the information would be injurious to relations with the government, institution or organization". It will not be enough, if the document comes from a foreign government and is marked confidential, if this test can't be met. This will involve, obviously, some communication with the third government to determine how anxious the foreign government is to protect it. If they're very anxious to protect it, then the injury test will be met.

Section 14, for example, already has an injury test; I'll deal with that in round two.

Section 16 is the law enforcement exemption. The law enforcement exemption as now written has a 20-year exemption for information collected or prepared during law enforcement investigations. We're recommending that this be repealed and they be subject to an injury test. That injury test now exists in paragraph (c) of subsection 16(1). Our experience over 22 years, and I think most law enforcement agencies will confirm this, is that any ongoing investigations, any concern about the identity of informants, can be protected easily under the injury test that now exists.

As we'll see when we get farther on, our recommendations for inclusion will include officers of Parliament, such as the Information Commissioner. If we are going to include officers of Parliament, we feel there needs to be a particular exemption for information that officers of Parliament have collected from other government institutions. For example, if we collect information from a government institution during one of our investigations, and if someone were to apply to us to have access to it, we might be quite ready to give it out. We might even be recommending that the government institution give it out; it would be giving us order powers by the back door to allow us to do that.

● (1120)

So we're recommending that officers of Parliament be listed in a schedule in subsection 16(3), and that if there are any new officers of Parliament created—for example, the integrity officer under the whistle-blowing legislation—they can be added to the schedule. They would be required to refuse to disclose records or information they obtained from other government institutions. This would not prevent people from going to those other government institutions and asking for it, and then they would have to meet the injury tests and so forth that we are recommending.

Similarly, the Canadian Broadcasting Corporation would become subject to the act. You'll see that in subsection 16(4), we are taking account of the concern about the potential interference of access requests in the integrity and independence of the CBC's news gathering and programming activities. Some of that was seen in Britain, where living individuals were applying to the CBC to get access to the canned obituaries that might already have been prepared, and then launching lawsuits to have them changed, and all of that kind of stuff. I think we realize that the mandate of the CBC requires this. The three-year review committee that looked at this recommended a special exception of this nature for the CBC. That is why we're recommending this provision.

The exemption that caused most people concern at the time the act was passed was section 21. That's the exemption for advice and recommendations and internal deliberations and so forth in government institutions. It is a discretionary exemption. As we know, it has developed over time to be a fairly self-servingly applied one: where ministers wish that the advice be released, it's released; and when they don't wish it to be released, it's not. So we have added injury tests—which you'll see there—for each of the provisions of that exemption. We're recommending that instead of the 10-year period, a 5-year period be applied.

I think of most importance is the long list—I don't know if it's 13 or 15—of particular types of information and records that we feel need to be clearly identified as not qualifying for exemption. That list is not something that just came out of our heads; it exists in other statutes. It also is reflective of the experience we've had with litigation over 22 years. I think back to the national unity polls and the litigation with Mr. Mulroney, where the court ordered the disclosure of public opinion polls on national unity. You'll see that those are the types of material that we feel should not be swept into the realm of secrecy under the advice exemption.

I'd just like to take you to section 24 for a moment. Section 24 is the provision of the act that prevents the statute from being a comprehensive code on the balance between secrecy and openness in the Government of Canada. It prevents that because it allows other secrecy provisions to sneak in through other statutes. It's mandatory. It has no time limit. It means that secrecy is forever—and the list of statutes that have those provisions has grown now I think to about 55 statutes.

The three-year review committee recommended that it be repealed. We recommend that it be repealed. We are convinced that all of the information in those statutes that is sensitive and is in the schedule can be protected through other exemptions in the act. It will prevent innocuous information now being withheld under this section from being withheld. Of particular concern at the moment is the amount of secrecy that's being claimed due to the Defence Production Act, which is listed in the schedule as one of the statutes putting on a blanket of secrecy.

● (1125)

I think an important one I'd like to take you to is proposed section 26.1. There has been concern throughout the system for some years about the potential for access requesters to abuse their right of access and to make an access request for a volume of record or a volume of access requests or certain types of requests, perhaps targeted against individuals, that might amount to an abuse of the purposes of the act. We are recommending that the heads of government institutions be allowed to disregard such requests but only on the recommendation of the Information Commissioner.

The way that would work, the proposals we're making would give the heads of government institutions the right to complain to the Information Commissioner about an alleged improper request. The commissioner would investigate and make a recommendation to either disregard the request or get on with it. If the recommendation is to disregard, the request could be disregarded and that requester would then have a right to go to court and ask the court what the court felt. If the commissioner said, "No, I think you should get on with it; I recommend you get on with it," then the department would get on with it. I think it will be little used, but it's a fail-safe safety valve that exists in other statutes in other jurisdictions.

I'd like to take you, then, to proposed subsection 30(5). If the Information Commissioner is subject to this act and complaints are made about the Information Commissioner's decision to keep information secret, who's going to investigate those? Our proposal is that it must be an independent person, and that would be delegated pursuant to section 59 of the act, which allows the commissioner to delegate any of his powers to another individual. That is a process that's followed currently for complaints against the Official Languages Commissioner, who is also subject to the Official Languages Act.

Proposed subsection 37.1 is the next provision that I think has some significance that I'd like to draw to your attention in round one. It is a type of whistle-blower protection provision in this statute that protects any person from being accused of an offence or wrongdoing if they disclose in good faith to the commissioner information or records relating to a complaint under this act.

I think it's fairly self-evident. We have individuals, sometimes public officials, who wish to come to us with evidence in the form of records about some possible improper action under this act. Under the Security of Information Act and under oaths of office for these individuals they often feel subject to potential reprisal. That has, in our experience, caused them to be less than forthcoming with us and allowing us to do our job, and we think they should be protected in this way.

With respect to proposed subsection 38(2), this is a provision that is kind of the second type of incentive for good behaviour that we're calling for, and that's shining the light of day on improper behaviour. That is simply requiring the commissioner to report details of what he or she considers to be failure to discharge obligations under the act.

Most commissioners do it anyway in their annual reports. I don't think it will be an onerous new obligation. However, if you look at proposed subsection 38(3), it does put a procedural approach in place to ensure that heads of government institutions have a heads-up and get to comment on that. It is also a little protection against the possibility of an information commissioner who might be kind of cozy with the government and might not wish to bring cases of wrongdoing to the public light. This will be an incentive I think for Parliament and the public to be fully informed of the performance of governments.

I'd like next to pass to section 54, because it links with the comment I just made about information commissioners.

● (1130)

The appointment process for an information commissioner, we believe, needs attention because in the current process a majority government can select an information commissioner when every member of every other opposition party objects. For officers of Parliament, that, in our view, would be inappropriate. For commissioners, a broad support in the House is important at the outset.

I think in the original days, 22 years ago, when this act came into force, it was an understood process that the nomination of the commissioner would be seconded by the leader of the opposition. That fell apart in the second round, when Mr. Mulroney nominated his press secretary, Mr. Phillips, and every member of the opposition voted against the nomination. Nevertheless, despite that, it was approved because of the government's majority. In fact, it was only because of the GST senator increase, which I think the Conservatives put in, that it got through the Senate.

The problem, of course, is how to do it. We've put the two-thirds majority there, and we're reflecting now whether that's even possible. I believe there is a provision in the Constitution Act that may require all decisions of the House of Commons to be simple majority. I think this committee might want to turn its mind to some other approach that would get to the same end, such as requiring seconding from leaders of the other official parties in the House, for example. I think that would ensure a consultation process, a consensus-building process, and that would be reflective of the role the Information Commissioner plays as an officer of Parliament.

We are also recommending.... If you look at proposed subsection 54(5), as it now stands, if the Office of the Information Commissioner becomes vacant through illness, death, or end of term, the government has the option of filling it without resort to Parliament for up to six months. Our feeling is that the statute should make clear this is a process that is only intended for holding the fort until Parliament gets to it and that the person who is appointed for the six months should not then be eligible for appointment as the Information Commissioner.

If you turn to proposed section 60.1, we're recommending a broader role for the Information Commissioner consistent with recommendations previously made by review committees and task forces—a general oversight role for monitoring the act; the ability to engage in public education, public awareness building, training and education of public officials; engaging in research to assist this committee and the public in dealing with issues; commenting on matters, initiatives, or proposed laws that come before the House. That role would require the commissioner to be able to speak publicly. Right now, the act prohibits the commissioner from disclosing anything that comes to his knowledge during the course of investigations, except to the complainant, to the head of the government institution against whom the complaint was made, and to Parliament in an annual report.

So you'll see at proposed subparagraph 63(1)(a)(iv), we are giving the commissioner the ability to disclose information to "make the public aware of any matters related to the Commissioner's duties as he or she considers appropriate". That would of course be still subject to the section 64 provision, which prohibits him from actually disclosing secrets of the government. What the government wants to keep secret, he cannot disclose.

● (1135)

The next section I'd like to take you to is 67.1, and this is the third type of incentive. We already have an incentive in the act for anyone who destroys or falsifies or conceals a record or counsels it. We also believe that we should include in the offence section the failure to create in accordance with the earlier section that I reviewed with you.

Every jurisdiction I think now has agreed that there is no healthy reality to an access regime if there is no mandatory creation of records.

Now that brings me to section 69, which is a major change for the federal level but is a way of bringing cabinet confidences into line with how other jurisdictions deal with them, and other jurisdictions deal with them as an exemption rather than as an exclusion. They are mandatory in nature and subject to review by the Information Commissioner, and by the court, subsequently.

We are recommending that we define precisely what we mean by cabinet confidences, and you see that in 69(2), where we define a confidence of the Queen's Privy Council as "information which, if disclosed, would reveal the substance of deliberations of Council or the substance of deliberations between or among ministers".

That would mean we would not need that long list of documents that are now considered to be cabinet papers, because the cabinet paper system changes from time to time. We are recommending that cabinet secrecy exist for only 15 years rather than for 20 years. Again, that was proposed in the two private members bills and by the committee that reviewed this initially. We're recommending that the public still has a right of access, as it does now, to the background, explanations, analysis of problems, and policy options that go to cabinet to assist cabinet in decision-making. We are also recommending that decisions of cabinet be made public, if they have not been made public already by cabinet, four years after the decisions are made.

Now that would not mean there wouldn't be other exemptions applicable. For example, if a cabinet decision related to a matter of national security, there would still be the national security section 15 exemption available to protect it. It simply would not be grabbed by the cabinet confidence exemption.

I'll now take you to section 70. Section 70 is one more way we feel there can be an incentive in the system for good behaviour, and that is by proper data collection and reporting. We're going to be recommending, as you'll see, that the designated minister, the President of the Treasury Board, do an annual report on the system, that we get rid of all these individual reports that every government institution prepares every year and submits to Parliament in favour of a kind of grossed-up report on the whole system. The minister would be able to put in that report whatever he or she wanted, but it would have to include the specific items that are mentioned there, which we feel....

There are statistics that are now captured by all government institutions, so it's not a work burden, but it gives a snapshot of the health of the system. Right now we can't tell from looking at reports how many requests—what percentage—are in "deemed" refusal, for example, and that would allow parliamentarians, the Office of the Information Commissioner, the Treasury Board, and the public to do an assessment every year of compliance. We try to do it on a snapshot basis through report cards each year within the limits of our own resources. This would allow it to be done on a comprehensive basis.

Section 72.1 is what I just mentioned, the requirement on the designated minister to make and submit the annual report.

I'd like to draw your attention to proposed sections 73 and 73.1. We now know that each government institution has an access coordinator. They're responsible for receiving requests and processing requests, and we find a large variation across government about their seniority, their competence, their training, and their delegation of authority. Some have no authority to make decisions. The authority is kind of in a senior operational line manager, for example.

● (1140)

We believe the ministers should be delegating to a specific coordinator. That coordinator could have authority to delegate to others, if necessary, to help the coordinator, but to every member of the public it should be clear who's making the decisions on access in that institution. It shouldn't be hidden in layers of approval and so forth. That doesn't mean there can't be layers of approval, but the obligation, the delegation, should reside in the coordinator. The statute should specifically identify the head, the deputy head, and that coordinator as the individuals who have to stand up and be accountable for the administration of the act.

That's proposed new section 73.1. It is a modification of the notion of ministerial responsibility, admittedly. I think it's one that we'll be seeing coming out of Gomery. It reflects the reality. If we want there to be a conscience for openness in each government institution, then we'll have to have a legal encouragement of that. We all applauded when the coordinator at Public Works stood up against senior-level pressure in the sponsorship inquiry and refused to disclose doctored lists of sponsorships. It shouldn't have to be a matter of courage; it should simply be an obligation of duty. That's the reason why we've made that recommendation.

Probably what is the most interesting, and maybe what we'll have most discussion on, is proposed subsection 77(2). This is the start of how we get institutions covered by the act. The process goes this way. We recommend, in 77(2), that the Governor in Council be required to add to the schedule certain institutions. If anyone feels that an institution has not been added, they can complain to the Information Commissioner, and the Information Commissioner will investigate and make a recommendation. If any institution added feels they shouldn't have been added, they can complain to the Information Commissioner, and the Information Commissioner will investigate and make a recommendation.

With regard to the five categories of institutions, we think it's comprehensive. It includes all departments and ministries of state, all bodies or offices funded in whole or in part from parliamentary appropriations. That brings in foundations and any type of institutional form other than a department that government may choose to conduct public business. It includes all bodies or offices wholly or majority owned by the Government of Canada, all bodies or offices listed in the Financial Administration Act—that's all the crown corporations and so forth—and then all bodies or offices performing functions or providing services in an area of federal jurisdiction essential to the public interest as it relates to health, safety, or protection of the environment. That would be institutions like Nav Canada, which conducts the navigational system for the country, and Blood Services—these kinds of institutions.

There still would be certainty in the system because no one is covered if they're not in the schedule. There is a mechanism for getting people into the schedule and getting people out of the schedule, but you're not covered unless you're in the schedule. That's important for the system, too, for certainty. You can't have these criteria just out there on their own without the certainty of a schedule.

However, if you look at proposed new subsection 77(3), we're also recommending that the Supreme Court of Canada, the Federal Court of Canada, and the Tax Court of Canada not be covered by this act, and neither would offices of members of the Senate or House of Commons be covered, but the administrative apparatus of Parliament would be covered.

● (1145)

I think that might be a good place to end round one. Does anyone have questions?

The Chair: Mr. Tilson.

Mr. David Tilson (Dufferin—Caledon, CPC): Mr. Chairman, could you clarify what the rules are?

The Chair: I think we'll probably stay with our regular time.

Mr. David Tilson: Seven minutes, five minutes, and then whatever.

Thank you, sir, for your presentation. It was excellent. You've done exactly what the committee asked you to do and we appreciate that.

On the last issue, proposed section 77—which I guess goes together with proposed section 41(1), which deals with exceptions for certain institutions—could you comment on whether it would be appropriate for this legislation to say that all agencies would be included and the government of the day could pass or introduce legislation to exempt...as opposed to what this is, that the government of the day would introduce legislation that would exempt certain institutions and then that would be debated in Parliament?

Mr. J. Alan Leadbeater: In principle, I don't disagree with that approach, except how do you actually articulate all the agencies? We think crown corporations should be included, but, for example, would you consider Nav Canada an agency of the Government of Canada?

I think the reason those specific categories have been listed.... The goal is to get all agencies, but it's broken down in order to do it.

Mr. David Tilson: I understand that. I guess it's your opening comment and the title of the act—the Open Government Act; make it all open. There may be very good reasons why certain agencies should be excluded, but that would be debated by Parliament, as opposed to listing them now. I don't see how it's possible to get all the appropriate agencies right now.

Mr. J. Alan Leadbeater: I think the scheme would work in this sense. If passed, the cabinet would be under a positive legal obligation to add. If it did not add, there would be a complaint right then to the court. The court would order it added, or if it didn't meet the criteria, it would order that it not be added. It would take the caprice out of decisions about whether or not to add. That would not remove the opportunity for Parliament, at any time, to pass a statute saying that corporation X or institution Y should not be subject to the act.

Mr. David Tilson: Mr. Chairman, I have a further question about proposed section 54(1), which I think is the two-thirds majority and has to deal with the staff. You've already commented that that could be open for further discussion. Constitutional questions are a simple majority. Quite frankly, I don't know what the answer would be. I think it's appropriate that all parties of the House approve someone, but I could foresee that in certain situations, with how this place is created—whether it's a minority government or otherwise—you could have mischievous parties. I know we'll say that could never happen, but it's possible, in which case we'd never get a two-thirds majority. I gather you've left that open for further discussion, and I'm pleased to hear that.

The independent person—I think it's section 30 and section 59—as I understand the sections, and I just looked at them for the first time.... The commissioner appoints someone and that person reviews the decision a commissioner might have made.

Mr. J. Alan Leadbeater: That's right. The commissioner would delegate all his powers to conduct the investigation to an independent party. That independent party would then stand in the stead and to the side of the commissioner for the purpose of investigation and recommendation.

● (1150)

Mr. David Tilson: That independent person is going to be chosen by the commissioner, so I guess my question is, does justice appear to be done?

Mr. J. Alan Leadbeater: That's certainly a point. If the statute requires independence, specifically stating “independent person”, and someone questions the independence of the person, that would be a legitimate subject for judicial review. If someone did not accept that the person was independent, he or she could seek judicial review.

Mr. David Tilson: I find it strange that a commissioner appoints an “independent person” to review what the commissioner is doing. You call that person an independent person, but he or she really isn't independent because they're appointed by the commissioner. I'll leave that with you to think about.

Mr. J. Alan Leadbeater: It's a rather odd situation. We followed the official languages commissioner model, which seems to have worked, but another approach could be to have direct access to the court for those complaints. That would be an option as well.

Mr. David Tilson: Thank you, Mr. Chairman.

The Chair: Mr. Laframboise.

[*Translation*]

Mr. Mario Laframboise (Argenteuil—Papineau—Mirabel, BQ): Thank you, Mr. Chairman.

In the exceptions, in the proposed section 69(1) the following is noted:

> 69.(1) The head of a government institution shall refuse to disclose any record requested under this Act that contains confidences of the Queen's Privy Council for Canada.

This is a proposed change to the existing section 69(1) of Act, which reads as follows:

> 69. (1) This Act does not apply to confidences of the Queen's Privy Council for Canada [...]

This means then that certain Privy Council confidences are in fact made available.

Briefly, can you explain to me the reason for that? By the way, I think it's a good idea, but I want to be certain that everyone understands you clearly.

[*English*]

Mr. J. Alan Leadbeater: We want to do a couple of things. We want to reduce the scope of cabinet secrecy not so much to the cabinet paper system, which is a fairly broad system, but to content. If the content were to reveal the deliberations of cabinet, that's a legitimate secret. If it's a decision of cabinet that's public, then that's not a legitimate secret because it doesn't reveal the deliberations of cabinet; it doesn't reveal who said what to whom and about what, or who took what position. It's just the final decision. We wanted to reduce the scope by definition. We then wanted to reduce the scope by time, from 20 to 15 years, to reduce the amount of documentation that's captured. We also wanted to reduce the amount of secrecy by clarifying that a certain amount of the background that goes to cabinet to help cabinet decide, which in itself does not reflect the deliberations of cabinet, should also be released.

Of course, we wanted to make sure there was independent review, that the commissioner could look at the documents and assess whether they met this criteria.

● (1155)

[*Translation*]

Mr. Mario Laframboise: You stated in your summary that you didn't want the minister's or the prime minister's records to be made available, but that decisions...

Could you elaborate on that?

[*English*]

Mr. J. Alan Leadbeater: I think you're referring to this question: If the offices of ministers and the Prime Minister's office are covered by this legislation, what does that mean in the real world about what kinds of documents are going to become available? My comment was that this does not mean that the personal and political papers of ministers and the Prime Minister would become available. It does mean that documents in those offices relating to the business of the departments over which they preside would become subject to the act. They may be exempt under other exemptions, but they would be subject to the right of access.

I made the comparison with any other public servant. If I were to bring my income taxes to the office to work on, they don't become subject to the act because they're in my office. They're personal; they don't relate to my duties, and that would be the same for the personal and political papers of ministers.

[*Translation*]

Mr. Mario Laframboise: It's no secret that it takes your office considerable time to process requests at this time, because it lacks sufficient resources. Will the amendments that you are proposing make your job easier? Will they force departments to provide responses when right now, they often refuse to comply. Surely you try to obtain records. Will this make it easier for you, even though you seem to have ample opportunity to obtain them?

In my opinion, the pressure that you will put on government will mean less need for intervention. Am I correct?

[*English*]

Mr. J. Alan Leadbeater: I think if we get to round two, we can deal with some of the administrative recommendations. There are recommendations that we think will facilitate our work and will make our work easier. But we also have some recommendations to put some obligations on us to complete our work in a timely way. We're not only interested in putting all the burden on government institutions. We too have an obligation to get investigations completed in a timely way and so forth, and we have some recommendations to that effect.

Overall, the impact of these changes will be to increase the work of the commissioner. It won't be to reduce the work of the commissioner. There will be more institutions covered. He'll have a greater role in public awareness. He'll have a greater role in advising the government of this committee on the impacts of new legislation and so forth.

Mr. Mario Laframboise: Merci

The Chair: Mr. Szabo.

Mr. Paul Szabo (Mississauga South, Lib.): Thank you, Mr. Chair. The time will certainly be used up.

I want to deal with an area that I'm familiar with, and that's the whistle-blower aspect. Bill C-11 will be coming before the House on Monday. The only two exemptions in the whistle-blowing legislation are CSIS and the military. Everybody else is covered with regard to wrongdoings.

I raise this because you use the terminology “wrongdoing” in proposed section 37.1. It is not defined in this act, but it is defined in Bill C-11, and it's quite substantial and very sensitive. We've had a great discussion about this language, about what constitutes good faith, etc., and this is almost like a reverse onus.

Obviously, if people are doing something they believe in, even under the whistle-blower protection act, if that should become law in Canada, they would be covered because it has to do with the safety of employees, criminal wrongdoing, etc.

● (1200)

Mr. J. Alan Leadbeater: Yes.

Mr. Paul Szabo: I'm curious about whether to use the terminology, whether there should be a definition, or whether this is really necessary at all because of the public service oath of office, etc.

You also might want to comment on this. One of the first things that I noticed with regard to the purpose of the act—and people will read some of it, but they won't read all of it—was the part in bold about "to be fully accountable". This is very unusual. Even in institutions such as hospitals, when they put up a mission statement, they will never say "to provide the best health care to our patients", because they can't ensure that it's going to be the best; it is the best possible or reasonably possible care.

I'll go about seven or eight lines down. There is the "necessary exceptions" referral. I think maybe some consideration should be given to having a qualifier that it's "as fully accountable as possible", so that people are very quickly alerted that there are going to be some circumstances where it's not 100% accountable.

Mr. J. Alan Leadbeater: Yes, it could be "fully accountable consistent with this act", or something like that.

Mr. Paul Szabo: Well, you understand the point.

Mr. J. Alan Leadbeater: Yes, I get the point.

Mr. Paul Szabo: I also had a question about the volume of requests. When we had our meetings with John Bryden and we went through the act, there weren't a lot of questions about whether there was abuse under the act. It didn't seem that it was a significant problem. Substantively, most of the volume requests were coming from researchers who were getting the government to do their work for them.

But I do appreciate this thing about disrupting a department, because then every department would have to have a standby squad to be able to handle things. So I'm very pleased that there is a focus on it.

I only raise those points, and I'm sure other members have a couple of things to add in our time.

Mr. J. Alan Leadbeater: Thank you.

The Chair: Thank you.

Mr. Bains.

Mr. Navdeep Bains (Mississauga—Brampton South, Lib.): Thank you for the presentation.

I have a couple of quick questions. You mentioned with respect to the scope of the Access to Information Act that before it applied only to Canadian citizens and immigrants or anyone who resided in Canada, but that it would now be open to everyone. In terms of workload issues, we've looked at some of the budgetary issues and concerns regarding the office and the limited resources. Have you re-examined or had an opportunity to take into account the workload issues with respect to additional requests that might come from abroad?

Mr. J. Alan Leadbeater: Yes. Our estimates are that it would be less than 1% of requests, because those who have an interest in obtaining Canadian documentation, whether it be commercial interests due to the global economy, immigration interests, and so forth, do it now through agents. So the volume of requests already exists. There may be some modest increase through academics, researchers, university students in other countries doing their graduate papers, and so forth, but the other countries that have this now do not have a large number of foreign applicants for immigration.

Mr. Navdeep Bains: You cited the United States and Ireland as examples.

Mr. J. Alan Leadbeater: Yes.

Mr. Navdeep Bains: A quick follow-up question. You mentioned section 77 and listed various officers and individuals who would be included. I didn't see the Ethics Commissioner. Maybe I could have clarification on that, if that's included or not, or whether that was intentional.

Mr. J. Alan Leadbeater: We think the Ethics Commissioner would be included under the act as an institution funded from parliamentary appropriations, so they would become subject to the act. Would they then be able to have a special exemption for information they collect during the course of their duties? That I think is up to Parliament to decide, whether they should be considered an officer of Parliament. They're not in the five categories at the moment because—

Mr. Navdeep Bains: You had listed I think five—

Mr. J. Alan Leadbeater: Yes, but that's why we suggest a schedule, so it could be added to as legislation that creates additional officers of Parliament and so forth. It's a bit different with the Ethics Commissioners, who are separate for the Senate and the House of Commons.

The Chair: We'll have a short round now.

Mr. Hiebert.

Mr. Russ Hiebert (South Surrey—White Rock—Cloverdale, CPC): Thank you.

I have a couple of questions starting with section 77. Right at the end of your presentation you commented that courts would not be subject to the process or any component part thereof. Can you tell me briefly, does that include courts of appeal and provincial supreme courts, or other levels of courts other than those named?

● (1205)

Mr. J. Alan Leadbeater: Yes, it would. And I'm not sure constitutionally that Parliament could legislate with respect to the provincial supreme courts and courts of appeal, in any event, so the Federal Court system I think is the only system that Parliament could legislate. That's why those courts are mentioned.

Mr. Russ Hiebert: Okay, that's fine.

Proposed subsection 77(2)(b), just before that, institutions included in the schedule...it states, “all bodies...funded in whole or in part”. Could you tell me, does this include, for example, interest groups who may have received a $5,000 or $50,000 grant from the government? Would they now be subject to these requests?

Mr. J. Alan Leadbeater: No. It's not a specific parliamentary appropriation. There would be an appropriation for a funding program, but that would not be what this would have in mind.

Mr. Russ Hiebert: All right.

A moment ago Mr. Bains asked a question about foreign applicants. Is it your understanding that a Canadian agent would still be required for foreign applicants?

Mr. J. Alan Leadbeater: No, not under this proposal.

Mr. Russ Hiebert: Okay.

Are there any suggestions that were made in the Bryden bill that you explicitly excluded in your consideration of this? If so, what were they, and why were they excluded?

Mr. J. Alan Leadbeater: Maybe I'll give you one or two examples. I'd be happy to give you a list, but I don't have it at my fingertips. The Bryden bill had some language in it about allowing the government to keep secret information that threatened the constitutional integrity of Canada. We didn't feel that that concept was sufficiently precise or sufficiently appropriate and that information that related to federal-provincial affairs is already adequately dealt with in the legislation. So that concept of constitutional integrity of Canada was dropped.

Let me see if I can think of another one that we were not.... Well, I can't do so off the top of my head. I would have to get back to you on that, and I'd be happy to do so.

The Chair: Next is Mr. Zed.

Mr. Paul Zed: Thank you.

As you know, we're reviewing public security and emergency preparedness at the moment. There's a mandatory review under way.

It's interesting that we're hearing contrary views, as you might gather. Mr. Campbell, a very learned colleague of yours in the public service, recently said that Canada's laws are too open—the information is far too available, and we need more security for our information.

Against that backdrop and those comments—and I urge you to get his testimony from our hearing—I'd like to hear your philosophy for our committee today, specifically on the issues of public security, national security, and emergency preparedness. I'll add the words “commercial confidentiality”, because—and I know, Mr. Chair, I've asked a lot of questions—when you draw your net around some of these crown corporations, and I can think of Export Development Canada and the Business Development Bank of Canada, how do we protect the commercial confidentialities?

Give us your philosophy on security, please. Thank you.

Mr. J. Alan Leadbeater: With respect to your last point, the business development bank is currently covered. It is subject to the act. I don't think it has had difficulty protecting any information it needs to at the moment. The Bank of Canada is covered now. In the area of commercial confidentiality, we're very confident from experience that the necessary confidentiality is built in.

You'll see, too, that we've recommended some additions to section 18 so that government institutions can protect trade secrets and competitively sensitive information once they get covered by the act.

With respect to security, national security, and law enforcement, we're not recommending changes to section 15, the major provision of the legislation that deals with national security. I think it runs to some four or five pages in the statute. It has been the subject of review by the government's task force. I think one of the recognized Canadian experts on national security is a Professor Wesley Wark. He specifically studied for the task force whether or not the Access to Information Act was robust enough to protect national security information in the current environments. His conclusion was that it is robust enough and that it has not been the reason for inappropriate disclosure of national security information.

● (1210)

Mr. Paul Zed: Okay. I have a short follow-up.

I have to tell you that philosophically I have a problem with changing the definition on citizens of Canada to anyone having access to Canada. Part of it would be the cost issue, as Mr. Bains alluded to, but philosophically I think you have enough work to do without having you do work for other folks around the world.

You were at our committee previously, telling us that you're backed up and don't have enough resources. God knows how this section might be used, so I just thought I'd make that point, Mr. Chairman.

The Chair: Did you want to answer that?

Mr. J. Alan Leadbeater: No, I take your point.

The Chair: Mr. Desrochers.

[*Translation*]

Mr. Odina Desrochers (Lotbinière—Chutes-de-la-Chaudière, BQ): Thank you, Mr. Chairman.

As you doubtless know, two years ago, Parliament Hill was rocked by the so-called sponsorship scandal which later was the focus of a review by the Public Accounts Committee. Subsequently, the Gomery Commission was set up to probe into the scandal further.

One of the problems that the committee encountered at the time was that several people did not have documents in their possession. You will recall that even the Auditor General was unable to determine why certain spending actions had been taken.

The proposed section 2.1 reads as follows:

> 2.1 Every officer and employee of a government institution shall create such records as are reasonably necessary to document their decisions, actions, advice, recommendations and deliberations.

Do you think “shall” is sufficiently forceful? Perhaps you could say “is required”, to avoid a repeat of the situations that arose two years ago. What are you views on the subject?

[*English*]

Mr. J. Alan Leadbeater: If you combine the proposed section 2.1 and the proposed amendment of section 67.1, which makes it an offence to.... I can guarantee that it will have an enormous impact for change on the Government of Canada. Will it solve every problem? Nothing will, but it certainly will make an enormous impact for positive change.

[*Translation*]

Mr. Odina Desrochers: So then, do you believe the addition of the proposed section 2.1 will prevent a repeat of this situation?

[*English*]

Mr. J. Alan Leadbeater: I'm not sure I can add much more to my answer.

I just feel it is doable because it is now policy, and all public servants should be doing it. It was the hallmark of a professional public servant for years to properly document what you do as a public servant. That doesn't mean that every single word you say has to be written down; there's a reasonably necessary test in the provision. I think that with that test, coupled with an offence provision, you would see that records would be created to give proper audit trails and proper accountability mechanisms. The public archivist has said that we've now lost 15 years of the corporate memory of Canada because of a move to an oral culture in government. The only way we're going to move away from an oral culture—which has come about because of fear, the fear of embarrassment—is to have this legal obligation.

I'm not sure I can say more than that.

The Chair: Your time is up, Monsieur Desrochers.

Ms. Jennings.

Hon. Marlene Jennings (Notre-Dame-de-Grâce—Lachine, Lib.): I have a whole series of questions, but given that this is a short three minutes, I want to come back to the interpretation section, section 3, where it defines trade secrets of a government institution, and then section 18, where for the existing paragraph 18(a) you are deleting everything except for the term "trade secrets" of a government institution. My colleague Mr. Zed raised the issue of some government agencies, crown corporations, that conduct commercial activities, and you made the point that BDC, for instance, is already subject to the act.

My question is, why have you removed "or financial, commercial...information that belongs to the Government of Canada or a government institution and has substantial value or is reasonably likely to have substantial value"? Why are you recommending that be removed? When I look at your definition of trade secrets, which is the only piece of information that you're recommending remain protected, it's a very narrow definition in the sense of any information:

> including a formula, pattern, compilation, program, device, product, method, technique or process, that
>
> (a) is used, or may be used, in business or for any commercial advantage

—and it goes on to mention "independent economic value", etc.

So I'd like a little more expansive explanation and argument for what the Information Commissioner is proposing here in section 18, and for the definition of trade secret, because there is no definition in the current act, if my memory is correct.

● (1215)

Mr. J. Alan Leadbeater: That's right.

Hon. Marlene Jennings: So why have you given that particular definition and why are you recommending that section 18 eliminate all of those other types of information, except for trade secrets?

Thank you.

Mr. J. Alan Leadbeater: Thank you for your question.

The definition of trade secret is a combination of words used in the British Columbia freedom of information act. We actually drew words from the British Columbia Freedom of Information and Protection of Privacy Act. We also took into account the Federal Court jurisprudence. The Federal Court has already had to import a meaning to "trade secret" in order to apply section 20 of this act, which refers to trade secrets.

Our philosophy in amending section 18 was not to encourage more openness; it was to allow those institutions that are brought in which are in competitive business activities, such as Canada Post and the Atomic Energy of Canada Limited and so forth, to have the same kinds of protection under section 18 as they have now under section 20.

Right now, their information is still being asked for in the hands of government regulatory agencies, and they get to use section 20 to protect it. When they come in to be covered by the act, they'll have to use section 18. That's why we needed to add a trade secret requirement. It's already in section 20; we needed to put it here. We needed to put in "interference with contractual or other negotiations"; that's in section 20 but not in section 18. And we had to put in the issue of material harm to their competitive position.

If you're saying that maybe we haven't in our definition been broad enough to capture the things that were in the existing paragraph 18(a), I certainly take those representations, and we'd be happy to look at the question. It was not our intention to remove from section 18 protections for commercial information.

Hon. Marlene Jennings: I'm not suggesting; I'm asking you to state whether or not your definition of "trade secret" does in fact capture all of the protection that existed in paragraph 18(a), which under your proposed act you're recommending be deleted.

● (1220)

Mr. J. Alan Leadbeater: I believe it does, yes.

Hon. Marlene Jennings: That's one.

Secondly, you say the definition of “trade secret” that you're proposing is based on the B.C. freedom of information act and Federal Court jurisprudence. Could you provide this committee, through our clerk and the chair, the references for the specific Federal Court decisions where the Federal Court has come up with a definition?

Mr. J. Alan Leadbeater: Yes, I'd be happy to.

The Chair: Mr. Martin.

Mr. Pat Martin (Winnipeg Centre, NDP): Thank you very much, Mr. Chair.

I will be substituting for my party for Ed Broadbent for the duration of the study of this whole issue. Thank you for this opportunity.

I'm sorry to have missed the earlier part of the presentation, Mr. Leadbeater; I was speaking in the House on another bill. But I'm very gratified to see us at this stage, with the work that's been done. Clearly your office has been seized of the issue to the point where there's been an unbelievable amount of work.

We're missing things by just one day. I should point out that yesterday was Freedom of Information Day internationally for 60 countries around the world that acknowledge the importance of transparency and access to information laws.

Because I only have three minutes, I'll simply ask a few straightforward questions. As you know, Bill C-201 in my name, the old Bryden bill.... My question is this. In the opening page of your notes, you suggest that the proposed bill could be called the Open Government Act, which is in fact the name chosen by Mr. Bryden in what we call Bill C-201.

Could you, in a nutshell, list some of the key elements that may have been borrowed from Bill C-201 and that find themselves in your recommendations, with particular emphasis on a main theme of Mr. Bryden's research and the work Mr. Szabo and others did in developing that bill? That is the general public interest override. Does that manifest itself in these proposals?

Mr. J. Alan Leadbeater: Yes, it does.

You're right. This committee almost had a bit of an instruction that the spirit that should imbue change should be the spirit that was in your bill and Mr. Bryden's bill, which received unanimous support at second reading in a recorded vote. I think there was a recorded vote.

Yes, by suggesting we keep the same title, I think it is to reflect that, to make sure the purpose section specifically articulates its goal to be the accountability of government; to make sure there's a public interest override for all of the reasons for secrecy, no matter what they are; that there be a fail-safe so that if there's a public interest that outweighs those needs, it should be released; that exemptions should be discretionary and subject to injury tests and not be these class tests with 20-year secrecy for this and 10-year secrecy for that. While it is far from being identical, I certainly believe it's been inspired by those bills.

Mr. Pat Martin: Mr. Reid was no great fan of Bill C-201. He made it abundantly clear. He thought it had huge problems, some of which were due to Mr. Bryden's eagerness to get the bill through. He was compromising along the way, as he ran into brick walls with the bureaucrats or justice department officials. Some of Mr. Reid's reservations about Bill C-201, I suppose, are addressed in this.

Mr. J. Alan Leadbeater: Yes, they are.

Mr. Pat Martin: Can you point out any key ones?

Mr. J. Alan Leadbeater: I mentioned earlier that we've dropped entirely the concept of threats to the constitutional integrity of Canada, that sort of notion. It was going to appear in a purpose section I think. We thought it might be creating a whole new exemption outside the exemption section that has never been judicially considered, and we didn't know what that concept would be like.

I have made a commitment to provide to the committee the things that were in your bill and Mr. Bryden's bill that we have not adopted in this bill. Just off the top of my head, I'm not able to come up with a list.

Mr. Pat Martin: Fair enough. I understand.

Thank you very much.

The Chair: Mr. Tilson.

Mr. David Tilson: Yes, Mr. Chairman, I'd like to ask some questions along the line that Monsieur Desrochers was asking. They have to do with proposed section 2.1 and proposed section 67.1.

I've perused the act—it may be here and I just haven't found it—but what happens when an officer or employee of the government doesn't comply with those sections? I look at section 38, and I suppose that's one section, but are there any other sections?

● (1225)

Mr. J. Alan Leadbeater: I don't know of any statute where the purpose section gives rise to an offence. The purpose section is to allow the courts to properly interpret specific directive sections of the act. So I don't think there will be any offence possibilities leading from proposed section 2.1. Proposed section 2.1 is just a guidance to courts on how to interpret this act.

Mr. David Tilson: The reason I asked that question is that I attended a presentation of the Canadian Newspaper Association earlier this month. I believe you and some of your colleagues were there. One of the issues raised concerned the many excuses that officers of the government—municipal, provincial, federal—give to say why you can't get information, and some of them are absolutely preposterous. The question is, should this legislation, at least the federal authorities, be dealing with that. It was a genuine concern. People just made things up as to why they weren't going to give information out.

Mr. J. Alan Leadbeater: I take your point, and I may have been confused between subsection 2(1) and proposed section 2.1. Proposed section 2.1 is a directive section and proposed section 2.1 does give rise to an offence.

The mechanisms that we have included in the statute to encourage compliance are the specific offences with respect to document handling and document creation. Those are criminal offences, in the nature of quasi-criminal offences.

We have included economic incentives in the nature of fee refunds and fee waivers for delay-type problems. If they're delay-type problems, there are mandatory fee refunds and waivers. For overall failure to give a good service, we have public exposure through the data collection that's imposed upon the President of the Treasury Board and the public reporting that's imposed upon the Treasury Board and the public reporting that's imposed on the Information Commissioner whenever he sees a non-compliant institution. That multi-faceted approach to incentives, we think, is the best we can do.

The Chair: Thank you.

Mr. Epp.

Mr. Ken Epp (Edmonton—Sherwood Park, CPC): Thank you, Mr. Chairman.

Thank you for your presentation and this vast sea of knowledge that you have on this particular topic.

Because of limited time, I would like to have you address three specific questions. They have to do with bringing coverage into the act, thereby giving Canadians access to information in three areas. The first one is the Canadian Wheat Board. Until now, they have not been covered and it has been impossible for farmers in the west to find information pertaining to the operation of their own organization, which greatly affects their economy and their financial well-being. Will the Canadian Wheat Board now be covered? Will it now be possible to find out the salaries and the expenses of board members and others?

My second question has to do with Canada Post. Over the last 15 years, or probably a little less, there have been issues with Canada Post and cross-subsidization between the government-granted monopoly of Canada Post and their use of the facilities they have in order to compete with Purolator. They use Purolator to compete with other companies that provide services. That's against their rules and they have always claimed that they don't cross-subsidize, yet we've never been able to obtain information that would actually verify that.

My third one has to do with cabinet ministers, their travel expenses, their hospitality expenses. Will we now be able to have access to those particular and interesting pieces of information?

Mr. J. Alan Leadbeater: It is our assessment, given the criteria that we propose be included, that the institutions you've mentioned will be subject to the Access to Information Act.

Mr. Ken Epp: All of them.

Mr. J. Alan Leadbeater: Yes.

Mr. Ken Epp: Good. Thank you.

That's it, Mr. Chairman. I'm satisfied.

The Chair: Thank you.

Mr. Laframboise. This will be the last one because our witnesses need some time to go over some administrative things. Then, hopefully, we'll have a little more time for questions.

● (1230)

[*Translation*]

Mr. Mario Laframboise: I have a short question.

Under the proposed subsection 21(1), the head of a government institution may refuse to disclose records that have been in existence for less than five years. Five years would now be the standard. However, pursuant to the proposed subsection 21(2), various records, factual material, public opinion polls, economic forecasts and statements will be disclosed. Subsections 21(2)(a) to 21(2)(0) cover a range of records. You cited the Mulroney case, but surely that isn't the only time you had problems obtaining records. Can you relate to me some of the experiences that you've had?

[*English*]

Mr. J. Alan Leadbeater: That's part of the problem with the current act. We can't really give you too many specifics about cases we investigate because we're required not to. Things that have been made public I can refer to, and that is why we would like the option to be able to speak publicly about these things.

Maybe generically there is a tendency for government institutions to interpret the terms “advice” and “recommendations” broadly—very broadly. There have been some court cases that have actually endorsed a broad interpretation of “advice”, that have interpreted “advice” so broadly that it would sweep in many of these things that are listed there specifically, factual background information and so forth. Taking into account our own experience with that and the very good provisions in more modern access acts that have come into force since ours did in other provinces, we've actually come up with these categories of records that we think Parliament needs to say you can't call advice and you can't keep them secret.

The Chair: Thank you.

We'll go into your second phase, and then maybe we'll have time for a few more questions after that.

Mr. J. Alan Leadbeater: Thank you.

We've had very interesting and good questions. We've covered some things that I intended to cover, but if we start with proposed section 2.2, we believe the act should require all departments to maintain a public register describing all records disclosed under this act. This is something some departments now do; the Department of National Defence does it.

It facilitates requesters getting informal access to records. They've already been disclosed; they wouldn't have to go through a process, and it would allow researchers to have a better idea of what records are available in various government institutions.

We talked about trade secrets already, so I won't do that.

We are also recommending that people be able to ask for and receive records in any reasonable format they specify. If they want it on a diskette or a CD-ROM, or they want it on paper, or they want it sent to them by email, as long as there's a reasonable test, we believe they should get it in that format.

We have also included in proposed subsection 4(5) a requirement that government institutions not disclose the identity of access requesters, except to the extent required to process the request. They'll need to disclose it to the finance department because the $5 cheque is going to the finance department, and they may need to disclose it to an operational unit if the person is asking for records about themselves, but otherwise the identity should not be disclosed. That has arisen in cases you may be aware of—requesters have received slower service, less disclosure, less-forthcoming disclosure, and other types of reprisal because of who they are as requesters, when that fact should never have been known to the senior officials of the department.

We are recommending in section 9 that departments be able to group records. Have I talked about this already? I may have talked about this already. They'd be able to group records, requests, for the purpose of meeting the large volume, for extending the time period. If a person makes 100 requests in the same month on the same subject, none of which singly involves a large volume of records—but in total they do—the department can group them for the purpose of applying that extension. Departments have been telling us they would like to have that ability.

We're also recommending that when a government institution fails to meet a timeframe and they go into what we call "deemed refusal"—they have not met timeframes—they'd be required to give a notice of that to the requester and to the commissioner. That will allow us to monitor, in a much more systematic way, which departments are meeting timeframes and which are not, and it will allow requesters the right to complain to us immediately.

We're recommending as well that there be an obligation to consider requests for fee waivers and that there be criteria in the legislation for fee waivers. That's at proposed subsection 11(7). We have set out four criteria for fee waivers that we believe are sufficiently objective. They're not dependent upon who the person is—journalist, member of Parliament, rich, poor, whatever. They are related to the nature of the record itself: Has it been disclosed? Does it contain information relating to public health, safety, protection of the environment, and so forth? Is it related to getting eligibility for a program or service? Is it generally in the public interest that it be disclosed?

We are also recommending that requesters have the right to decide whether they want to come in and view a record or whether they want a copy of the record. It's 20¢ a page. It's the most expensive photocopying in history, I think; you can get it for 4¢ a page at most Mac's Milk stores. At 20¢ a page, some people may want to just come and view the record, instead of paying for a copy, and we believe they should have the right to ask for that.

● (1235)

I won't go through all of the changes that we were proposing to the exemptions, because they're all related to putting in the injury test and making them discretionary.

I think it is important, though, to notice that we are also putting an obligation on the commissioner to do his work in a timely way. If I could draw your attention to proposed subsection 30(4), we're recommending that a complaint be completed within 120 days. If it's not completed, a notice goes to the complainant and the complainant can decide to wait or go to court.

We feel a provision like that is important for two reasons.

First of all, it will enable us to justify resource needs. When we try to justify resource needs right now, we're often told that we're under no obligation to answer in any time, so we can take our time. We're told not to get worried and to take our time. On average, I think we're now up to almost nine months for an investigation. I think if we have a statutory obligation to do it in four months, then resources will flow.

From the point of view of service to the public, if a requester doesn't get service from us, the requester should have some rights. The requester should have some recourse. In this case, the requester could go to court.

We are recommending that the act be amended in subsection 36(2) to make it clear that the commissioner has the right during his investigations to see information that is subject to solicitor-client privilege. There was a decision of the Federal Court of Appeal that the commissioner could see documents subject to solicitor-client privilege only if they were the documents that were requested and denied. The commissioner could not see collateral records to help him decide whether the department had properly applied exemptions if they were covered by solicitor-client privilege. We are seeking leave to appeal that to the Supreme Court of Canada at the moment, in the hope of convincing the court that subsection 36(2) as now written is a clear expression of parliamentary intent that we should see that type of information. But for clarity, the addition of an explicit reference to solicitor-client privilege is being recommended.

On the administrative side, I think that's a good place for me to stop. There are small things that I think are self-evident when you read them, and it might be a waste of your time for me to go through all of those. If there are any further questions, I'd be happy to deal with them.

● (1240)

The Chair: If there are really important questions, we can take a few minutes. I need a few minutes at the end to present a proposed agenda for the committee, but we can do a few if you want to.

Mr. Szabo.

Mr. Paul Szabo: I want to finish this up by asking you whether all of the irritants that have been identified under the current act have been effectively addressed. I could think of things like access to the Prime Minister's diary, which was a big deal. I think we're taking care of crown corporations now. Have you had any further thoughts, as a result of the work you gave, on how to relieve some of the administrative pressures?

As an example, I remember that one request was to the Minister of Industry to provide a copy of every letter he'd received on a certain subject over a certain period of time. Of course, I'm not sure exactly where the rules sit now, but to have to go back to the source of those letter writers, saying that you've received this request and asking if there's any objection, is a tremendous amount of work. The onus always seems to lie with the government, as opposed to providing a list of the names that someone can go back to for each one of those. What can we do in terms of this volume issue?

I think the government departments and agencies really have to have a little bit of a break. I think the potential abuse, notwithstanding the current form of the act, is a big risk area.

Mr. J. Alan Leadbeater: There are a couple of things in this proposal that we hope will alleviate those concerns. One is, as I've mentioned, the ability to group requests in order to take extensions of time—in other words, not to be forced into 30 days if there are a lot of requests.

We also have included this fail-safe mechanism now of the government institution being able to come to the commissioner to make a complaint about an abusive request; in other words, to come and say, "We think this one has gone over the line and we don't want to have to do it. Commissioner, do you agree with that?" That's something totally new.

We also feel that through a beefing up of the commissioner's education role, the tools that are in the act now to allow government institutions to demand deposits and to extend time could be more effectively managed to discourage the kinds of things you mentioned.

The Chair: Mr. Hiebert.

Mr. Russ Hiebert: Thank you, Mr. Chair.

In light of the sponsorship scandal, these amendments are very timely, and I'm glad to see there are steps being taken to address what has happened in the past.

Another timely factor in all of this is the sentencing consequences for breaching these kinds of acts. Canadians have recently been informed that Paul Coffin was sentenced to a lecture series and a weeknight curfew. I look at subsection 67.1(2) of the act. It appears to me it was not amended. I was wondering whether you have considered amending it in light of the fact that the amounts for a fine seem to have been set in 1985. That was about the time when a litre of gas was still 35¢. I'm wondering if you've thought at all about amending the consequences beyond house arrest.

● (1245)

Mr. J. Alan Leadbeater: I'm not sure.... You've mixed a lot of things into that question. Do I think the penalties that are listed in section 67.1 are appropriate? Yes, I do. For a public servant, whether it's $10 or $10,000, if you get convicted of this, your career is over.

Do I think Mr. Coffin got the right punishment? I just don't want to comment on that.

The Chair: Mr. Tilson, quickly.

Mr. David Tilson: This is just a comment with respect to subsection 36(2) on the issue of the waiver of solicitor-client privilege. I believe the law societies and law associations across the country will go ballistic when they see that one. I don't know whether you have any further comments on what you already said. You indicated it's before the courts, and I wasn't aware of that, but I find it quite an interesting proposal.

Mr. J. Alan Leadbeater: Let me just answer this way. For 22 years the commissioner has always had access to solicitor-client material. That provision has always been interpreted as applying to any privilege, including solicitor-client privilege. It didn't mean the privilege was lost—that documentation didn't then become available to the public—or in litigation it didn't mean it lost its privilege. It just meant that if we went to a department to ask, "Why did you do this?", and they said, "The lawyers told us we had to do it that way", we would look to see, if the lawyers told them to do it that way, what they told them. We would see it; then that would help us make informed recommendations to the head. It didn't mean there was a loss of privilege. And all other commissioners—

Mr. David Tilson: But this section says it is.

Mr. J. Alan Leadbeater: No, this statute says the commissioner may see it, despite the privilege. It doesn't mean the privilege is lost. The privilege could still be asserted in any court case. There wouldn't be a loss of the privilege in that sense.

All commissioners who do access to information investigations in the country receive that information.

The Chair: Thank you.

Mr. Laframboise, do you have a quick one?

[*Translation*]

Mr. Mario Laframboise: Thank you, Mr. Chairman.

I think the 120-day timeline you've allowed yourself for responding is reasonable. That should be included in the Act. I'd like to follow up on my initial series of questions when I asked if you had the required staff and if this would mean extra work for you. I understand that you will require funding to meet the deadlines imposed. That's been the OIC's biggest problem, namely that you've never been allotted the proper funding to meet the targets. That's why you were told to take your time before responding.

Many Canadians no longer have faith in the process. They're no fools and they know you're slow to provide answers, as is the government. This timeframe is needed and your office must be allocated some resources. I hope the government doesn't reject the proposed reforms on the grounds that it doesn't have the necessary resources. If there's one agency that should have the resources to address the complaints of Canadians, surely it's the OIC. I hope the government agrees to the proposed deadline and I'm very satisfied with your recommendation. Thank you for your fine work.

[*English*]

The Chair: Thank you, and thank you to our witnesses. Clearly, we have a lot of work to do on this, and we are proposing that the commissioner come before our committee again. It is very highly likely that some of you, at least, will be accompanying him. I think we have a lot of work to do to examine the act, and we will probably have a lot more questions. We're going to be working on this for some time, but thank you for the initial briefing.

● (1250)

Mr. J. Alan Leadbeater: May I ask one question for clarification? I understood you to say at the beginning that the document is considered public now, and I certainly will communicate your request about interviews.

The commissioner has been asked to make a presentation to the Gomery commission concerning the need for accountability through transparency. His intention was to provide to Mr. Justice Gomery the text of his proposed revisions to this legislation in order to encourage Justice Gomery to consider them in the context of his recommendations as well. I'm wondering if that is a course of action that would still fit with the limits you put at the beginning.

The Chair: I think that's fine. Unless there's objection somewhere else, I think that's fine. We simply didn't want to upstage comments by the commissioner before he had a chance...but certainly it is public because we're in a public committee hearing and it is here. So I think that will be fine.

Mr. J. Alan Leadbeater: Thank you.

The Chair: Colleagues, unfortunately I do not have translation on this proposed agenda so I can't circulate it, but I can present it to you. The other issue is whether you want to do that in a public meeting or you want to go in camera. Do you want to go in camera?

Some hon. members: Agreed.

The Chair: We'll just break for a minute to allow the room to clear and then we'll proceed with that.

[*Proceedings continue in camera*]

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