House of Commons
CANADA

# Standing Committee on Access to Information, Privacy and Ethics

ETHI • NUMBER 010 • 1st SESSION • 39th PARLIAMENT

**EVIDENCE**

## Monday, October 16, 2006

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## Chair

**Mr. Tom Wappel**

# Standing Committee on Access to Information, Privacy and Ethics

**Monday, October 16, 2006**

● (1530)

[*English*]

**The Vice-Chair (Mr. David Tilson (Dufferin—Caledon, CPC)):** Good afternoon, ladies and gentlemen.

I'd like to call the meeting to order. This is the Standing Committee on Access to Information, Privacy and Ethics, meeting number 10. The orders of the day are, pursuant to Standing Order 108(2), for a study on issues related to the alleged disclosure of the names of access to information applicants.

We have three witnesses today, who are listed for you. We have David Gollob, who is vice-president of public affairs of the Canadian Newspaper Association. We have Ken Rubin, who is a *Hill Times* guy, a famous guy. I don't mean to be flippant, sir. We respect what you do; you are a journalist or reporter with *The Hill Times* and on other issues. We have Colonel Michel Drapeau, who is a lawyer.

Good afternoon, gentlemen.

We'll have each of you spend up to ten minutes in a presentation of your comments, in the order I just listed you—you've all been present and you all know how the game is played here—and then we will proceed with questions and comments from members of the committee.

Good afternoon to you, Mr. Gollob. We will start with you.

[*Translation*]

**Mr. David Gollob (Vice-President, Public Affairs, Canadian Newspaper Association):** Thank you, Mr. Chairman.

I am pleased to have the opportunity to appear before your committee today. I will continue in English because it is the language I would rather speak.

[*English*]

As you may know, the Canadian Newspaper Association is the voice of Canada's daily newspapers, and two key areas concern us: our business environment and threats to press freedom.

I have circulated to the committee—I hope you will receive copies of this—a letter of complaint from the Canadian Newspaper Association to the office of the Information Commissioner. This is a letter that was sent in September 2005. In my remarks I will be making reference to it, in a few moments.

Along with it, I distributed the photograph I am holding, which is from the U.S. Department of Defense. It appeared on the front page of the *The Globe and Mail* one day last week. It shows the Korean Peninsula, seen from space at night. This image is graphic evidence of the radical differences between two systems of government. As you will see in the picture, South Korea is lit up like a Christmas tree, and North Korea is as dark as a tomb.

I need not ask you, members of the committee and Mr. Chairman, which of these images is your preference, because I know that the answer is something that unites all of us in this room. The difference between totalitarianism and democracy—between a country that has a free press and one that does not—is so stark that you can see it from space.

I want to emphasize that while it was the U.S. defence department that took this photograph, it was a Canadian newspaper that put it on its front page. We rely on our journalists to tell us what the world looks like, whether down on the ground or up in space, or especially in the corridors of power. We rely on our newspapers and electronic media to keep our governments accountable, to shine the light of inquiry into the business of government.

The world in which the media exist simply to repeat government handouts is the world of Kim Jong-il. This is not the world Canadians desire. Unfortunately, the fact is that governments in Canada have an uneven record in showing that they share the same desires as Canadian citizens for the greatest possible transparency, the greatest possible illumination. Some in government appear to prefer that we leave them to govern in the dark.

In my opinion and the opinion of the Canadian Newspaper Association, this committee should not be limiting itself to investigating whether laws were breached in this, that, or the other instance; it should be inquiring, in our view, into the systematic spin management processes within government targeted at access to information requests from one group in particular that shines light on government decisions: the media.

Access to information, the Supreme Court of Canada tells us, is a quasi-judicial right and a cornerstone of our democracy. This committee has heard from senior public servants at Treasury Board that the Access to Information Act, the primary tool of transparency, is working well. And you've heard Treasury Board say that there is no widespread problem of disrespect or disregard within government, either for the spirit or the letter of the Access to Information Act, which is the law of the land. However, in May 2002 a former member of the governing party of the day with tremendous access to information wrote an article in which he described the creation of a "secretive Communications Co-ordination Group" at the very centre of government communications operations.

Jonathan Murphy wrote in that article, if I can continue the quotation:

> The CCG,chaired by [the communications director to the Prime Minister], is made up of the top Liberal functionaries from ministers' personal staff, along with several of the PMO's senior staff, and the top communications bureaucrats from the supposedly non-partisan Privy Council Office, this latter group led by [the] assistant secretary to cabinet (...)
>
> While the CCG's mandate is supposedly to "co-ordinate" the government message, in practice much of the committee's time each week is taken up discussing ways to delay or thwart access-to-information requests(...)

Did this secretive group, composed of exempt staff as well as senior officials from the Privy Council Office within government, really exist? And was its primary activity to thwart the quasi-constitutional rights of Canadians?

● (1535)

Jason Kenney and James Rajotte, Conservative MPs in opposition in 2004, denounced the existence of this secretive spin control group in the House. They clearly believed that this group existed. Does such a group still exist? Was this spin control mechanism dismantled, or does it survive in some other form? We believe this is the broader issue that should concern the committee.

As you know, the Elizabeth Thompson story suggests that the media requesters are sometimes identified by name in conference calls involving senior communications officials across government. That could point to the continued existence of a group of the type I have described. What should concern us is that media requests are singled out for special treatment. Let's not quibble over whether this is a widespread practice or not. We're dealing with a very small number, after all, of access to information requests in comparison to the total, the 10% of total requests that come from journalists. Why else would Treasury Board assign a special category to requests from media if they did not intend to treat them differently?

We have seen in testimony to the Gomery inquiry that this special treatment can involve toing and froing with the political office of the department and involve efforts to obstruct access. We have seen from the research of Anne Rees, an Atkinson Fellow who uncovered the so-called amber lighting system in her research—and I believe the committee has heard about this and discussed it and made reference to it—and from Professor Alasdair Roberts, whose research established that requests so flagged are subject to extensive delays, that media requests suffer from discrimination in violation of the letter and the spirit of the law.

As another point of illustration, this past spring the Canadian Newspaper Association conducted its second freedom of information audit. It's a sample, a rudimentary test of freedom of information and access to information systems across the country. In this exercise this year, five of six inquiries that went to the federal government were not responded to after five months, whereas the statutory period for response is 30 days. This is something the Canadian Newspaper Association has long complained about, and in fact, it has been the subject of a formal investigation by the Office of the Information Commissioner. The letter of complaint in both languages that I have distributed to you along with this photograph goes into this in more detail.

More than a year after that investigation began, we know nothing about what has been found, because we've been told that counsel for the Treasury Board objects to letting us see the data and is delaying the process. We believe this needs to be cleaned up. The Conservative government had a mandate from the people to do that, and the Canadian Newspaper Association is counting on this committee to hold the government to its promises.

Thank you. I'll be happy to answer questions.

● (1540)

**The Vice-Chair (Mr. David Tilson):** Perhaps we can do that after the other two speakers have concluded, Mr. Gollob. Thank you very much.

I'll remind the speakers that what we're trying to do in this committee is talk about the alleged disclosure of names with respect to access to information.

Mr. Rubin is next.

**Mr. Ken Rubin (As an Individual):** Thank you, Mr. Chairman and members.

The work of the House of Commons Standing Committee on Access to Information, Privacy and Ethics has been one of the few positive changes under Canada's first-generation access legislation. Your committee's efforts have been in contrast to official Ottawa's constant war to deflate the importance of information rights.

The focus of your current deliberations is on whether access users are too widely discussed, tracked, and monitored. I can testify to some of these counterproductive practices, like amber alerting and profiling of access users, adopted by government agencies. These practices create barriers to public access to federal records, and abuse the public's right to know about Ottawa.

I am probably the access user with the longest continual and varied experience, having filed thousands of access requests since October or November 1982. I am drawing from that experience, as well as other experiences with access.

I want to first make it clear that the problem of watching over access users and interfering with access as a quick, equal, and non-manipulative public access means to federal records is not a new one. I've given the committee various articles to that effect. Also, counterproductive practices are not just the result of a few isolated incidents, as in a handful of bad guys. This goes contrary to the position expressed by government witnesses you've heard.

Few officials will want to elaborate on the real problems. They've been trained to only answer as little as possible, very slowly—something like the treatment my access requests normally receive. That does not mean many are not trying, under difficult circumstances perhaps too timid in fashion, to help access users.

My experience is that who is applying contributes to the type of reply received and the length of time it takes. My access applications, for instance, are usually recognized, and can be met with uneven and at times unequal treatment depending on the agency and the officials. I'm pegged by different agencies in different fashions as an individual applicant, as media, as business, as researcher—you name it. So having officials keep my identity secure or treat my applications fairly is important, but not always done. That has implications on how information sought is treated.

Two inside tracking systems help to watch users like me. One managerial coordination system, coordination of access to information requests, or CAIR, has been around since 1989. In a 1989 *Toronto Star* interview I questioned the wisdom and purpose of the CAIR tracking system in its matches and the central agency's use of it, and it still goes on.

I've also questioned the need for other early warning systems that give communication and political operatives a chance to intervene in information releases. One particularly insidious system that's been around for some time goes by different names such as amber light, red alert, or red file process. It channels some of my many requests and other users' requests as “sensitive”, “interesting”, in separate streams, all in need of watching.

Discussion is not usually recorded, or at least not in full, where such access requests involve access and communications people, even ADMs, DMs, and ministers' office representatives. It amounts to both an early warning surveillance system and a communication damage control vehicle, and it contributes to delaying access and subverting the public's right to know.

Countless times I've been told by officials that the data requested is further delayed by a week or two or more, having been dropped off at the communication shop, or is being reviewed by this or that exempt political staffer in the minister's office. This can be quantified to a point through access tracking logs—they don't record everything. Academics like Alasdair Roberts have referred to it, and citizens groups like the B.C. Freedom of Information and Privacy Association, which you will be hearing from, have documented the access problems such inside tracking systems bring. I'm not statistics; I'm the flesh here.

● (1545)

Given recently an actual internal amber alert memo for the first time...brings this questionable ongoing tracking system into further disrepute. That particular June 2006 amber alert was written about in *The Gazette* and *The Hill Times*. It was generated by one of my requests at Citizenship and Immigration Canada for records on developing integrated Canada-U.S. immigration systems.

Communications people, fed by the access officials, were given a heads-up and a few days' time to review the materials for release to me, and possibly prepared ministerial house cards and media lines. Certain pages of the proposed access release were identified—pages 21, 52, 120, 224, etc.—that might be sensitive or embarrassing or receive unwanted or undue publicity.

One of the officials taking part in the amber alert exercise works in the office of the current Minister of Citizenship and Immigration.

**Mr. Dave Van Kesteren (Chatham-Kent—Essex, CPC):** Mr. Chair, I have a point of order. This is all very fascinating, and I think it's important. Maybe we should be looking at this, but we're still not talking about what we are supposed to be doing in this committee, which is to investigate and report on issues related to the alleged disclosure of names of access to information applicants.

I fail to see where this is going.

**Hon. Jim Peterson (Willowdale, Lib.):** On that point of order, Mr. Chairman, to me it's very relevant to our mandate. If they are saying that when names are disclosed differential treatment is provided, that's critical.

**Mr. Dave Van Kesteren:** I think this is the second witness, and we're still not going into our mandate, which is to see if the alleged disclosure of names has happened in the previous government and in this government. Are we moving in that direction?

**The Vice-Chair (Mr. David Tilson):** It's a fine point. Mr. Peterson has raised an issue: if you open that door, you can go a little further.

Mr. Rubin, I will repeat what I said at the outset. We need the help of you witnesses with respect to the problem of releasing names of reporters and journalists when they make applications under the freedom of information legislation or the access to information legislation.

However, Mr. Peterson is right. There is a grey area, so please keep that in mind with your comments.

**Mr. Ken Rubin:** There's a narrow and a broader way of interpreting the spirit of the act, just as there is a narrow and a broader way of interpreting what colours what. My points will be that the names are one thing, but once they're in the system, or there are tracking systems or profiling, it's all part of the same thing. It is grey if sometimes the people are dishonest and not willing to talk about it inside.

I was talking about this very sensitive immigration case. The reason the amber lighting system is not a genuine...[*Inaudible*]...in information system disclosure is that it sees things to be diverted, diced, and dissected. Invariably these systems lead to classifying access users and targeting some that are more troublesome or adept users. For instance, in this one I was classified as media, and I could match up to my access request.

So some media and opposition groups are targeted, but they're targeted one day; the next day or the next week, it may be somebody else who is targeted. The former Reform Party, who utilized a more systematic use of access requests on certain subjects, was one access user group that was followed and targeted.

The problem becomes even more pronounced when citizens put in privacy requests along with access requests, and their identities, even their motives, are challenged. This, from experience, includes applications made on behalf of Meme breast implant victims, fired government scientists speaking out on safety concerns, and attempts by an individual such as Maher Arar to seek records that would help clear his reputation.

Yet another level of monitoring concerns me that goes beyond just tracking: categorizing or channelling access responses. That's when access users are profiled. I have just discovered that I was subject to this treatment. My name is mentioned, so I guess it's okay.

On October 5, 2006, after a long-standing complaint to the Information Commissioner, I received from Canada Border Services a memorandum, previously totally secret, dated January 27, 2004. It had the agency's president's name on it. The subject was access requests, including mine on the controversial advance passenger information and passenger name record systems that track airline passengers—they're tied in with surveillance systems in the United States. The memo was drafted for the then public safety minister, Anne McLellan, but CBSA officials, in the October 5, 2006, letter to me, say the memo in question was never conveyed to the minister or her office, at least in written form.

My name was brought up in that memo, being criticized as one who had applied for data on the secretive air risk scoring system. Mention is made that the*Toronto Star* had made use of some of the data that CBSA had released to me to date on the subject, but the customs intelligence people preparing the January 27, 2004, ministerial memo then brought up my name again in a totally unrelated context, as one who was filing access requests for Maher Arar and Monia Mazigh, who as we now know were both on CBSA's lookout watch list, along with their very young children.

This is unacceptable. Matching up my background data and work on separate access requests should not be used to create a profile and discuss my access usage or that of other requesters. I do not consider this type of data being prepared and shared internally, or potentially going to a minister, a positive part of sharing within the spirit of the Access to Information Act.

I still have other access requests about the lookout watch system and advance air passenger database system at CBSA. They remain unanswered for many months.

Another disturbing development is even more intensive weekly review of requests by senior officials over many months. This was the case in the aftermath of the sponsorship scandal and during the Gomery inquiry. Records I obtained revealed that senior weekly meetings were held at Government Services and Public Works Canada to discuss handling sponsorship developments, including access use by me and others.

● (1550)

Senior ADM and interdepartmental meetings also took place regularly on the Arar file once the O'Connor inquiry was called. They had discussions on how to handle information, including coordinating responses to me as the individual applying, under both the access and privacy acts, for Mr. Arar and Ms. Mazigh. This is of concern to those I've talked to about this, as well as to me, as those applications contained sensitive personal and inaccurate information that was wrongly shared.

**The Vice-Chair (Mr. David Tilson):** Mr. Rubin, I think you now have the attention of the committee.

We're over the ten minutes. Do you wish him to go on?

**An hon. member:** Perhaps we should.

**The Vice-Chair (Mr. David Tilson):** Okay. Is everybody agreed? Okay.

You're well over your time, sir, so just keep that in mind.

**Mr. Ken Rubin:** Thank you, Mr. Chairman.

These tracking systems create a chilling and deterrent effect. They're not productive, unless you're an insider who is more intent on hiding, delaying, or manipulating data, or gagging your own officials. They add costs. They create administrative layers and fear inside the system. There is a code of silence.

And make no mistake, these tracking and coordination systems start at the very top. Back in 1986, records I obtained revealed that Prime Minister Brian Mulroney told the deputy ministers of defence and external affairs, through his political staff, to watch what they released on his prime ministerial foreign travel expenses. Jean Chrétien said the same thing when it came to his riding association.

This sent a signal to people down the line to watch access users more closely. None of the prime ministers since Prime Minister Joe Clark has even bothered to say to his officials that the main purpose is release of information. So when you get a Bronskill case, where official, tax-paid, private interdepartmental discussions are had about reporters, who's governing this country? Is it the people talking about the media and then naming them, or is it getting on with the real issues?

Heck, my name was brought up in the infancy of this act. I found out under an access request that the Atomic Energy Control Board of Canada was discussing why I was applying for their records on nuclear safety regulatory problems. I was right there on the official agenda.

In the 1990s, departments such as National Defence—and your committee has heard briefly about it—took zealously to tracking and discussing certain access users like me, the *Ottawa Citizen*, David Pugliese, and my colleague here, Colonel Michel Drapeau. They were very prejudicial in the way they treated us. I'm sure Mr. Drapeau will testify to that.

● (1555)

**The Vice-Chair (Mr. David Tilson):** Mr. Rubin, you're getting into some great material here for us. My problem is that I've been told to go by rules, and you're well over. Could you wind up?

**Mr. Ken Rubin:** If it helps the committee, could I give you some suggestions as to what to do about these problems?

**The Vice-Chair (Mr. David Tilson):** You're miles over, sir. I would prefer you wait until questions.

**Mr. Ken Rubin:** I'd be more than willing to do that.

**Col Michel Drapeau (Lawyer, As an Individual):** Mr. Chairman, I'm not going to have opening comments, I just have a thumbnail sketch of where I'm coming from and why I have an interest in access to information.

When I retired from the military in 1992, I was appointed acting director general of corporate management services at National Defence Headquarters. At the time, the access to information and privacy function was my responsibility. I spent three or four or five per cent of time a day on it. Every day, I had those green folders on my desk. It was my task to either inform the Minister of National Defence at the time, through his staff, to let him know what kinds of documents would be released on a specific day. I did this for two years.

On retirement, I created my own consulting firm specializing in access to information and privacy. My clientele ranged from members of Parliament—from every party in fact—to corporations, individuals, academia and the like. On average, I would submit something like 1,200 to 1,500 requests a year.

In 1996, I decided to go back to school, and I attained a law degree in both civil law and common law. On completion of my articles at the Federal Court of Appeal, access to me then, if it meant what it said, that it is a quasi-constitutional right.... In my research, and in the work I did as an articling clerk at the Federal Court of Appeal, when I looked at the law library, I recognized that there wasn't a single textbook on access and privacy. I set out a course to correct that. And I did. Before I was called to the bar, I produced the first edition of *Federal Access to Information and Privacy Legislation*. It is now in its fifth edition.

Being called to the bar, I opened my own practice, and I actually spent a good proportion of my practice doing access to information and privacy. The majority of my clients are either media or corporations or individuals. About 20% of my practice is now devoted to access. I submit, I would say, 600 or 700 requests a year—at least, the staff do it on my behalf.

At the same time as authoring this book, I also teach at the faculty of law,

[*Translation*]

in the civil law section, an access to information course for graduate and undergraduate students.

I should also add that my experience, as far as my private life and personal information being violated — and in some cases, this goes back to 1996 and 1997 — has convinced me that every time I made a request, the authorities who wanted to know who I was, did what they had to find out, and they did it on a regular basis.

[*English*]

I've been intercepted at cocktail parties, or through phone calls, and in many other ways, where people say they've heard I submitted a request or that my firm submitted a request. So I've lost any of my innocence concerning the potential protection of my privacy when I submit an access request.

People come to me as a lawyer and as a law firm to submit access requests because, besides providing them with the expertise that I've acquired over the years, I'm providing them with client-solicitor protection. My name could be divulged, but the identity or even the types of activities performed for my clients would not be known. It is too bad that we have to do this, but this is something we have to do.

To me, this divulgence of personal information is but one aspect. It's a serious aspect, but it doesn't prevent me from doing my job. I've learned over the years to cope with it, understanding that I have no protection through the system and that my identity is in fact regularly revealed as and when required.

I'll take questions.

● (1600)

**The Vice-Chair (Mr. David Tilson):** Thank you, sir.

We'll start with Mr. Peterson.

I remind all members that we're trying to look at the disclosure of names of access to information applicants.

Mr. Peterson. You have seven minutes.

**Hon. Jim Peterson:** Thank you.

First of all, Mr. Gollob, I'm shocked to hear that four out of five of your requests have not been answered after five months. What recourse is there for you?

**Mr. David Gollob:** Normally, the recourse is to lodge a complaint with the Information Commissioner. In this particular instance, we did not do that because our purpose was to demonstrate, as it turns out, that access to information requests made by media are subject to systematic delays that are routine. We don't know the reason for the delays in this instance.

**Hon. Jim Peterson:** Would you mind showing us those five requests?

**Mr. David Gollob:** Absolutely. I don't know them off the top of my head, but I can make them available to the committee in our report.

**Hon. Jim Peterson:** I think this is shocking. We have to find a way, as a committee, to deal with these types of things.

Thank you.

Mr. Rubin, we've heard from Colonel Drapeau that he makes 600 to 700 requests a year. How many do you make?

**Mr. Ken Rubin:** I don't count anymore, because I'm into the thousands for sure. I probably make more than a thousand. A lot of them are my own. Some of them are like Mr. Drapeau's, who has clients. My clients vary too. And there are personal information ones too.

**Hon. Jim Peterson:** So you act as a consultant to other people too.

**Mr. Ken Rubin:** Both, yes.

**Hon. Jim Peterson:** Do you get the requests for this information from people before you make them, or do you make them on your own, usually?

**Mr. Ken Rubin:** Primarily on my own, but it works two ways. That's the whole give and take in information giving. In an ideal situation, of course, we wouldn't have to do this, because the government would just give out information.

I've even had provincial governments come to me to apply for the federal government...or agencies come to me to apply for other federal agencies. That's how ridiculous this system is.

**Hon. Jim Peterson:** We heard from deputy commissioner Leadbeater that it is legitimate for a department to inform the minister of the identity of a requester and to have officials examine the request, including the name of the requester, in order to prepare a media strategy in dealing with that request. Would you care to comment on, first of all, the name going to a minister, and secondly, staff needing time to prepare a media response?

**Mr. Ken Rubin:** If you're asking me, I think the practice is wrong, because basically what you're doing is creating a parallel, unnecessary system. It's for damage control; it's for the information as to the political spin and so on.

I remember when Finance Minister Michael Wilson acted as his own access coordinator. There you had the whole thing come together. When I applied for polls and he didn't like the fact that people in polls said that his economic policies were wrong, he didn't necessarily want to release them. He got mad sometimes when there were media stories as a result of my access requests. But that's not the way the system normally works.

I don't think there's any value, and that's why one recommendation is to outlaw or ban amber lighting, or everything going up the line to the ministers. If the information is valid, then there's no reason.... It should just go in or out; it's not something that needs a spin put on it. There are sensitive issues—very few—that somebody up the line may need to know. But when you get everybody and his dog into a room.... In this memo I have, you get so many officials, just like in the Bronskill thing, that it gets out of hand.

● (1605)

**Hon. Jim Peterson:** Mr. Leadbeater said it was legitimate for the minister to know of the request, and the name of the requester, in order that he could cope with questions in question period, or during a scrum.

**Mr. Ken Rubin:** Yes. That's the way our system works. But right now, as Mr. Drapeau is saying, we have to cope with this system, but it's the wrong system. That's why I'm saying—

**Hon. Jim Peterson:** But supposing you get your information within the 30 days—I find that very legitimate—are you saying it should only go to an information officer and no one else in the department, and that information officer is under a burden of not disclosing?

**Mr. Ken Rubin:** That would be a better system.

One of my recommendations is that all the officials involved in access, including the minister if he's involved, should be identified in the reply letter to you. Let's not beat around the bush; there's a system here that isn't normally told to you.

But no, I don't think they should be. If they track, monitor, and profile your name, it should be grounds for appeal to the commissioner. You should have the right to complain about it, and you should have the right to say that this practice should be banned.

**Hon. Jim Peterson:** I welcome hearing further from you on who in a department is entitled to know the identity of the requester.

Are you also saying that the Privy Council Office should have absolutely no connection with any request?

**Mr. Ken Rubin:** They're part of the care system—not just because of the name—that coordinates the access to information request. If anybody gets a cabinet confidence, they automatically have to delay things and go to the Privy Council Office to check if it's a cabinet confidence. There are many reasons besides the communications one why people delay or go to the Privy Council Office. I'm saying that it's an unproductive, counterproductive system.

If for instance, things are known prior as a cabinet confidence, then departments are capable of handling them. If people get information requests, however sensitive, they're capable of handling them. You don't need the massage factor built in through several different layers.

**Hon. Jim Peterson:** Wait just a second. Do you mean the massage layer in terms of responding to you, or the massage level in terms of responding to possible questions in public?

**Mr. Ken Rubin:** If they're well prepared in advance, and it's their policy—and it's been paid for by tax money—then they should know and be able to respond to things.

So many times I find I get briefing notes now that are not briefing notes on the issue; they're briefing notes about whose access request was prepared, and that's not the substantive thing.

**Hon. Jim Peterson:** So are you complaining about the quality of the response?

**The Vice-Chair (Mr. David Tilson):** Mr. Peterson, I'm sorry.

Madame Lavallée.

[*Translation*]

**Mrs. Carole Lavallée (Saint-Bruno—Saint-Hubert, BQ):** I would like to begin by thanking you for appearing before the committee this afternoon. Your testimony is important all the more so because, based on what we have heard, you have all been expert victims of the access to Information Act. None of you, unless I am mistaken, seems to question the fact that the name of a reporter who had placed a request under the access to Information Act was turned over to a minister's staff. If you do not agree with what I have just said, please say so. It would be interesting to hear what you have to say in your capacity as expert victims, if I may use that expression, on certain issues, be they secondary or very important.

To begin, two weeks ago, experts from the Office of the Information Commissioner came before the committee and told us that applicants were divided into five categories: corporations, members of the public, organizations; the media and people from academia. We were given a breakdown of requests in the form of percentages.

Do you really believe that there are only five categories and that there are no sub-categories? Have you ever thought about making an access to information request to see if there are any other categories?

You probably know that our committee adopted a motion, two and a half weeks ago, asking the minister to redraft the access to Information Act. We gave him December 15 as a deadline. Perhaps he is listening to us as we speak. It is also possible that certain people would like to know what you are suggesting to protect the identity of applicants. In your opinion, that is as expert victims, what sanctions do you think should be imposed on people who revealed the identity of applicants to make sure that this sort of thing does not happen again?

Lastly, two weeks ago, I presented an idea to the representatives from the Office of the Information Commissioner, namely that when an applicant is provided with the information requested, the names of the people to whom the applicant's identity was revealed also be provided to the applicant. I do not know if that is a good idea. I would like each of you to answer these questions, and please feel free to decide amongst yourself who goes first.

● (1610)

**Col Michel Drapeau:** As for whether there are more than five categories, I have absolutely no doubts about that. But whether these categories are actually useful, valid and precise, the answer is no.

when my firm makes a request, is that of concern to certain media, universities, organizations, corporations or individuals? Those people really do not know. As for me, I really have no idea how my request is categorized. Is it classified as an organization or as something else? The numbers are worth what they are worth, but I really do not see what the point is of organizing the requests based on the type of applicant.

I have made requests for the purposes of research. In that type of situation, it is possible to ask to be exempted from related fees and disbursements, as stipulated in the act. In that type of request, you have to explain that you need the information for the purposes of research. However, in each of those cases, we failed. It did not matter that we indicated the type of request and not the name of the applicant.

As for redrafting the Access to Information Act, I have to admit, Ms. Lavallée, that I feel very protective of the way the Act is currently worded, and I feel it belongs to me, even though I have been a victim of it. Why is that? We have been living with this legislation for 33 years. If I were to pull out my book, I could show you to what extent the courts have tried to interpret this little piece of legislation, be it the Federal Court, the Federal Court of Appeal or the Supreme Court. There is no doubt that the Supreme Court ruled that this Act is quasi constitutional. Access to information is a right which belongs to everyone. According to Mr. La Forest, this Act ensures that our democracy is rich and vibrant. By having access to information, simple citizens, as well as the media, can hold governments to a certain degree of accountability. I am therefore surprised that this right is being questioned. No other right, be it freedom of religion or freedom of expression, is questioned. These rights are respected by our officials and by everyone. So why should this Act be dismissed?

In my opinion, the Act as worded works. I use it regularly. Despite the fact that you have treated me as a victim, I ultimately can use the legislation in the course of my work. There are other issues which are much more acute and thorny, including the huge delays in providing information. Mr. Peterson referred to this a little earlier. I can give you two examples of situations I experienced, and they happened last Friday and this morning.

In 2004, I filed a request on behalf of a businessman with the Department of Indian Affairs. One month later, I received about 30 pages of information. I knew instinctively that this was not what I was looking for. If I had not thought of complaining at that time, I would only have received those 33 pages, but today I received 635 pages of information.

I will now talk about the second case. In 2003, I was hired by Radio-Canada — and so this is the public domain — to conduct research on the history of the 1995 referendum. I made a bunch of access to information requests. Many of them were followed up, but most of the files — of which I received about 10 per cent — went back to before the 10th anniversary year of 2005. Last week, I received a box this high from the Privy Council. After having filed a complaint, I finally received the documents. But it is too late now: everybody knows of what happened. You did not have to be a genius to realize that I wanted the information for historic reasons only.

● (1615)

**Mrs. Carole Lavallée:** If you do not want those documents—

[*English*]

**The Vice-Chair (Mr. David Tilson):** Thank you, Colonel Drapeau.

Mr. Martin.

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

Thank you, witnesses.

The reason we're having this study is that most of us around this table were horrified to learn that the name of a journalist was revealed in the context of an access to information request. This has not been common knowledge amongst most MPs I know, so we were horrified and shocked to learn through your testimony, and in fact through testimony of the Treasury Board and the Information Commissioner, that it is in fact commonplace for the minister, or at least departmental heads, to find out who is asking the question. In fact, it's a matter of course, it would seem, that the first thing that happens when a difficult or nuisance complaint comes forward is that the minister's office demands who's asking. This is shocking to me. If the right to know is quasi-constitutional in its importance, then your constitutional rights are being systematically violated in a widespread way.

I guess our first interest in having this study was, is it in fact happening? I think we're satisfied, from what we've heard, that it is happening. We wanted to know how frequently and how common it's happening, and that's being answered. We wanted to know if it was happening in the previous government as well as the current regime. In fact, Ken has pointed out that it's been widespread, back as far as we can remember.

I guess the question I have—and I'm learning something every day, and I'm more disappointed and shocked every day I learn about this—is on what Ken has brought to the table now, that not only are they asking to know the name of who applied, but they're also getting a detailed profile of the type of person—that is, what is the level of threat this person's question may pose to the government?

Can you expand on how often we've seen this profiling? Or is it a new revelation that it's not only the name, but also what the person does, what type of questions they ask, and what causes they've been associated with in the past? That's what's worrisome to me, and it adds a whole other element to this. I think it's an absolute bombshell that they're not only asking for the identity, which I think undermines the integrity of the whole system, but they're also asking for confidential personal information.

Is this not a Privacy Act offence?

**Mr. Ken Rubin:** I still don't consider myself a victim or a marked man. I'm exerting my information rights, and there's an act here, a legal act. The problem is that some government officials have decided there is no right, that it's just a privilege they can manipulate and be deceitful about. It's unfortunate that it's got to this point.

Profiling is the wrong end of the stick in terms of what you should expect when you put in an access request, like anybody else, particularly if you put it in for other individuals who really have problems with the government and need their reputations cleared, or have a toxic waste site and they're trying to figure it out.

What do they do? They try to watch you, instead of watching out for the Access to Information Act and its spirit. So this is a problem.

I don't think this is the first example of this kind of thing I've had. A lot of this, as you've heard before, was done orally, and you find out at parties or wherever people are talking, and you go into the circle, where they say, oh, I can't talk, Ken Rubin is here.

This is the problem we have here.

**Mr. Pat Martin:** But wasn't the expectation of privacy a key and integral part when the original bill was drafted?

● (1620)

**Mr. Ken Rubin:** Yes.

**Mr. Pat Martin:** I know the act has never been reviewed, but is it your understanding that the anonymity of the applicant and the expectation of the privacy of the applicant are integral parts of the act?

**Mr. Ken Rubin:** Yes, and as MPs, you handle constituency concerns and so you know how delicate and sensitive these things can be. You've been in this particular boat too.

So I think an amendment to the Privacy Act, on which third parties have access to personal information, is more in line than one to the Access to Information Act. Better privacy protection used in disclosure codes, subject to an independent review, is needed. Right now there isn't sufficient protection—and that would help.

**Mr. Pat Martin:** That's useful, but I want to know how and when did we get so off track? How did we get derailed from when the act was first established in 1983 or 1982? When did we start losing this expectation of privacy that I think is so key and integral?

**Mr. David Gollob:** Could I add something to Ken's remarks? The previous witnesses have also spoken about the fact that in some cases the identity of an individual can be deduced by officials within a department when it is a media person or a journalist who has made the request, because if I remember correctly—I'm not quoting verbatim—so-and-so has been writing stories about such-and-such, and here we have an access request from an individual about this topic; it's a journalist; it must be Fred. I don't know exactly the number of journalists in this country, but there are not thousands and thousands of journalists making access to information requests; there is a limited number of journalists, in fact. It's a small pool, so the moment you do identify that this is a request from a journalist, then the chances of someone's being able to guess rightly that it's Jim Bronskill, because he's been writing about CIA planes, are very high.

**Mr. Pat Martin:** So even without using the name, but just that information of—

**Mr. David Gollob:** That's why it is injurious to be categorizing requests as media requests and to be subjecting them to special treatment, which is the subject of our complaint, as I mentioned earlier.

**Col Michel Drapeau:** Mr. Martin, you asked when it started. I think it started right at the very beginning. Both of them were enacted at the same time, back on July 1, 1983—

**Mr. Pat Martin:** Which both, sir?

**Col Michel Drapeau:** The Privacy Act and the Access to Information Act, and I've done extensive research of all the House of Commons debates that took place 10 years earlier, leading up to it. When the acts were enacted and the two commissioners were appointed, Dr. Grace as Privacy Commissioner and Mrs. Hansen as the Information Commissioner, there was no public education program, no system of any sort to give direction to the bureaucrats that this was a right like any other, and they would be held to a standard, and there would be penalties—not in the act, but in policies; you would expect that to be done. There were no expectations, and there was also no change in values. The processing of these records has now been transferred from the bureaucracy to the public as a concept.

**The Vice-Chair (Mr. David Tilson):** Thank you, Colonel Drapeau.

Thank you, Mr. Martin.

Mr. Stanton is next.

**Mr. Bruce Stanton (Simcoe North, CPC):** Thank you, Mr. Chair.

Before I get to my question, on Mr. Martin's point about the questions that were put.... Let me come back to that thought in a second.

I'll go to my question first to Mr. Rubin. Mr. Rubin, we heard some sensational testimonies and allegations around inside tracking systems and motives being challenged on numerous requests, I assume, in your testimony. On the systems themselves, I think it's reasonable to suggest that every department has to have some way of tracking inquiries and data and categorizing these types of inquiries for purposes of efficiency. What are you really alluding to here? What point are you trying to say, and what proof would you have to suggest that somehow these tracking systems, as you call them, are somehow not what they should be?

**Mr. Ken Rubin:** That's what the insiders call them too—tracking systems—and I did give documentation. I'm not making allegations; I have documentation from the very government that's doing it.

There is another example, before I forget. Besides the Reform Party's being specially targeted, the Bloc Québécois, during Meech Lake and when they put in requests at the sponsorship scandal, was also targeted. So the system gets warped depending on the issue and the nature of the flavour of the day.

I'm really trying to be a positive guy here. I just want to see information going out without all this overlay. I mean, if you're interested in avoiding the extra costs of all these people sitting around tables discussing me and my access thing, and getting on with the policy of efficient government in fewer ways, that's one way we could make sure that there's better government—just get the information out there. I've got an act that I'd like to present to the committee called the public right to know act, and in there I say that the main feature of it is proactive disclosure—do away with a lot of this complicated bureaucracy and parallel tracking of people and their access requests.

● (1625)

**Mr. Bruce Stanton:** I appreciate that.

I wanted to make a point on Mr. Martin's question. The testimony I heard was that the minister wasn't demanding this information. We heard in our last testimony that ministers had the ability to learn this information, and I'd be happy to look at the blues to confirm this. But what we heard today in some of our questions was certainly a variation on what I heard from previous testimony.

There's no question that this committee shares a genuine interest in trying to ensure that access to information is done in an objective way; that regardless of what category you happen to be in, the requests are handled professionally; and that the information is brought in accordance with, and with respect for, the Access to Information Act and the Privacy Act.

There are 25,000 access to information requests—that's on ATI. There are another 36,000 in privacy. We've had words that suggest foot-dragging in getting information out. But put in context, this is a massive operation. There are some 500 people in the federal civil service who deal exclusively with ATI issues.

We've heard testimony that, yes, there have been some issues. Treasury Board Secretariat has been acting on those and doing training and all the right things. Out of all that activity, there's bound to be some information slippages or mishaps. But to suggest that it's broadly spread, I'm not seeing that. Could you comment on this?

**Mr. David Gollob:** The access to information system was the subject of a 2002 study by a government task force. In this study it was learned that the government spends approximately $800 million on communications. That's the government generating messages it wishes the public to pick up about its operations, policy, and programs.

We do not have—though it would be interesting to discover—the budget across government for processing those 25,000 access to information requests. But I would suggest that it's far inferior to the $800 million spent on what some might uncharitably describe as “spinning”. This, nevertheless, is a constitutional and legal requirement—providing information when it is requested.

An important part of the issue is this: people are frequently ill-prepared to manage this volume of work, as Colonel Drapeau was saying, and the whole system is seriously under-resourced.

**Col Michel Drapeau:** In 1977, the then minister, the Honourable Francis Fox, tabled a green paper on access to information. Its introduction and most of the data, including the green paper itself, was drawn from the American experience. The Freedom of Information Act became a statute in the United States in the 1960s. The estimate in the green paper was that if we were to use the American experience we should anticipate 100,000 access requests a year.

Some calculations were made on the assumption that Canadians were not quite as nosy or entrepreneurial as our American cousins, and the number was reduced to 70,000. That was in 1977. This figure was used to do the original staffing of access to information staff in the various departments and institutions. So we're not even halfway to what was originally estimated as being the annual ATIP workload throughout the Canadian government.

● (1630)

**Hon. Jim Peterson:** Can I ask each of you for a simple answer? Should a minister in certain circumstances be entitled to know the name of the requester?

Mr. Gollob, tell me yes or no.

**Mr. David Gollob:** No.

**Col Michel Drapeau:** I have no problem, Mr. Peterson, with the fact that on occasion a minister may have to know.

**Hon. Jim Peterson:** Mr. Rubin.

**Mr. Ken Rubin:** Yes.

**Hon. Jim Peterson:** Okay.

Should anybody in the department other than the information officer be entitled to know?

**Mr. David Gollob:** The person who cashes the cheque obviously has to know.

**Hon. Jim Peterson:** So that's two people.

**Col Michel Drapeau:** And I would stop at that—two people.

**Hon. Jim Peterson:** Only two people in the department have to know, but sometimes the minister?

**Col Michel Drapeau:** Well, sometimes there would be more than two—the ATIP coordinator and his staff. So I would say the ATIP staff and whoever.... A legal adviser may on occasion have to know—I'm talking about the Justice Canada legal adviser in the department—and whoever cashes the cheque.

**Mr. David Gollob:** I'd submit that it's a "need to know" principle: who needs to know in order to fulfill this request?

**Hon. Jim Peterson:** To see whether the provisions of the law allow exclusion of certain information as well requires some type of judgment to be made by somebody, I guess.

**Col Michel Drapeau:** In the example I'm alluding to, that of a legal adviser, there will be occasion—I'm saying "on occasion"—when I will be requesting information under the Access to Information Act, and that may include the personal information of the requester. The legal adviser would have to know that the requester in fact is person X, and this information will have to be released to him.

**Hon. Jim Peterson:** Mr. Drapeau and Mr. Rubin, what percentage of your requests are met on time?

**Col Michel Drapeau:** Ten per cent, fifteen per cent.

**Hon. Jim Peterson:** Mr. Rubin?

**Mr. Ken Rubin:** I'd say 5%, and sometimes it takes up to three or four years.

**Hon. Jim Peterson:** Do you complain, usually?

**Mr. Ken Rubin:** I complain selectively, but of course the Information Commissioner has his own lack of resources and takes a lot of time. There's more than one way of complaining under the system: you can complain to ministers, you can complain to the press, you can complain to MPs. One of the things your committee should consider doing—because you're dealing with one specific access problem here right now, and it's good, as I started off by saying, that you're around—is spending an in-depth session on delays, excessive exemptions, increasing types of exclusions under the act, and many other related problems. I think you would find some startling facts.

**Hon. Jim Peterson:** Mr. Rubin, you have a number of recommendations for us. Could we hear them, please?

**Mr. Ken Rubin:** Sure.

Number one is to make access a constitutional right, and not just a statutory privilege to be tampered with.

Two is to make access a fully documented proactive disclosure service, with a designated public authority and a responsible minister. The Bill C-2 clause on access services is just too weak and double-faced.

Three is to outlaw practices such as systemic amber lighting in systems and profiling, and spell out obligations of access integrity officers; do away with access officials having dual roles, such as contributing to amber tracking and working on security-classified department records; and ensure that those processing, reviewing, and deciding on access requests are identifiable.

Four, add as a ground for appeal the secrecy practices of tracking and profiling access users.

Five, give the Information Commissioner binding order powers, including the power to review agencies engaged in tracking and profiling access users.

Six, make tracking and profiling access users an offence subject to penalties and jail terms, and substantially reduce existing exemptions and any catch-all blanket exemptions, and prevent delays that go hand-in-hand with watching and tracking access users.

Finally, amend the Privacy Act to tighten up which third parties have access to personal information, and provide better privacy protection and make use and disclosure codes subject to independent review.

● (1635)

**The Vice-Chair (Mr. David Tilson):** Thank you, Mr. Rubin.

Mr. Wallace.

**Mr. Mike Wallace (Burlington, CPC):** Thank you, Mr. Chairman.

Thank you to the panel for coming.

I have a couple of questions, and anybody can answer. First, let's start with Mr. Gollob. The report I have in front of me, which I was able to briefly read through one time, was provided in 2005 when the Liberal government was in charge. Is that correct?

**Mr. David Gollob:** That is correct.

**Mr. Mike Wallace:** Were you surprised when some of my friends across the way were shocked that there were some delays and so on? This has been happening for a number of years, then. Is that an accurate statement?

**Mr. David Gollob:** Which of your statements are you referring to?

**Mr. Mike Wallace:** Well, we heard from my friend Mr. Peterson—

**The Vice-Chair (Mr. David Tilson):** Try not to bait them, Mr. Wallace.

**Mr. Mike Wallace:** —that he was shocked that there were these long delays in getting your reports back.

I want to know if that's since we took over on January 23, or if it's something that's been happening for years and years.

**Mr. David Gollob:** This has been the subject of increasing concern to information commissioners, and it's been expressed in their annual reports, going back to Commissioner Grace, in fact—

**Mr. Mike Wallace:** Right at the beginning.

**Mr. David Gollob:** —who, I think, was the second commissioner.

The matter of delays is widely known in the journalistic community, the delays of journalistic requests to the extent that many journalists have been discouraged from using this tool because of the expectation that the information would no longer be of use or benefit.

**Mr. Mike Wallace:** Unfortunately, I was unable to be here the last week that the committee was meeting. I was with the finance committee on a tour.

I'd like to quote you something that Mr. Leadbeater, the deputy information commissioner, said. If you could comment on it, that would be fantastic. He said:

> We have no objection to government communications functions or ministerial staff knowing what information is going to be released under the access to information so that they can be prepared with house cards and Q and As and so forth, as long as the process of doing that does not prejudice the requester by either delaying the answer going out or by changing the amount of censoring that's in the document and so forth. That process, I think, can flow without there being any exchange of identities—and some departments do it very well.
>
> So no, as long as timeframes are met under the statute and it is properly applied, we don't have any problem with the "sensitive requests" being routed through the communications function of a department.

This came from the deputy information commissioner, and I want to know what you three think of the comment.

**Mr. David Gollob:** I would say we have no problem with the government developing, in parallel—as I believe it is supposed to function—a communications strategy to explain why a decision was taken when the background to that decision is going to be released in public, as long as it does not interfere with the process and as long as statutory response times are complied with, and—as Mr. Leadbeater said—as long as it does not lead to additional censoring or requests for the alteration or obstruction of records, as we saw in the Gomery inquiry.

This was, in fact, part of the to and fro. It was described in great detail how an access to information request from a journalist went through the coordinator, up to the political office, back down to the department, back and forth as they debated about what the requester actually asked for and what they could leave out, in terms of...and this whole process took weeks and weeks.

So our issue is with delays and with this process interfering and causing those delays.

● (1640)

**The Vice-Chair (Mr. David Tilson):** Mr. Rubin, you have a minute.

**Mr. Ken Rubin:** Well, listen, if this act were really utilized, if a million Canadians used this, do you think that parallel system wouldn't break down? I'm saying it's already broken. I disagree with the deputy information commissioner. I don't think it's needed. I think it just creates problems. It creates opportunities for people to censor, to delay, and too many unwritten things are said....

I've seen too many communications strategy plans that have called for low-profile release or that try to dampen expectations. If a government wants to govern, let them govern. Let them not waste all our time by doing these parallel systems.

**The Vice-Chair (Mr. David Tilson):** Mr. Wallace, and then Mr. Laforest.

[*Translation*]

**Mr. Jean-Yves Laforest (Saint-Maurice—Champlain, BQ):** No.

[*English*]

**The Vice-Chair (Mr. David Tilson):** I have you on the list. Do you want to say anything?

[*Translation*]

**Mrs. Carole Lavallée:** Mr. Drapeau, you said a little earlier that you received boxes of information on the referendum. I would offer to pick them up and feed them into the shredder.

But seriously, I would like to come back to the issue we are discussing, more specifically finding solutions. Even if you say you do not feel like a victim, the fact remains that it is something the three of you have in common today. The minister is streamlining and strengthening the access to Information Act. I am sure you have solutions to propose.

A little earlier, Mr. Rubin told us how he would like to see the Act changed. I would like to know what Mr. Gollob thinks. Do you think we should change the fact that the minister can have access to the identity of an applicant?

Mr. Drapeau, I would like you to briefly tell me under what specific circumstances a minister should know the identity of an applicant in order to govern the country.

Lastly, since you all have been victims, I would like to know what sanctions should be imposed on those who break the rules. I do not think that the current legislation contains anything of the sort.

Mr. Drapeau, I would ask you to please answer briefly, so that the other witnesses also have time to respond.

**Col Michel Drapeau:** In my opinion, the minister should be responsible for that. The Act says that it is the minister's responsibility. He entirely delegates his authority. I see the minister as being a member of the Privy Counsel, and sometimes, when you govern a country, in exceptional circumstances, the minister should know the identity of an applicant. Again, I would like to clarify that the minister should decide, and not his staff or other officials. However, I cannot put myself in the shoes of the minister and say under what specific circumstances that should happen.

As for the tools which should be used, I believe that the heart of the problem lies with the access to information coordinator. This person should expect her performance to be evaluated at the end of the year. That should be reported. Only then should it be determined whether the coordinator acted in accordance with the Act. But that is currently not done.

**Mrs. Carole Lavallée:** Mr. Gollob, how would you like to see the Access Information Act changed?

**Mr. David Gollob:** The Canadian Newspaper Association supported the amendments proposed by the former information Commissioner, Mr. Reid, as well as the suggestions made by justice John Gomery. He also supported Mr. Reid's recommendations.

Further, at the time we supported the program put forward by Mr. Harper in a *Montreal Gazette* editorial which appeared in June 2005 and which basically supported the same proposals.

**Mrs. Carole Lavallée:** Among the recommendations you supported, did any include sanctions for people who broke the rules, especially when an applicant's identity was disclosed?

**Mr. David Gollob:** At that time we did not study that matter.

In my view, we can draw an analogy between the study being carried out by this committee and the broken window of an apartment. The window is broken because an intruder entered the apartment. Rather than focussing on the broken window, we would rather look at the intruder and the fact that a robbery actually took place. In this analogy, the robbery is actually the entire system which discloses the identity of applicants and whereby media requests are given specific attention.

● (1645)

**Mrs. Carole Lavallée:** I am not quite sure I understood. When you talk about an intruder, are you comparing that to the person who disclosed the identity of the reporter?

**Mr. David Gollob:** Of course, I talked about a committee which, based on the testimony of a person who was a member of the Liberal Party at the time, existed in 2002. The point of the committee was to slow down access to information and it held meetings where information requests made by reporters were discussed.

I suppose that at those meetings the names of the reporters were mentioned. In my view, that was not really the problem, but rather the fact that they tried to block access to information.

**Mrs. Carole Lavallée:** Nevertheless...

[*English*]

**The Vice-Chair (Mr. David Tilson):** Thank you.

Mr. Van Kesteren.

**Mr. Dave Van Kesteren:** Thank you, Mr. Chair.

I have a few very quick questions. I just need a yes or no for the first two.

I think I've got this right: to amend the Access to Information Act, Mr. Gollob, you say definitely yes.

Mr. Drapeau, you say no, that it's not required.

Mr. Rubin.

The next question.

**Mr. Ken Rubin:** What did I say?

**Mr. Dave Van Kesteren:** I'm sorry. You said we definitely need... and I think you gave us 10 recommendations.

**Mr. Ken Rubin:** That was just for this problem. I think we need a totally new act. You can't just amend this act; it's broken.

**Mr. Dave Van Kesteren:** Okay, so you say it needs a new act.

Mr. Ken Rubin: Yes.

Mr. Dave Van Kesteren: I want to get back to the original question, the very reason we were going to have this forum: are the names of access to information requesters being given out? I think that's a clear way of asking it.

Mr. Gollob, do you believe that the names of access to information requesters are being given out?

**Mr. David Gollob:** We believe that it is routine.

**Mr. Dave Van Kesteren:** Okay.

Mr. Drapeau.

**Col Michel Drapeau:** Yes, and I know so.

**Mr. Dave Van Kesteren:** Okay.

**Mr. Ken Rubin:** Yes, and three strikes and you're out on this one.

**Mr. Dave Van Kesteren:** All right.

From that, we can conclude that the former government definitely did take that practice. The question today is, is this still happening? If so, we want to put an end to it.

I'd like to quote from Mr. Dale Eisler in respect to the Bronskill matter:

> There was no knowledge of an ATI request by any specific reporter. We are never privy to that information. In this case, there was a discussion about ATI files that were being released on the issue of alleged CIA overflights.
>
> It was well known that Mr. Bronskill had already written several stories on the matter, and had been calling Public Safety and other agencies for comments and clarification. In this case, the assumption was that, given his particular interest in the subject, he would be writing another story.
>
> In retrospect, it was inappropriate that any such assumption was made.
>
> This was a discussion only among officials. There were no involvement by political staff and the summary report of the discussion by officials was a practice that predated this government. These type of summary reports were regularly shared with members of the previous government's Prime Minister's communications office.

Here we have a top PCO official basically describing public officials speculating on a name and then including it in the routine minutes of their meeting, which was distributed to the political staff as well. Do you think this is evidence of a deliberate violation of the law by political staff?

I guess I need the same thing, just an answer from everyone.

**Col Michel Drapeau:** I don't have enough to say definitely yes.

**Mr. David Gollob:** My answer was made earlier when I said that if you identify media requests and put them in a sidecar, and you know that there are only five people who could have made a media request—that there are only five people who routinely make requests to that department on it—and there's one journalist who's been writing about it, you're going to guess rightly who that journalist is.

**A voice:** So what?

**Mr. Gollob:** So the contention is that as soon as a request is identified as a media request, some degree of violation has occurred, because who you are should not be relevant for the request to be processed.

● (1650)

**Mr. Dave Van Kesteren:** Mr. Rubin.

**Mr. Ken Rubin:** The issue isn't really how much of a public personality you are or how much they can find out about you. The issue is, are you going to let them get the information? Do you freely feel they should get it? And are you going to waste everybody's time by speculating, or are you going to get on with your job of governing the country?

**Col Michel Drapeau:** It's one thing guessing that this probably will come from a media source, because of the subject matter and being told precisely what the identity of the individual is.

That's why I equivocated as to whether or not this is a violation. It's not a violation of one's privacy, even for you to guess, but it would be a violation of privacy for the name of the requester to be disclosed and then used for a purpose for which it was never designed, never consented to.

**Mr. Dave Van Kesteren:** Yes, that's what we're trying to get to the bottom of.

**The Vice-Chair (Mr. David Tilson):** Mr. Peterson.

**Hon. Jim Peterson:** Thank you.

I think it would be a great help to this committee going ahead—because of the great expertise that you three have—if you could give us, in writing, what changes you think we should make.

Would that bother any of you?

**Col Michel Drapeau:** I'd be honoured to.

**Hon. Jim Peterson:** Thank you.

Just so I'm very clear, two of you disagree completely with deputy commissioner Leadbeater that a minister should not be apprised of a request even though he might have to answer to it in public.

Mr. Gollob.

**Mr. David Gollob:** Apprised of the identity of the requester.

**Hon. Jim Peterson:** Of the identity and the content.

**Mr. David Gollob:** I don't recall making any objection to the content, but the identity.

**Hon. Jim Peterson:** Okay.

Mr. Drapeau.

**Col Michel Drapeau:** I have difficulty with the way you've phrased it. I would certainly not give my consent that a minister can or has to know the identity in order to answer in public. I'm saying for reasons of state, and it could be national security, an issue of immigration, it could be a whole range of issues. Exceptionally, a minister also has a right to know for reasons of state. I'm saying very exceptionally he may ask the person to whom he has delegated this authority, on a very specific occasion, who is this? He has to know for a precise reason, and that would be one in ten thousand. It wouldn't be a regular occurrence.

**Hon. Jim Peterson:** So I'm clear, the content of the request as opposed to the identity of the requester can be made known to the minister and/or his staff. No problem there?

**Col Michel Drapeau:** The content itself? Of course not, because that's going to become public.

**Hon. Jim Peterson:** Mr. Rubin.

**Mr. Ken Rubin:** I still have a problem with the parallel system you're describing. If the minister—and you were a minister too—is on top of his portfolio and knows about it, he should be able to defend himself in the House and the House cards can be prepared. To divert all this into the latest access request seems to me to be a colossal waste of taxpayers' money. It's a system of risk management, it's not a system of good governance and answering questions in the House of Commons.

**Hon. Jim Peterson:** Certainly, you don't want the minister to know the identity of the requester. Am I right?

**Mr. Ken Rubin:** Yes.

**Hon. Jim Peterson:** In the circumstances referred to by Colonel Drapeau, you wouldn't go along with him on that—the one in ten thousand where the identity should be made known?

**Mr. Ken Rubin:** I don't think so. I still feel there are a lot of other queries the government gets, not through access to information. What is the government going to do? Are they going to prepare House cards every time a Canadian wants to know something? It's crazy.

**Hon. Jim Peterson:** Let me be clear. Can a minister's staff be apprised of the content of the request?

**Mr. Ken Rubin:** No.

**Mr. David Gollob:** How can a question be a matter of national security? The answer—

**Hon. Jim Peterson:** Of course, because as a minister, often you want to know about what you're going to be hit with the next day in question period or the next time you scrum. If an access to information has gone out from your department, and you're hit with it, the public knows about it before you do. Your only answer can be, I don't know anything about that, I'll have to go and bone up on it. If that's what you're suggesting, I'd like to know for sure.

● (1655)

**Col Michel Drapeau:** If we are to be entrusting a minister with the secrets of the state and the management of a portfolio and have him as a privy councillor, then on a rare occasion he may have to have access to the identity of a specific requester—not for the purpose of entering into a scrum, not in question period, and not before the press, but for reasons of state. So the door is cracked open, and I say the minister because the authority in the first instance flows from him—all of it.

**Hon. Jim Peterson:** I understand that. Thank you, Colonel.

Mr. Rubin.

**The Vice-Chair (Mr. David Tilson):** You're over.

Mr. Stanton.

**Mr. Bruce Stanton:** Thank you, Mr. Chair.

Continuing on that line, we heard some testimony in the week prior to the break with respect to this very question. What we heard fairly clearly, I thought, from those who were giving testimony is that it's perfectly within the confines of the Privacy Act for ministers and people within the department to know the name of the requester—provided under subsection 8(2). That's the section that comes to mind as the section that enables that. There are some ten categories that allow that purview. It speaks to the earlier point that I raised in relation to Mr. Martin's point, that just because it's allowed doesn't necessarily mean it happens.

The same question came to mind as at least of couple of you spoke in your testimony about different instances of coming across information suggesting you've learned that somehow someone in the department knew that the name of the requester was there. That very fact doesn't necessarily mean that anything was out of sorts. It could very well be within the context of the Privacy Act that this information was known. It gives me pause to wonder why one would conclude that it would be anything different from that.

We've also heard, certainly through your testimony today, some suggestions about how things should change with the Access to Information Act, and that's all well and good. We're concerned today with coming to understand better how this process of the names of the requesters is being handled within the departments. That's the context of our discussion today.

On this question of the minister knowing the name, how many of those instances that you mentioned might well be quite legitimate under the Privacy Act, which exists today?

**Col Michel Drapeau:** It probably exists today. But to go back a step, when somebody submits a request to an institution, and in it there is his or her personal information—his name, his address, his date of birth—it's provided for a specific purpose: to obtain access to information in records. If you're going to use this personal information for any purpose other than satisfying the request, then you can do it in one of two ways. You can either ask consent of the individual, saying, "Do you give me consent to divulge or to disclose?", or whatever, or do it on an issue of public interest. The Privacy Act says you can disclose personal information on an issue of public interest.

If it is not one of those two issues, then you're in violation of the Privacy Act. If you're going to say you will now use this information to let your communication staff or anybody else—deputy ministers or political staff—say, "By the way, John Smith has asked this request because of...whatever", that is not required to process a request and to disclose records, and that would be in violation of it.

**Mr. Ken Rubin:** Some of the applicants who are asked to apply are also asked for their social insurance number, for their fingerprints, given the nature of the files.

**Mr. Bruce Stanton:** When did that happen?

**Mr. Ken Rubin:** It's common practice if you're applying, for instance, for a criminal file or certain other files. You have to give some further identifiable information.

Where do you draw the line in terms of how much information it is? I guess the point I keep trying to go back to is that when you create parallel systems and there are privacy concerns and tracking concerns, surveillance concerns, you're meshing those two together, and there's bound to be some bad judgment or unnecessary waste of people's time. I still feel it's very counterproductive to how the system should work.

The government witnesses said that all we need to solve this is training. I'm sorry, I came in front of this committee and the Senate to pass the only amendment to the access act, which is on record penalties, after the Somalia cover-ups and after the committee destruction of records. It was to put forward jail terms and penalties for people who altered records.

Well, there's a situation here that should be treated seriously. You can have all the training in the world, but when you have a training system inside that's, as one witness put it, a call centre away, we'll tell you, we'll remind you, that it's not good enough. You need a bit of a carrot. You need those penalties and you need a serious realization that you can ruin reputations, or you're just wasting your time, spinning your wheels.

● (1700)

**Mr. Bruce Stanton:** Yes, we got that point. I just say that—

**The Vice-Chair (Mr. David Tilson):** Mr. Stanton, that concludes the second round.

For the official opposition, it's Mr. Peterson.

**Hon. Jim Peterson:** Thank you, Mr. Chair.

Could I come back to you, Mr. Rubin? I understand your position that you don't want the identity ever disclosed to the minister or his staff or officials outside the small group of information officers. What about the content never being disclosed to the minister?

**Mr. Ken Rubin:** The minister deals with a huge range of topics and is responsible for various pieces of legislation. He has a lot of officials who are supposed to brief him and tell him about these. If you're on top of your files, there is no need to sidetrack yourself and ask what the latest—

**Hon. Jim Peterson:** Are you saying a minister should never know the content of a—

**Mr. Ken Rubin:** He's going to read it in the papers, or different groups will use it in certain ways. I don't think it's that relevant that he know—

**Hon. Jim Peterson:** I tend to disagree with you. If you've given the content to an outsider, at least at that time shouldn't the minister be made aware of what was disclosed? What is improper about that?

**Mr. Ken Rubin:** Once it's released, of course— everybody should know. It's improper before a release of an access to information request; it's for interference or potential interference in the situation.

There's another scenario too, and that is that when third parties seek or get your identity—maybe corporations are after it—that poses certain problems as well. The flip side is that there's more than one prying set of eyes after your identity at times—and that puts an access request in for it.

**Hon. Jim Peterson:** I'm sorry, I don't follow that. Could you explain that?

**Mr. Ken Rubin:** People sometimes put in applications strictly seeking to know who put in *x* requests, including my requests. That just shows you how silly the system can get.

**Hon. Jim Peterson:** Oh. Thank you.

**The Vice-Chair (Mr. David Tilson):** Mr. Kenney is next.

**Mr. Jason Kenney (Calgary Southeast, CPC):** Thank you, Mr. Chairman.

I moved the motion that led to these hearings, and I'd like to read back to the committee and witnesses that motion, because we are straying far afield from it. It is a very simple, limited, and discrete motion: “That the committee investigate and report on issues related to the alleged disclosure of the names of Access to Information applicants to political staff of the current and previous governments.” *Point*—period.

It's not a general, open-ended discussion of access to information policy. We've had that at this committee; we can have it in the future. It's an issue, understandably, of perpetual debate. But we're not here to discuss sidetracking and all these other practices that appear to be perfectly legal, according to the information and privacy commissioners' offices, which appeared before us. We're here to discuss the alleged disclosure of the names of ATI applicants to political staff.

I have a simple question, and I think it's the only relevant question really for the witnesses, and I'm not quite sure why we're having witnesses who don't seem to speak directly to the motion; I wish we could bear down on this. Quite frankly, these hearings are happening because the opposition alleged the government had deliberately violated the Privacy Act in at least one instance. I'd like to know whether that is true

So I have a simple question for any of the witnesses. Do you have any concrete, specific, tangible evidence that you can furnish the committee with of the names of ATI applicants being furnished to political staff?

● (1705)

**Mr. Ken Rubin:** Mr. Kenny, don't punish us if we don't have particular names.

**Mr. Jason Kenney:** I'm not punishing you. I'm asking you a question.

**Mr. Ken Rubin:** Your motion opened a Pandora's box, because what's perfectly legal and, as some witnesses have said, has perfectly good guidelines may be wrong, and that's what I and others have been testifying to.

**Mr. Jason Kenney:** But you've had an opportunity to testify on and off for two hours. I'm asking a specific question. Is the answer yes or no: do you have any information of this practice?

**Mr. Ken Rubin:** I have already in my testimony suggested some examples, yes.

**Mr. Jason Kenney:** Then you have concrete evidence you can furnish us with.

**Mr. Ken Rubin:** If someone wants further information than what I've said, I'll give it to them, but it's very hard to get the documentation.

**Mr. Jason Kenney:** So you don't have documentary evidence, then.

**Mr. Ken Rubin:** I have some.

**Mr. Jason Kenney:** Can you please furnish us with it?

**Mr. Ken Rubin:** If it's the will of the committee—

**Mr. Jason Kenney:** I'm a results-oriented person.

**Mr. Ken Rubin:** I asked at the beginning of the hearing if I could table some of the documents I have.

**Mr. Jason Kenney:** Please do.

**Mr. Ken Rubin:** Doesn't that require...?

**Col Michel Drapeau:** Do I have documentary evidence of a recent...[*Inaudible—Editor*]? The answer is no. Do I have a conviction that it has taken place, is taking place as we speak? Yes.

**Mr. Jason Kenney:** You believe names of ATI applicants are going to political staff.

**Col Michel Drapeau:** Yes, names are going to political staff, administrative staff.

**Mr. Jason Kenney:** You believe it's happening, Colonel Drapeau, even though you say you have no evidence for it.

**Col Michel Drapeau:** The evidence I have is anecdotal. It dates back quite a few years. In some cases, I would not be in a position to disclose it. I got this conviction based on my experience on a day-to-day basis.

**Mr. Jason Kenney:** My question wasn't about conviction. You just said that you had anecdotal evidence. What does that consist of?

**Col Michel Drapeau:** Anecdotal evidence of comments being made by third parties.

**Mr. Jason Kenney:** Rumours.

**Col Michel Drapeau:** No, the comments were made to me, and I was aware that a request had been made either by me or by somebody on my behalf to a specific department. This has happened more than once.

**Mr. Jason Kenney:** So you are talking about third-hand comments, but you have no evidence, nothing you can furnish us with to confirm that this practice has occurred.

**Col Michel Drapeau:** It depends what you mean by evidence. Do I have somebody who was made aware that a request was submitted by me or by somebody working on my behalf on this specific subject? Yes.

**Mr. Jason Kenney:** Could you furnish us with their names, their contact information? Could you supply letters from these people?

**Col Michel Drapeau:** As much as I would like to, the answer is no.

**Mr. Jason Kenney:** Mr. Gollob, do you have any evidence?

**Mr. David Gollob:** Mr. Kenney, in my remarks I made reference to a statement that you made in the House in 2004. It concerned the existence of a central communications group revealed by someone by the name of Jonathan Murphy. You may recall this. The purpose of this group, as Mr. Murphy alleged in an article published in *The Globe and Mail* , was to discuss access to information requests and do whatever they could to delay and thwart them.

If such a group did indeed exist—and I have no doubt that it did, though I have no evidence beyond what was published—it is beyond imagination that it would not have discussed the identities of individual requesters and the fact that they were members of the media. I find that difficult to believe.

My challenge to members of the committee and to the government is to clarify whether such a group still exists. Is this part of the tracking mechanism we've been talking about? The tracking mechanisms do exist, and the discrimination of media requests as opposed to other kinds of requests does take place. In this kind of management of requests from the media, it is likely that identities will be talked about, though I don't have the documentary evidence that you request. I just want to clarify.

● (1710)

**The Vice-Chair (Mr. David Tilson):** The problem the chair is looking at is this: on the one hand, the three witnesses are saying you shouldn't be entitled to this information; on the other hand, if there's a problem, the committee needs specific examples. Therefore, we're asking you to contradict the very thing you're asking us not to do. It's a bit of a problem. You're essentially asking us to trust you, that there are examples out there, but “we can't tell you about them”.

Monsieur Laforest.

[*Translation*]

**Mr. Jean-Yves Laforest:** I respect Mr. Kenney's opinion, which is that we are trying to determine whether names were given to the minister, but I also agree with what Mr. Gollob said, namely that the mandate of the committee is to make sure that our laws are respected, even though that is not specifically what we are examining right now. I do not believe we are necessarily in a position to find one or more guilty people, but we have to make sure that this type of situation does not happen again. That is why I think this is an important discussion.

The Access to Information Act has been in effect for about 20 years. I think that over that period, we realized that there were undesirable side effects for governments. In my opinion, the system of monitoring the categories of information applicants for statistical purposes generated other types of information. And I believe this has interfered with the public's right to know.

I think all reasons are good to explain what happened. The act contains very few sanctions for officials; in other words, it has no bite. Some people are caught between their obligation to protect the identity of applicants under the act and the desire to climb the ranks. So that way, I am convinced that this system presents great difficulties for many officials who feel caught between a rock and a hard place.

I have a question for all three of you. In your opinion, if the Access to Information Act were redrafted, should it includes specific provisions, much clearer than what currently exists, to prevent the identity of applicants from being revealed? Further, should there also be sanctions which would discourage officials from disclosing an applicant's identity, which they might otherwise do in order to get a promotion? Sometimes they might ignore the law in order to promote their own careers.

**Col Michel Drapeau:** I think the answer is yes. I think that if and when the act is redrawn, it will be important to clearly say that Canadians have a quasi constitutional right to obtain information. We have to make a 190-degree turn so that when an official receives an access to information request from a citizen, this official feels compelled to provide the information.

In its current form, the act is precious in many ways. Subsection 2 (2) says that the Access of Information Act is a complement to existing procedures. Our fathers and grandfathers did not have access to this type of legislation, but they nevertheless managed to get information simply by making a request. Today, when you ask for information, how ever simple it may be, you will be directed to the act, which involves all kind of delays and processes. In my view, that is what the problem is.

**Mr. Jean-Yves Laforest:** Mr. Gollob.

**M. David Gollob:** I think that the act should include explicit measures to protect the identity of an applicant. Further, there should be explicit sanctions, as is the case for people who obstruct access to information or who try to hide it.

**Mr. Jean-Yves Laforest:** Mr. Rubin.

[*English*]

**Mr. Ken Rubin:** Yes, I think the mindset is such that we're operating under a very limited framework—and it has to be changed. And so when you're looking at the system, you have to say, how will the access to information coordinators fit into this new system under new guidelines; how will the Information Commissioner fit in with binding powers; how will we implement these penalties and offences? And in order to do all of that, you really have to have a totally new arrangement, because as has been pointed out by previous witnesses, it's perfectly legal for a minister, under certain guidelines, to have the identity and to track the users; it's perfectly legal to have amber lighting, and so on.

So in order to resolve this situation—because it's more than just the identity, but it's the tracking and surveillance combination that becomes deadly for people trying to exert their information rights—you have to give them better information rights, and mandate the authorities to have a different set of guidelines on pro-disclosure, and mandate the Information Commissioner to have that as a ground of appeal, which he can look at through binding powers, and impose penalties when need be.

● (1715)

**The Vice-Chair (Mr. David Tilson):** Thank you.

Government members.

**Mr. Jason Kenney:** I have a point of order.

**The Vice-Chair (Mr. David Tilson):** A point of order. We haven't had one of those in a long time. Go ahead.

**Mr. Jason Kenney:** It's just to get consent to table a document. Can I go ahead with that, if there are no more questions?

**The Vice-Chair (Mr. David Tilson):** Official opposition? No?

Go ahead.

[*Translation*]

**Mr. Jason Kenney:** Mr. Chairman, as soon as I learn that there are documents which are relevant to the mandate of the committee as far as this issue is concerned, I insist on sharing them with all committee members. I would like to draw your attention to an e-mail dated September 21 which was sent by Chris Froggatt, the Chief of Staff for the Treasury Board Secretariat. It is simply a reminder for government ministers and their chiefs of staff. Let me read part of that e-mail:

> in view of the recent questions regarding the disclosure of the name of an applicant who made a request under the Access to Information Act, it is important to remind ministers and their exempt staff of the rules and regulations governing privacy and access to information.

[*English*]

**The Vice-Chair (Mr. David Tilson):** It's in both languages.

Does anyone else have anything to say?

Seeing none, I would like to thank all three of you. You've all been before this committee before. We appreciate your wise words and thank you very much for coming. Thank you, gentlemen.

Members of the committee, somewhere along the line, we're going to have to discuss where we're going next. I'm suggesting that on Wednesday at 5 o'clock we should set some time aside to discuss what we're going to do after that day.

The meeting is adjourned.

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

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

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