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Chair

Mr. Tom Wappel

Standing Committee on Access to Information, Privacy and Ethics

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● (0900)

[*English*]

The Chair (Mr. Tom Wappel (Scarborough Southwest, Lib.)): Good morning. I call the meeting to order.

Welcome to our fiftieth meeting.

Today we have with us, from the Office of the Information Commissioner of Canada, the Information Commissioner of Canada, Robert Marleau, and Daniel Brunet, director of legal services. From the House of Commons, we have Rob Walsh, law clerk and parliamentary counsel.

Colleagues, I understand that the commissioner does not have an opening statement, so I'll set the context for him.

Some of the members of the committee were of the view that it might be helpful in our investigation of the document entitled "Afghanistan 2006: Good Governance, Democratic Development and Human Rights" if we had an opportunity to talk to the commissioner, to ask questions of the commissioner about some of the things that are troubling some of the members, and to perhaps get the commissioner's advice.

We're mindful of the evidence that was given the last time you were here, with respect to the specifics of any particular case. For those who might have forgotten, the commissioner will of course remind us. But there may be other questions the committee members may have of the commissioner.

Commissioner, that's why you're here. If there are indeed no questions, and we'll soon find out, then we'll say thank you for coming. But there were members of the committee who expressed an interest in having you here.

Mr. Walsh, of course, is our legal counsel. We've asked him to be here for a number of reasons, including the fact that he gave some advice to the subcommittee in camera and not all of the members were at that meeting. We thought it would be useful for members to be able to ask Mr. Walsh some questions.

I hope and believe Mr. Walsh has an opening statement of some kind. Is that correct, Mr. Walsh?

Mr. Rob Walsh (Law Clerk and Parliamentary Counsel, House of Commons): If I have an opening statement, it would be an impromptu one.

I received an e-mail from the committee clerk yesterday at noon on the matters I'm to address, and I did not have time to prepare a formal statement for the committee. I'm quite happy to leave that aside, if you want to proceed with the Information Commissioner, and later I'll answer questions the committee members may have.

The Chair: I think it's important that you perhaps set the scene for us in terms of the rights and responsibilities of this committee and some of the legalities that are involved. You could go through what you were given a heads-up on, if I can put it that way, and give an impromptu series of remarks that might possibly trigger some questions from committee members.

Mr. Rob Walsh: Thank you, Mr. Chairman.

Let me first tell you what I have been given. I've been given five points, only one of which perhaps relates to what I discussed with the steering committee. Was it a few days ago or last week? I can't remember.

● (0905)

The Chair: Time flies. It was three weeks ago.

Mr. Rob Walsh: Time flies, yes.

Again, I'm reading from the e-mail received from the committee clerk. There are five items. The first one is with regard to the powers of committees in calling for persons and papers. I believe that's the topic that is primarily of interest this morning. The second item is the obligation of witnesses appearing before committees; third is the legal status of evidence taken by committees; fourth is the history of swearing in of witnesses under oath; and last is a possible response to a letter that I have received from a member of this committee.

Certainly in respect of the first item, I can reiterate what I said a few days ago. Basically there are no prohibitive limitations on committees seeking documents or calling upon persons to appear. There are, however, some practical limitations that arise from time to time, as you can read from the very learned text of Marleau and Montpetit, available to all members. There is some discussion there, I think on page 860 and following, about the witnesses at committee. You'll also find in that text a discussion of papers.

Basically you can command the production of any papers. The problem—and this is what I stress with the committee, as I think it's the case here in particular—is that a given document in the possession of the government that a committee is seeking to obtain may be subject to access to information restrictions. That is to say, the government may exercise its rights under that act and preclude the disclosure of the document or parts of the document, and indeed insist on that vis-à-vis this committee or any committee; this is not the first time this has arisen. And I make no comment about what proceedings may or may not be going on in the Office of the Information Commissioner. I'm just speaking generally here.

Regrettably, while the committee is entitled, in my view, to receive the document in its unexpurgated form—or, as they say now, its "unredacted" form, which I don't quite understand—the fact remains that the government, not the government of the day in relation to this particular document but the government or officials generally speaking, feel that they can't provide the document because they would be contravening the act and their obligation.

So what do you do? Well, you can just simply bang the table more loudly and insist on the document coming to you, in which case the government will bang the table more loudly and say no, we can't give it to you because of the act. You would get to a bit of a standoff.

Yes, the committee could call upon the minister, perhaps, to come before the committee to explain why the document is not being provided. That may not be satisfactory, and the committee might then make a report to the House citing this as being a breach of its privileges and make a recommendation to the House as to what the House should do. The House may or may not take the steps that the committee recommends. But meanwhile, the document is not before the committee while you're going through that process.

In principle, you're entitled to what you ask for. In practice, however, in the face of a statute that applies to the government but doesn't apply to the House, or doesn't override its constitutional privileges, you nonetheless have this dilemma where the official feels constrained by the law in the act and the committee wants the official to disregard that.

The simple solution, Mr. Chairman, is to amend the act. But I'm sure there would be ways of getting around that amendment, even if there were one, in various circumstances.

That's what I said to the steering committee, Mr. Chairman, if I'm not mistaken. You were there. I don't know if there's anything I can usefully add to that at this time.

The Chair: Okay.

Can you carry on with the other points, then?

Mr. Rob Walsh: Okay.

The obligations of witnesses appearing before committees...well, clearly the obligation is to be truthful, and to suggest that's not the case is to suggest that witnesses can appear in front of committees and say what they like, whether or not it's true. But clearly the witnesses are obliged to be truthful before the committee, and to be fully truthful: not to, in my view, limit their answers to some narrow interpretation of the question but to answer fully the matters of interest to the committee as reflected in the questions put to them and to be available to the committee as the committee may require from time to time in further clarification of their testimony.

The reverse side of this coin is what the situation would be were there to be an appearance of untruthfulness on the part of a witness. There are basically two avenues. One is the committee comes to a conclusion that the witness was untruthful and reports this fact to the House and makes a recommendation to the House, perhaps that some steps be taken against that witness for this false testimony.

The other avenue.... I don't know if this is the occasion to go into this, but ostensibly there's an alternative of prosecution for perjury under the Criminal Code. I don't want to take up the time of this committee unnecessarily, but I am troubled by the consequences of a decision handed down the day before yesterday by the Federal Court in an action brought by Deputy Commissioner Barbara George, for a number of orders.

In respect of the request that the court discontinue the police investigation of a possible perjury charge on her part, the court denied that it had jurisdiction, with the result—and what is troubling to me—that this may be taken by the RCMP that they continue to have the prerogative of choosing to investigate whether given testimony of a witness was or was not truthful with reference to a possible charge of perjury.

Now, on their side, if you like, is the fact that section 131 of the Criminal Code expressly refers to testimony given to a committee of the House or the Senate. But what's not on their side, in my view, is that the putting of that into the Criminal Code doesn't override the constitutional privileges of the House and its committees. In my view, in a nutshell, I don't believe the police have the right to initiate an investigation for perjury without the consent or instruction or request from the committee to whom the false testimony was given and perhaps subsequent confirmation by the House itself.

What's troubling to me especially in that context, Mr. Chairman, and it relates indirectly to the subject of the letter from a member of this committee, is that you have there an investigation being carried on by the RCMP with respect to one of its members, a senior member of the force, in respect of testimony given to a committee in the matter of an inquiry into the RCMP itself. It troubles me for two reasons. One, the parliamentary privileges of the House are not being respected here by the RCMP, with the result that this witness and other witnesses observing this may be intimidated and unwilling to testify before that committee, including that particular witness who may next show up before the committee and refuse to answer questions because of this continuing investigation. What troubles me as well, of course, is that in my view a police investigation is in the nature of a legal proceeding. It's the exercise of legal powers for the purposes of determining whether a criminal offence has occurred, and it could result in a charge being laid.

It strikes me—from what I'm seeing from a distance, admittedly—that this is akin to a self-serving use of one's legal powers for the purposes of dealing with a situation that's problematic to the institution itself. I say that not with any comment on the veracity of the testimony in question. I have no idea whether the testimony in question was or was not truthful, but it seems to be entirely inappropriate—and I'm saying this to you as my client and through you to the other committees who may have witnesses before them and whose testimony may on occasion seem doubtful—that the police can launch an investigation for perjury of their own choosing. That's a serious compromise, in my view, of the integrity of the parliamentary proceeding itself. And I think the committee ought to be concerned about that, on behalf of its own proceedings as well as on behalf of the witnesses who appear before it.

Now, the court in the George case said it simply didn't have jurisdiction. I don't quarrel with that conclusion, but it nonetheless concerns me that this is going on and will continue to go on in the circumstances. This relates to the matter raised by one of your members in his letter, and I'll jump to that right now. It relates to the Security of Information Act and the possible application of that act to members of this committee with respect to documents coming into their possession. Here, too, an investigation could be launched, because we're talking about an offence. So an investigation could be launched, ostensibly for the purpose or having the effect of intimidating members of this committee engaging in their parliamentary business.

● (0910)

That is profoundly problematic, in my view. I say that to you, Mr. Chairman, as legal adviser to this committee and to members of other committees. You have to defend the integrity of your proceedings against any other interference.

The Security of Information Act contains a prohibition against persons hanging onto documents that fall within the ambit of that act. If they come into possession of those documents by happenstance, they're obliged to return them. If they fail to return them, or if they make use of them, they could be subject to prosecution under that act.

I don't propose to make any comment on the particular situation that may apply to individual members of this committee or any other committee with regard to documents that may have come into their possession. But it is the case, in my view, that those provisions are there and could put the position of some members in jeopardy, by virtue of those members being in possession of documents covered by that act.

I'll return to that—

● (0915)

The Chair: I guess, in that instance, the question is whether a particular document is covered by the provisions of that act. If it is, then it's one thing. If it isn't, then it's irrelevant—for that purpose anyway.

Mr. Rob Walsh: That's correct, Mr. Chairman.

But there are a number of other legal issues that could arise, and that's why I hesitate to comment specifically on the circumstances here, because there could be circumstances of an exonerating nature that apply and could be overlooked in any comment I might make about the possible application of this act, or the committing of an offence by any member of this committee under that act. So, in fairness to those individuals, I'm just not going to go there, if you don't mind, Mr. Chairman. They are entitled to their own private legal advice as to what their position might be, and they may want to do that. But there are other aspects of this letter I can return to later, perhaps, if these are of interest to members of the committee.

The legal status of evidence taken is that of protected testimony. This was affirmed by the Federal Court yesterday—but only in respect of the internal disciplinary proceedings the RCMP is undertaking with regard to the applicant, Deputy Commissioner Barbara George.

The reason the court had jurisdiction there is that it's covered by statute. The Federal Court is a creature of statute. It derives its authority—its jurisdiction—by virtue of statutory provisions giving it jurisdiction. If it doesn't have its jurisdiction found in a statute it doesn't have what we lawyers call original jurisdiction, as the superior courts in the provinces would have.

The result is that the court found it had jurisdiction with respect to the proceedings pertaining to internal discipline, because those are carried out under the regulations of the RCMP Act, but it did not have jurisdiction with regard to the criminal investigation, because those proceedings are not carried out under any statute as such. They're carried out under the general common law power of police to investigate allegations of criminal offences.

The Federal Court affirmed that the testimony of the witness to this committee was not available for purposes of that internal disciplinary investigation. The court did not order the investigation. It couldn't go ahead; it can't use testimony to this committee. To the extent it relies on testimony to this committee—which seems, frankly, to be central to that proceeding—the proceeding cannot go forward.

The history of swearing in of witnesses—

The Chair: Just to be clear, then, the evidence given before a committee is protected, in the sense that it cannot be used against the person who gave the evidence in outside proceedings. Is that correct?

Mr. Rob Walsh: More broadly, article 9 of the Bill of Rights Act of 1689, which has been affirmed as part of the constitutional law of Canada and applied by the Federal Court earlier to this George decision—but not mentioned in the George decision, perhaps because it wasn't necessary—makes it clear that no court or other place can question the proceedings of the House.

In a sense, you might more properly say that the jurisdiction of courts and other proceedings is limited; they can't look at what happens before committees, or in the House. Those proceedings are protected from any review, examination, or questioning by any outside body, process, or authority. Okay. That's essentially what that's saying. You can call it a privilege if you like, but strictly speaking it's a limitation on the jurisdiction or authority of those outside bodies.

The bottom line is that what you say to this committee stays with this committee, as it were, in terms of any other legal proceedings.

The Chair: I'll just put out an example, Mr. Walsh. If someone confessed in a committee that they had committed a specific armed robbery on a specific date, and there was no other evidence whatsoever to link that person with that crime, other than the admission before this committee, that person could not be convicted via court using that evidence, because they couldn't use that evidence. Is that correct?

Mr. Rob Walsh: That's my view, although extreme hypotheticals are always problematic. That would be my view, yes.

The Chair: All right, thank you. Because if that's the view in the extreme, then in the less extreme it's even stronger.

Mr. Rob Walsh: Indeed, I would argue it goes one step further. Not only is the testimony itself not available, but evidence generated in reliance on that testimony is not available either. More than that, evidence generated elsewhere, which is not appreciated for its significance without reliance on that testimony, is itself unavailable. But these are all points or evidentiary arguments one would make in court on the occasion of being presented with testimony before a committee, and the courts would draw their conclusion.

I'm reminded, of course, that there's always the possibility that the House could waive its privileges in this regard and allow its proceedings to be used, typically for a prosecution for perjury.

● (0920)

The Chair: That's a good point. But it would be the House's privilege to waive.

Mr. Rob Walsh: The committee could make its own decision to waive and then report that to the House, and if the House concurred.... Obviously this has larger implications than for just one committee. So the committee could do it, and the outside authority might rely on that, but there might be an argument to be made that it's not sufficient and that it requires the House to confirm the committee's decision. These are not questions that have been, to my knowledge, addressed in any courts of law and from which I can say there's a judicial determination. But that would be my own view of the situation on the basis of principle.

The Chair: I interrupted you, sorry. You were at point number four.

Mr. Rob Walsh: Just on the last point here, Mr. Chairman, the history of swearing-in of witnesses under oath, the committees branch gave me a brief memo. It would appear that the history largely has been a debate about whether a committee needs the permission of the House to administer an oath or can do it without that permission. Much of that history is sort of passé, because it is the case, and I think it is generally recognized—I think Marleau and Montpetit's text affirms this—that if a committee wants to administer an oath or affirmation to a witness, it may do so. I'm troubled by that, and let me explain that practice.

The first time I remember it arising—whether or not it was happening with any frequency—was before the government operations committee, which at the time was looking into the Office of the Privacy Commissioner, and at which the veracity of some testimony was very much in question. There was talk about whether there might be a charge of perjury laid against some witnesses. So then the view developed that if you're going to lay a criminal charge of perjury, you have to have, on record, the administration of an oath, so that it's quite clear that the individual was well aware that they were legally obliged to tell the truth. Subsequently, this practice would creep up in the later proceedings of the public accounts committee pertaining to the sponsorship program, and on other occasions: if there is a sense that we may be dealing with some doubtful testimony here, if we want to prosecute for perjury later, we should get them to swear an oath.

In my view, I don't think the option of going for a prosecution for perjury is a very realistic one. However much one might want to bang the drums loudly about it, I don't think it's frankly a very realistic one, first of all because it's very difficult to successfully prosecute for perjury. It's not as easy as a bank robbery might be. It's very hard to know what the truth is in a given situation, and whether the individual knew that what he or she was saying was not the truth, and whether he or she intended to convey that untruth. These are hard things to establish legally in a criminal court. So I don't think it's a very fruitful avenue for the committees to look at, and I've said this to committees before.

What's more fruitful, perhaps, and more appropriate is for committees to defend themselves against false testimony and for committees to call upon witnesses to explain their testimony, and for committees, acting perhaps as judge and jury, to form a conclusion as to whether they were or were not misled or lied to by a witness, and to make a recommendation to the House that action be taken and so on, and to go that route, for which you don't need an oath, in my view. Now, if the House turned around and made the rule that yes, you do need an oath, if you're ever going to go to them with a complaint of being lied to, well then okay, you're going to have to. But I doubt that the House would make such a rule.

I don't look fondly on the idea of using oaths, frankly, but the practice has emerged, in my view, for that reason from time to time. One could argue that it could be an affront to the witness sometimes, who is here perhaps not in a challenging situation, to talk about some public program or policy program or whatever, and all of a sudden is confronted with an oath as if they're being told that they can't be trusted to tell the truth so we have to require them to swear an oath. The optics might be problematic as well and set things off to a bad start between a committee and a witness.

That, I think, in short—not in short, in too long, perhaps—responds to your points.

The Chair: The points you've raised are important. I think they're helpful to the committee.

In your opening remarks, do you want to specifically address any particular aspect of Mr. Reid's letter to you, other than what you've already said?

Mr. Rob Walsh: Again, Mr. Reid posed four questions in his letter. It's a very comprehensive treatment of the subject and, as one might expect, Mr. Reid is very skilled in such matters.

The first question is basically to ask what steps members of the committee might take to discharge their obligations under the relevant provisions of the act. Basically, the short answer to that, which might seem self-serving, is go to see a lawyer and get some legal advice, but you should probably return the document.

You know you have a document. You should know the circumstances. You may have reason to believe you don't have lawful entitlement to the document and you're not meant have it. It's governed by this act. I'd assume you'd have time to read the act and get some legal advice. But at the first opportunity, once you're satisfied that is the case or could be the case, you'd be wise to return the document to its apparent owner.

● (0925)

Hon. Jim Peterson (Willowdale, Lib.): That would be after you've made a copy.

Mr. Rob Walsh: Mr. Chairman, the problem is that if you hang on to the document for any period of time, at some point you are making use of it. You're not simply informing yourself as to your legal position and returning it, if that's the obligation. At some point you're making use of it, whether or not you actually do something. You may just enjoy reading it, and you're making use of it for your own purposes. You're not entitled to make use of the document if it's one that's covered by this act.

The second question relates to a particular member of the committee. As I indicated to the member, I prefer not to reply with specific reference to any member of this committee.

The third question is on whether or not the circulation of the document in a committee meeting room, but not as part of the official proceedings of the committee, means the document somehow falls or moves outside the act. In my view, no, it doesn't.

The privileges for documents with regard to committee proceedings turn on those documents becoming part of the committee proceedings at some point. Until that point, they are no different from any other document. The person in possession of the document, including members of Parliament, is in no different position from any other person in possession of those documents. But once they become part of the proceedings of this committee, they are then privileged. In my view, the committee is at liberty to look at those documents and deal with them. That's not to say the committee shouldn't take some precautions about public disclosure and should maybe go in camera, and that kind of thing.

How does it happen? Well, I think it would happen, Mr. Chairman, if the document were given to you and you, as chair, asked the committee if they wanted the document circulated, and so on. The committee could by resolution say the document should be circulated and they would look at it at the next meeting. From that point, in my view, the document is now part of the committee's proceedings. It took place within a committee proceeding.

But I don't think the fact that the document shows up in a committee room and is somehow shuffled about among members, but it's never properly introduced to the committee, brings it within the proceedings of the committee. I don't think it thereby acquires the protection of parliamentary privilege.

The fourth question is on what further obligations committee members face with regard with to the examination of these documents to ensure they do not commit any new offences. Once the document is part of the proceedings of the committee, I don't think you're susceptible to any offence for studying the document in the course of your committee proceedings.

What a committee member might do with the document outside this committee room could well give rise to a problem. The privileges apply to that document for the purposes of the committee proceeding, not for any other purpose. It's not to be taken as a licence to take the document elsewhere and use it for other purposes.

It's not to say the document won't get into the public domain by virtue of the committee proceedings. It may well happen. But the privilege attached to that document is not itself a licence for an individual member, or an individual staff person, or a person in the room to take the document and go elsewhere with it.

The privilege is for the purposes of the committee proceedings. I would think the law would say that's the limit to which any protection enjoyed by the document applies.

Those are the answers to the four questions.

The Chair: Mr. Walsh, I know you've only had a brief time. I would ask you this, though. Have you have been able to form an opinion of any kind on whether or not the document entitled "Afghanistan 2006: Good Governance, Democratic Development and Human Rights", the documents for the years 2002, 2003, 2004, 2005, or any of them fall under the definition of documents in the Security of Information Act?

Mr. Rob Walsh: Mr. Chairman, I've not been able to form such an opinion, as I've never seen those documents.

The Chair: Well, then, on behalf of the committee, I'm going to ask you, as our counsel, to examine at least what we have, which is, as you say, the redacted version of, let's say, the 2006 document. I'd like you to assume that, for the purposes of your investigation and your opinion, somebody has the entire document unexpurgated. I'd like you to answer for us whether, in your opinion, that unexpurgated document falls within the definition of the documents under the Security of Information Act. Of course you'll need to take your time to do that, and we'll await that in due course.

Thank you very much.

We'll begin our questioning of the witnesses, and that means either of them, with Mr. Peterson.

● (0930)

Hon. Jim Peterson: We had testimony Tuesday from the august Department of Foreign Affairs and International Trade with respect to documents we had on hand. The issue was whether the revelation of torture or extra-judicial execution in these documents fell within subsection 15(1) as being injurious to the conduct of international affairs if they were disclosed.

Now, for the life of me, Mr. Walsh, I cannot figure out how a revelation of torture and extra-judicial execution, being revealed, could be injurious to international affairs.

I would welcome your opinion as to whether or not the department was entitled to redact those provisions.

Mr. Rob Walsh: Mr. Chairman, I haven't seen the provisions, in particular, to which the member is referring, but I should say—

Mrs. Carole Lavallée (Saint-Bruno—Saint-Hubert, BQ): It was in *The Globe and Mail*.

Mr. Rob Walsh: I understand, Mr. Chairman.

Mrs. Carole Lavallée: No, but because the translator did not....

Mr. Rob Walsh: I have the greatest respect for that journal, but I don't necessarily rely on its reports for all purposes.

The Chair: That's very wise, Mr. Walsh.

Mr. Rob Walsh: But a more direct answer to the member's question is this. As I'm reading subsection15(1) now, as fast as I can, this is a matter, it seems to me, within the discretion, initially, of the head of the government institution to determine that question. I certainly don't feel qualified to determine what the international affairs of the country at the moment or the defence of Canada at the moment may require for which reason this information has to be withdrawn. Mr. Chairman, I simply am not qualified to assess that, although that may be something on which the Information Commissioner may wish to comment. I don't feel I can really answer the member's question, as I understand it.

Hon. Jim Peterson: But if you were the lawyer advising that department, what would you say? Would you say to them, Mr. Walsh, that you're entitled to say that anything that we think is injurious to international affairs, we can cut it out, we can redact it? Or maybe there's just political embarrassment in having these things come out. Now, is political embarrassment injurious to the conduct of international affairs?

The issue was the government was saying time and time again that they had no knowledge of torture with respect to detainees handed over to the Afghan authorities, and yet they had these reports going back to 2002 saying there was torture being committed.

Mr. Rob Walsh: That's another one of those hypothetical questions, Mr. Chairman. And I'm putting myself in the position of a lawyer in the Department of Foreign Affairs.

It seems to me that your question with reference to political embarrassment is a comment on the domestic political situation, but this section refers to international affairs and in fact there could be international political relations that ought to be considered by the government with respect—

Hon. Jim Peterson: Such as?

Mr. Rob Walsh: Well, I wouldn't begin to speculate with any specificity, but there could well be dealings among the Government of Canada and third parties—other countries—which, in the judgment of the Government of Canada, could be adversely affected by the disclosure of this document.

I'm speaking hypothetically. Again, I haven't read the document. I'm not trying to defend the position of the government in redacting or claiming this document cannot be fully disclosed. I'm just trying to respond to what I think is the ambit of subsection 15(1), as a lawyer, hypothetically, situated in the Department of Foreign Affairs.

Hon. Jim Peterson: Would you be prepared to say that political embarrassment at home is not a reason for being able to withhold information?

Mr. Rob Walsh: “Political embarrassment at home”, to use your phraseology, I don't see mentioned as an exception to subsection 15 (1), or an overriding consideration, but perhaps I ought to study more closely the terms of subsection 15(1).

Hon. Jim Peterson: I would ask you to speculate as to what type of injury to international affairs could take place through the revelation of torture by Afghan officials.

● (0935)

Mr. Rob Walsh: Well, it's highly speculative, and, again, I'm not qualified to make an informed comment in this regard, but it's never slowed me down before, I suppose. Hypothetically, the Government of Canada could be engaged in sensitive negotiations with the Government of Afghanistan, or the government of some other country, with regard to the treatment of Canadians within their jurisdiction. It might well be that the position of the government at this particular time—and timing obviously is a consideration in all these matters—in trying to effect a favourable outcome to that situation could be adversely affected by disclosure of this document at that time.

Your question has been posed to me in terms of inviting me to speculate as to the reason the government might not disclose the report, so I'm in the position of defending the government's action here by what I'm saying, highly speculative as it is. One might well mount arguments of the kind you're implying to suggest why the documents should be disclosed, but you haven't asked me to go there, so I'm not going there.

Hon. Jim Peterson: What type of study must an information officer do in a department in order to say this particular statement in a document can be cut out? What type of legal reasoning must go on?

Mr. Rob Walsh: On behalf of the Information Commissioner, I think he might have some more cogent comments to make on this, as his recent report would seem to be addressing that very issue, but it seems to me, as legal adviser to a department faced with an application under this act, my advice to the department would be that it must respect and adhere to the provisions of the act and the objectives of the act, not simply reading the letter of the law and seeing where it is it can find a slice of light to get out of it. It ought to respect what the purpose of the act is and make every effort to disclose information that is sought, in keeping with the spirit of the act.

Hon. Jim Peterson: And the spirit and purpose of the act is to ensure that we are an open, transparent government and society.

Mr. Rob Walsh: That's correct, Mr. Chairman. The expression “freedom of information” is often used in this context, but I think it has been understood from day one why you have these exceptions in here, that there naturally would be a conflict between the disclosure of a given document and the interests of the country—not just the government of the day, but the interests of the state—and that this section is an attempt to put a constraint on disclosure in recognition of those interests that may run against disclosure of a document. The Information Commissioner, far more qualified than I am, is the person who is charged with addressing those issues.

The Chair: Thank you, Mr. Peterson.

Commissioner, did you want to make a comment on the question that Mr. Peterson asked?

Mr. Robert Marleau (Information Commissioner, Office of the Information Commissioner of Canada): The only comment I would make, Mr. Chairman, is that subsection 15(1) is a discretionary exemption. In the course of an investigation by our investigators, we would clearly challenge the rationale that was applied in selecting subsection 15(1). We can share that rationale if we accept that it has been applied correctly, and if it was not applied correctly we would first pursue the disclosure of that section. Quite often that occurs because we have challenged the rationale. Then it could be a legal opinion that we are in fact challenging within a department.

So I think it's important to note that subsection 15(1) is discretionary. It's not absolute. A lot of discourse in the context of the investigations takes place, such as “Why did you put this?” and “Why did you invoke that?” and “Can we see the rationale?” and “Can we see the legal opinion?”, or “Well, maybe you've gone too far here.” That kind of exchange takes place at the investigative level. Ultimately, it ends up on my desk by way of a report.

[*Translation*]

The Chair: Mrs. Lavallée, please.

Mrs. Carole Lavallée: Mr. Chairman, I would like to begin by asking you to clarify something for me. I hope that the time taken to address my question will not be deducted from my time for questioning the witnesses.

I did not fully understand what you said about getting an unexpurgated version of the Department of Foreign Affairs and International Trade internal report. Did you say that an official request was going to be filed?

[*English*]

The Chair: No. In the context of Mr. Reid's letter, the issue becomes whether or not the documents referenced in that letter fall within the definitions of documents under the Security of Information Act.

I asked Mr. Walsh on behalf of the committee to postulate, for the purposes of his opinion, that if an unexpurgated version of the report were given outside the confines of the department, whether or not the possession of that by someone outside the Department of Foreign Affairs would constitute a document as defined under the Security of Information Act and have certain obvious consequences, including various offences.

I'm not making a request or anything. We've already been told by Mr. Walsh that we can make the request and the department can turn us down. Then we can do a whole number of things, including report to the House in general and ask the House to make some order.

Just so you're clear, I just asked him if the unexpurgated version made its way to someone outside DFAIT whether that in itself would be a document as defined under the Security of Information Act, which would then have certain consequences under that act.

And none of that comes out of your time.

● (0940)

[*Translation*]

Mrs. Carole Lavallée: Thank you very much, Mr. Chairman.

Could we also file a request for an unexpurgated version of the document? Could we file an official request? I know that we have already asked for it. We received a reply from an official. However, could we not try another approach, perhaps contacting the minister himself, for example? That might be a good way to go about it. On that note, I am now going to turn my attention to our witnesses, as I also have some questions for them.

As you can see, obtaining an expurgated version of the report is of great concern to us. It would be very useful for our study.

My first question is for Mr. Marleau, the Information Commissioner.

Mr. Marleau, last week we heard testimony from Ms. Sabourin, who is responsible for access to information at the Department of Foreign Affairs. We know that your office gave the Department of Foreign Affairs an F, which is not the best grade that a department can receive, quite the opposite.

Ms. Sabourin also said that at one time, she was only able to respond to 39 per cent of the access to information requests within the statutory timeframe. She is now able to respond to 80 per cent of the requests within this timeframe and says that she's very proud of this achievement. However, as you know, the act stipulates that the timeframe must be respected in all cases. She should be responding to 100 per cent of the access to information requests within the statutory timeframe, yet she states proudly that she does so in 80 per cent of the cases. Frankly, I find her tone and her approach to be indicative of a certain disdain for the Canadian public.

Furthermore, she refused to provide Professor Attaran with a report offering an overview of the human rights situation in all of the world's countries, saying that such a report does not exist. Although she knew full well that reports were produced on each country, she chose simply to say that there was no report dealing with all countries.

Such an attitude is rather appalling. I think that she had a responsibility to tell him that reports on each individual country were available. Do you think that it is standard practice, among other things, to respond to only 80 per cent of requests and to refuse to provide a document because the request was not clear enough?

Mr. Robert Marleau: Mr. Chairman, I think that Ms. Sabourin was referring to the performance score awarded to the department last year, which was indeed an F. There has been considerable improvement this year. In my annual report that was tabled this week, the department was awarded a D. Although it might not seem like much, the percentage of cases not handled within the stipulated timeframe has dropped from 60 per cent to 17.2 per cent.

The previous deputy minister, along with my predecessor, worked hard to structure the system and to try to improve the access to information services offered to Canadians by his department. I do not consider a D to be acceptable, but, in the report, my office recognizes the efforts that have been made to improve the situation.

With regard to Ms. Sabourin's attitude, it is not for me to comment on how a witness behaves when appearing before a parliamentary committee. It is, however, utterly unacceptable for Canadians not to receive statutory services. That being said, I do not think for a moment that deputy ministers get up in the morning thinking about how they can best contravene the Access to Information Act.

There is, however, a considerable lack of leadership. The amendments that Parliament made to subsection 4(2.1), if I'm not mistaken, which will not come into force until September, introduce the notion of an additional duty to provide all reasonable assistance to respond to the requests made by the public.

Parliament perhaps wanted to ratchet responsibility up a notch. With this amendment, not only does the coordination officer in the office serving the public have a responsibility, but the head of the agency also has a duty to assist. As soon as the amendment comes into force, my team and I will discuss how we can change our approach in order to evaluate this new responsibility in our reports to Parliament.

● (0945)

Mrs. Carole Lavallée: Is it common practice for an ATI team to unilaterally decide to restrict access to information by, for example, removing the word "torture" each time a citizen files a request for documents? Is that normal practice? Does the act provide something that—

Mr. Robert Marleau: No. Subsection 15(1) of the act stipulates that discretionary exemptions can only be granted if disclosure would be injurious. In the annual report that will be distributed this morning—I know that you have not yet had time to read it—we refer to a similar case. No two cases are ever identical, but section 15 was invoked in the Maher Arar case. The report states the following with regard to invoking subsection 15(1) as a basis for saying no—and not just because of the word "torture"—:

> ...it must be borne in mind that speculative fears of possible injury from disclosure are insufficient. There must be a reasonable expectation, at the level of a probability, that injury to the intelligence or enforcement activity will result.

Mrs. Carole Lavallée: What page is that?

Mr. Robert Marleau: Page 55.

Mrs. Carole Lavallée: Subsection 15(1) comprises a number of paragraphs setting out the 10 grounds on which a request can be refused. Would it not be common practice to specify 15(1)(b) or 15 (1)(d), for example, rather than simply stating 15(1)?

Mr. Robert Marleau: Some responses simply state subsection 15 (1), while others give more details. Investigators look at the details. Subsection 15(1) comprises nine paragraphs. Investigators look into why information was denied. They would at least find out and assess which paragraph had been used to justify the decision. However, there is jurisprudence on this provision.

I am going to ask Mr. Brunet to elaborate on this point.

Mr. Daniel Brunet (Director, Legal Services, Office of the Information Commissioner of Canada): In the Vienneau case, which was brought before the Federal Court, the complainant cited exactly this issue in his complaint to the Office of the Information Commissioner. His ATI request was denied and he was simply told that subsection 15(1) had been invoked. He was not given any further information and was not told which paragraph of the subsection had been invoked. He complained about that. The Federal Court referred the case to the court of first instance. Citizens are entitled to file complaints with the commissioner. The commissioner then carries out an inquiry and seeks further clarification. If the case ends up before the courts, the supplementary information is revealed through the judicial process.

Mrs. Carole Lavallée: In such circumstances, should there not be —

The Chair: Excuse me, Mrs. Lavallée.

[*English*]

On your point, Madame, I just want to remind you again that the foreign affairs committee specifically passed a resolution asking that the Department of Foreign Affairs provide an unexpurgated copy of the report to the committee. That request was turned down by the deputy minister, and a copy of his letter was sent to me, in effect saying—by the way I read it—that if we make the same request, we're going to get the same answer. We're then at a stage at which Mr. Walsh told us that we decide how much banging of the desks we wish to do in each case, and/or whether we want to go to the House of Commons and ask for direction in this regard. That's just to remind you about that—that a committee of the House of Commons has already made a request and been turned down by DFAIT.

Commissioner, Madame Lavallée asked you about the spirit of the act as well, and your opinion of the spirit of the act. Before we get to Mr. Martin, is it the spirit of the act, in your view, that if you do not ask for a document by its exact name, you don't get it?

● (0950)

Mr. Robert Marleau: No. Categorically—

The Chair: Could you expand on that?

Mr. Robert Marleau: I just commented to Madame Lavallée that I think Parliament wanted to make that clear in the amendments it brought under Bill C-2 to section 4(2), wherein it has now essentially said that the head of agency has a duty to assist in every reasonable way. If you use the wrong vocabulary in your request, but your intent is somewhat clear, it's absolutely unacceptable that they would say they're sorry, but you didn't ask the right question.

The Chair: That is very important in terms of the investigation we're undertaking.

Mr. Martin is next.

Mr. Pat Martin (Winnipeg Centre, NDP): I think that's a very valuable point, Mr. Chairman.

In the little time I have, I'm not going to spend a lot of time on the libel chill slapsuit that Mr. Reid is engaged in here to try to silence opposition MPs from getting to the truth of the Afghan detainee issue, other than to say that I hope, Mr. Walsh, you will, when you have more time, review that a specific section of the act was struck down in the Juliet O'Neill case. As of late 2006, in fact, there are changes to the treatment of documents, etc., held by people for different reasons.

I will point out, too, that every page of the document that we all enjoy here today was released under access to information—at the bottom of the page you can see the code—so we have no idea if it was released in this form or in some other form.

I'm not going to dwell on that. Let me simply say that we were horrified by and disappointed in the bureaucrats who came to testify before this committee on Tuesday, in terms of both their attitude and tone and the content of their testimony. They asked for an extra 10 days to prepare for this meeting and then showed up with no files, and I mean no files. They had a blank notepad to take notes as they asked questions.

We called these witnesses. Just for your information, Mr. Commissioner, because I know you'll be investigating this whole file, we asked for specific information about two specific ATIP inquiries. They said they couldn't come when they were called because they needed ten days to prepare. When they came here, they came with two assistant staff people and two witnesses and no documents whatsoever—a clean desk. To me it was an insult to this committee.

Again, this idea that it's like Rumpelstiltskin or something, in that you have to say the magic word before the gold starts to flow, is an insult to the general public in terms of access to information. These guys reminded me of that *Yes Minister* TV show in which Sir Humphrey says something like "You can have good government and you can have open government, but, Minister, you cannot have both." That's what these guys reminded me of sitting there.

Clearly, in the cases we know of, they dragged their feet and took double the length of time they should have for these files, and then they were uncooperative with the applicants in asking the right question, which is the point the chairman made. The question asked if they could please send us the human rights reports that the government gets or keeps; it was taken to mean for every country, and there is no such report—but for specific countries there are, and no one asked if we would like to narrow down our request.

I know I'm supposed to be asking questions and not just making a speech here, sir, so I will ask about the report.

Hon. Jim Peterson: It's a very good speech.

Mr. Pat Martin: Well, thank you.

We're very interested in and grateful for the report, Mr. Marleau; congratulations on the first report under your tenure. I'm horrified that the Privy Council Office gets an "F", a failing grade—

The Chair: Mr. Martin, I know you're supposed to ask questions. I'm going to restrict all questions to the subject matter we're studying. If you have specific comments about the Privy Council insofar as the Afghanistan 2006 document is concerned, by all means proceed, but we're not going to get into Mr. Marleau's specific report or any part of it today. We can certainly have a meeting to that effect later on if we want, but today we're studying the document and the things surrounding it. If you have any questions of either of the witnesses with respect to that issue or some of the answers or non-answers that you felt the witnesses gave, or whatever, please go ahead.

● (0955)

Mr. Pat Martin: I wasn't clear on that.

The point I was getting to was that we believe that there may have been political interference. To put it this way, we heard witnesses testify before this committee—citizens who applied for information under the access to information laws—that they believe there was political interference in the administration of these particular claims, and perhaps there's a pattern or a motif developing here. If the PCO has an "F" in terms of their commitment to freedom of information, I think we have a serious problem, because certainly that is the attitude of this government, and the same culture of secrecy that allowed corruption to flourish under the Liberals seems to be alive and well under the Conservatives, notwithstanding this—

Hon. Jim Peterson: You were pretty good for a while.

Mr. Pat Martin: —so-called commitment to open government.

The Chair: Mr. Martin, do you want good government or open government?

Mr. Pat Martin: Both.

We have a saying in the NDP that freedom of information is the oxygen democracy breathes, and if that's the case we're having another smog day under the Conservative Party here, because they don't seem to have any commitment to open government whatsoever. It could be that these are rogue bureaucrats, and that's the Liberals' favourite reason when things go bad, that there's a rogue bureaucrat somewhere who's doing all the bad stuff, but somebody is setting the tone for these rogue bureaucrats to be so obstinate and to be such a barrier to access to information instead of an aid.

I appreciate Mr. Marleau pointing out that it's an integral part of the act, that the ATIP coordinators are actually on the side of the applicant, they're their advocate, they're their gatekeeper to help them get in, not to put up further gates to keep them out. That's what we seem to lose sight of sometimes. It's not the ATIP coordinator's job to prevent the government from being embarrassed by news stories that are in the newspaper.

The final thing I'd say is if Mr. Reid would like me to be led off in handcuffs because I'm trying to help with this investigation, he should get a bunch of tiny little handcuffs for every paper boy for *The Globe and Mail* who delivered the very same information to every household and doorstep in the country. Honestly, this is a really ham-fisted attempt to try to silence people who are just trying to get down to the truth, and I resent it, for the record, seeing this has become the subject of this particular meeting.

Thank you.

The Chair: Thank you, Mr. Martin.

By sheer coincidence, the next questioner is Mr. Reid.

Mr. Scott Reid (Lanark—Frontenac—Lennox and Addington, CPC): I'm just going to guess, Mr. Chairman, you weren't asking the witnesses to respond to any of that.

The Chair: There were no questions that I heard.

Mr. Scott Reid: No. I was thinking we both like good government and open government, and I was hoping there would be time for them to respond to something.

The Chair: If you would like to ask them to respond to his comments, by all means, it's your time.

Mr. Scott Reid: No, I think I'm going to ask them, Mr. Walsh in particular, to respond to one of my questions.

Mr. Chairman, I'm not sure if I'll take up all the time. If I don't, would it be possible for Mr. Wallace to carry on?

● (1000)

The Chair: Absolutely.

Mr. Scott Reid: All right.

I asked you four questions, Mr. Walsh. You were very gracious in getting back to me instantly, just about. You indicated at that time, as you did in committee, that you didn't want to provide me with any advice regarding other members of the committee. They can seek advice on their own.

Let me now, therefore, turn to a specific piece of advice as to how I am permitted to act. This is with further reference to the question four I'd asked you on what further obligations the committee members face with regard to the examination of these documents to ensure that we don't commit new offences under this law—that is to say, the Security of Information Act—in any possible future examination of these documents, those being the documents I'd referenced in the letter.

What I am wondering about here is that you've indicated that we ought not to be using them for any personal use, which would include reading through them. Now, there had been references made in this committee and a quotation made by one of the members of this committee directly from one of the redacted portions of one of the documents at our last meeting. It's been referred to several times in this meeting; that's where the reference to "torture" being blacked out comes from.

It's very difficult, if one complies with the requirement under the law, to turn these things over to the foreign affairs ministry to respond, either to even confirm the accuracy of what's been stated by another member of the committee in a public session or to find any contextual information that might be appropriate, showing that what has been asserted is either out of context or appropriately in context, or that there are other examples....

You can see the kinds of problems we have in dealing with the use of this committee to present a certain argument that we simply cannot comment on. I'm just wondering to what degree I would be permitted to retain these documents for that purpose, should further commentary be made by other members of the committee regarding these documents.

I'm thinking in particular, Mr. Walsh, of when the documents themselves have not been presented to the clerk of the committee as evidence. At that point I assume the circumstance changes somewhat.

Mr. Rob Walsh: At the risk of making it seem highly technical, it's not simply providing the document to the clerk of the committee. It would require the chair, in fact, to then present the document to the committee in a proceeding. It thereby, in my view, would acquire the protection of the parliamentary proceeding.

As I said earlier, that doesn't necessarily mean you can then take the document and walk off and get into other discussions in other places about the document, with the result that the content of the document is disclosed outside the proceeding.

Until that happens, Mr. Chairman, I don't believe.... And this is assuming the document falls within the prohibitions of the act. And this is an assumption. I haven't seen the document.

You know this, Mr. Reid, but other members of the committee may not have had the pleasure of reading sections 4 or 5 of the act. It's not a short provision. One needs to examine it very closely, with the document in hand, to see whether in fact it applies to that document, to see what the obligations are upon every individual who might himself be in possession of that document. I'm just not prepared to say at the moment what legally that obligation is without closer study of the act, with reference to the document in question.

I might point out that I have an additional problem if all I get is a redacted version. I mean, you have to picture it. If the member or any individual gets hold of a document with a lot of black spaces, well, they can only be responsible for what they can read. If what they can read does not present anything that suggests it's covered by this act, then arguably they're not at risk.

I don't know what the document reads. I need to see what the document is that was in their possession. If the document in the individual's possession is unexpurgated, unredacted, then that may present, of course, a different picture.

Mr. Scott Reid: Right. Thank you.

That was the only question I had for you, Mr. Walsh.

I think perhaps it suggests, Mr. Chairman, that as one of our next steps as a committee, we ought to find out—and Mr. Martin raised this possibility—if the entire document is at this point now open, in which case we could treat this very differently.

Perhaps we could inquire of the foreign affairs department for a bit more clarification on that.

The Chair: Absolutely.

I just want to remind everybody that I ask that we leave half an hour at the end so that we can talk about where we're going.

Let me be absolutely crystal clear: as chairman of this committee, I have received no document of any kind, nor have I seen any document of any kind, other than the redacted version that has been provided by the Department of Foreign Affairs. If I had gotten such a document from anyone, I would have, of course, as Mr. Walsh has advised us, discussed it with the committee and no doubt had him here at that time to give us due legal advice. And that may still yet happen.

You do have some time, Mr. Wallace.

Mr. Mike Wallace (Burlington, CPC): Thank you, Mr. Chair. I'll be quick, as usual.

This is just a procedural question, Mr. Marleau. Can you tell us whether there has been an appeal to your office on the ATI request that was made to the department?

Mr. Robert Marleau: Do you mean whether there has been a complaint?

Mr. Mike Wallace: That's correct.

Mr. Robert Marleau: We confirmed that at the last meeting when we were here on estimates.

Mr. Mike Wallace: One thus far, or can you even tell me that?

Mr. Robert Marleau: Related to this document?

Mr. Mike Wallace: To this document, yes.

Mr. Robert Marleau: We've received just one.

● (1005)

Mr. Mike Wallace: Just the one. And is that investigation in process then?

Mr. Robert Marleau: Yes, sir, it is.

Mr. Mike Wallace: Now, my suggestion was that we wait—not that we don't study it, but we wait until your office makes a decision on whether that was appropriate or not. Could you give us a sense of the timeline on that?

Mr. Robert Marleau: Our service standard in a case like this one is to try to get a response to the requester within 90 days, and when it's a difficult case, in terms of how it may come on my desk and that sort of thing, it's a maximum of 120 days.

Mr. Mike Wallace: You're expected to meet those guidelines. Is that correct?

Mr. Robert Marleau: Yes. We are trying not to have any new files fall into the backlog.

Mr. Mike Wallace: I just want to be clear that I did have an opportunity to educate the committee on sections 17 and 21 and subsection 15(1), and they really appreciated it.

An hon. member: We weren't listening, Mike.

Mr. Mike Wallace: And still aren't.

The question that I asked the ATIP officer who was here at the last meeting was on which section they followed. The answer was—and I have it in the blues—that they generally follow subsection 15(1) and that the list that is in the act, which I had read out and discussed, isn't completely exhaustive but is more a guideline, particularly subsection 15(1), in terms of international relations and so on.

Is that your interpretation of the act also, that those are guidelines in the sense that it's not an exhaustive list of exactly what could require that decision? I'm not asking you about this specific case, but about what has happened in the past.

Mr. Robert Marleau: Well, subsection 15(1), as I said earlier, is a discretionary exemption and it's subject to an injury test. Once you get into an injury test, you're getting into a more ambiguous situation in terms of evaluating that injury test. It's not just because the word "terror" happens to be in a report that it automatically gets invoked. If the use of the word "terror" or "torture" in that context potentially has real injury potential, then it can be invoked.

Mr. Mike Wallace: I have one final, very quick question.

The Chair: No, you're at eight minutes and 30 seconds.

Just for the information of the committee, subsection 15(1) clearly lists the criteria, and I'll read the words directly: "including, without restricting the generality of the foregoing, any such information", and then it lists paragraphs (a) through (i). So it's very clear that the section is very broad and isn't restricted to the paragraphs (a) through (i), which are there by way of example and do not restrict the generality of the potential claim of injury. That's right from the statute.

We go to Mr. Dhaliwal.

Mr. Sukh Dhaliwal (Newton—North Delta, Lib.): Thank you, Mr. Chair, and thank you, Commissioner Marleau, Mr. Brunet, and Mr. Walsh.

Mr. Walsh seems to be totally wrong about the Security of Information Act, I would say—the SOIA—and standing in the way of our getting documents at the committee. As of late 2006, key provisions of this act were struck down as unconstitutional by Madam Justice Ratushny. That happened in the case of Juliet O'Neill. As of today, it's largely defunct; the crown has not appealed this case.

My question to you, Mr. Walsh, is you should know this, so why did you fail to mention it here? Would you like to tell us the straight answer about this particular issue?

Mr. Rob Walsh: Mr. Chairman, I apologize to the committee if in fact the Juliet O'Neill case was not properly taken into consideration here. That may well be the case, as Mr. Dhaliwal is saying, but in the short time available to me, I had the act before me and read the act on its face, and I stand to be corrected. If in fact the Juliet O'Neill case makes some of these provisions irrelevant to the question put to me, then I'll certainly bring that to the attention of the committee.

Mr. Sukh Dhaliwal: Thank you, Mr. Chair.

Now, my question is to Mr. Marleau.

As I go through this act, paragraph 67.1(1)(c) says that to conceal a record is a criminal offence under this paragraph. When we look at Ms. Sabourin's issues, I think she tried to conceal the information. Would you agree that this is a criminal offence and we should have the RCMP involved in this particular issue?

Mr. Robert Marleau: While I've reviewed Ms. Sabourin's evidence, and I also have informed the committee that we have an investigation underway, until the result of that investigation is given to me, I would refrain from commenting on what is and what might not be the outcome.

If there is evidence of criminal wrongdoing, the act provides for the commissioner to turn it over to the Attorney General. Indeed, under section 67.1, I could conduct my own investigation to establish the facts, but it's far too premature for me to answer that question, sir.

● (1010)

Mr. Sukh Dhaliwal: It's also my understanding that Mr. Attaran has also asked you to get the RCMP involved and to cooperate with the RCMP in this. So you haven't done that so far, is that right?

Mr. Robert Marleau: The investigation is continuing, sir, and I don't think I can comment on directions it might be going in.

Mr. Sukh Dhaliwal: When we look at this, it's a very serious issue. It's a matter of torture and a matter of killing, murder. I personally feel, and I'm sure many members of the committee feel—and you as well, because you come with a lifelong experience, so you probably feel the same way—that this case should carry a priority. So how long would it take for you to conclude the investigation?

Mr. Robert Marleau: I agree with you that it is a very important issue. How I feel about it is not really relevant to what I have to do. The service standard is to try to resolve this within 120 days, possibly within 90 days. That's the standard the investigator is working under, and I have full expectation that that will be the timeline in which he will file his report.

Mr. Sukh Dhaliwal: Thank you.

The next question I'm heading to, you already mentioned.

The way I look at it is that Mr. Attaran filed his request around February 24 or February 29, and Mr. Esau filed the request around March 12.

On or around March 12, in a phone call, Mr. Attaran was informed by the access to information division of the DFAIT that there is a report on human rights in existence. So if we look at March 12, we see the human rights department of DFAIT informing the access to information in DFAIT, and on March 22, about 10 days later, the access to information of DFAIT telling Mr. Esau that no such report exists. I personally see this as totally a concealment of this, and that section 67.1 comes in.

Also, as earlier mentioned, Mr. Esau asked for a global report. When I look at this, he asked for a report of countries around the world. That means country by country by country. There was a report that was in existence. So would you reiterate that Ms. Sabourin was duty-bound to explain to Mr. Esau that, yes, there is that report available on human rights, country by country by country?

Mr. Robert Marleau: I'll refrain from commenting on that issue without the benefit of having a detailed investigation and looking at the facts of who said what to whom and when, and the premise of the search that was done or how complete it was. If you find in a situation that it was cursory and his request was given no attention or time, you could conclude something else.

The latter part of your question is relevant—and I don't mean in a procedural sense—to comments I made earlier, and that is the amendment brought to the statute under Bill C-2. I'll read it again in English. I've summarized it, so it's not that long:

> The head of a government institution shall, without regard to the identity of a person making a request for access to a record under the control of the institution, make every reasonable effort to assist the person in connection with the request, respond to the request accurately and completely and, subject to the regulations, provide timely access to the record in the format requested.

That section will come into force on September 1. I can say that as a new commissioner coming in, it will form very much part of my agenda in the application of this act.

● (1015)

The Chair: Colleagues, it's 10:15. I have Mr. Wallace, Monsieur Roy, Mr. Stanton, Mr. Pearson, and Mr. Martin.

My point is that I wanted to reserve some time to talk about witnesses. We have nothing scheduled for Tuesday. So if we don't get to this I won't be calling a meeting, which is most unfortunate. I'd really appreciate it if we kept our questions direct and short—I'm not for a moment suggesting that the answers haven't been. Then we'll go on from there.

Mr. Wallace, please.

Mr. Mike Wallace: I'm going to split my time with Mr. Stanton, so that will save us a little time.

Just to finish on the way the process works, the individual who came to see us before had about 17 years' experience in ATI application. I think she actually worked in the department when Jim Peterson was the cabinet minister at one time, but I don't think he ever met her, because there was no political influence, which she hasn't mentioned at all.

On what happens in the process—because I think that will be the discussion at the end—you deal with that individual, you get a chance to look at the actual document, you look at the decision-making based on that, and then you report that back to the requester.

Is it possible to have you come back in the future, after you've done that work, and report the findings? Are they public to us after you've found them?

Mr. Robert Marleau: No. They're private between me and the requester. If the requester chooses to make them public thereafter, I have no control over that.

Mr. Mike Wallace: If the requester makes them public, we can request that you come back to talk about the public aspects you released back to that individual.

Mr. Robert Marleau: I'm reminded that the department could also make them public at that point.

Mr. Mike Wallace: Thank you very much.

I'm going to split my time with Mr. Stanton.

Mr. Bruce Stanton (Simcoe North, CPC): Continuing in the same vein, and perhaps in the circumstances of DFAIT, if you have that specifically, when you've had a complaint from a requester about the degree of redactions in a report, for example, that's brought back to you and you then investigate with DFAIT to see whether the provisions of the act have been properly applied in the course of those redactions. In the case of DFAIT, what has been the level of success in determining that those sections were used properly? Do you have any indication when you go through the course of an investigation of a complaint, for example, what level of compliance the department has upheld under the act?

Mr. Robert Marleau: It's difficult to tell you what the level of compliance in terms of redaction would be. We have global statistics in the annual report.

Mr. Bruce Stanton: Perhaps this is a better way to put it: have there been circumstances where you haven't been satisfied and have chosen to take the department to the court level to say that compliance has not occurred? In that case, what has the court had to say about the way in which the department has applied those provisions of the act?

Mr. Robert Marleau: I'm advised that we haven't had such a case recently before the courts. But there is a similar case in the annual report—it's similar because no case is the same. It's case nine, which is the CSIS and Maher Arar matter, where they used subsection 15 (1).

We went in, reviewed thousands upon thousands of pages of documents, and ended up resolving the complaint. We accepted that some of the exclusions and exemptions were acceptable, rational, and in compliance with the act, and others were not. CSIS complied.

So the requester may not get 100% satisfaction if he had only 50% when he complained. He might get 75% or 80%. The trend in the office is that he usually gets more if he complains.

Mr. Bruce Stanton: This may be in your report. I just got it today, so I haven't had a chance to look into it.

As an ombudsman-type independent department of an office of Parliament, where are you in being able to resolve those issues amicably between the requester and the department ?

Mr. Robert Marleau: We have a very high degree of resolution. Ninety-nine percent of the complaints that come to us end up being resolved. They take a little too long, in my view, but 99% are resolved. Only about 1% on average over time end up before the Federal Court.

● (1020)

Mr. Bruce Stanton: Thank you, sir.

The Chair: Thank you.

Just looking through here I see that Industry Canada went from a D to a B in the last two years—under Mr. Peterson's tenure, I presume.

[*Translation*]

Welcome, Mr. Roy. You have five minutes.

Mr. Jean-Yves Roy (Haute-Gaspésie—La Mitis—Matane—Matapédia, BQ): Thank you, Mr. Chairman. I am delighted to see that you have again been elected chairman of the committee. I sat on a committee that you chaired for years.

My question is for Mr. Marleau. This seems to be a case of political interference—you have experienced others in institutions that I shall not name. I sit on the Standing Committee on Public Accounts and I could certainly talk to you about the RCMP.

In brief, this seems to be the culture that reigns. I would like to hear your viewpoint on this, because with all that has happened at the RCMP, it seems clear to the Standing Committee on Public Accounts that, on the pretext of protecting the institution's reputation or in this case, the government's reputation, there is a blanket refusal to provide documents.

My question is as follows: in your capacity as information commissioner you can exert pressure, you have a lot of power, but just how far can you go to have information disclosed? Have you ever imposed sanctions, for example, in order to gain access to documents? The fact of the matter is that waiting times very often exceed the statutory time limits, and in my view, your office is very lenient with the institutions.

Mr. Robert Marleau: There are two parts to my answer. Firstly, the act states that I am an ombudsman and, therefore, I have neither the power to issue orders, nor the power to impose sanctions. Under no circumstances can I impose fines or cut resources. A degree of mediation is therefore required and, I fully recognize, this is a more time-consuming means of addressing requests. However, as I said earlier in answer to a question raised by another member, our success rate is very high, with 99 per cent of complaints resolved.

As a last resort, a complaint can be referred to the Federal Court. The act provides for the Court to evaluate the case and issue a disclosure order.

Mr. Jean-Yves Roy: My second question is for Mr. Walsh.

This is the third time in the past few weeks that I have heard you give testimony, and it is this last part that I find particularly interesting. You may not have looked at this issue, but when the committee tables a report in the House, the government must provide its response within a specified time frame. But what can the House do if the government misses the deadline? What can be done when that happens?

Mr. Rob Walsh: It all depends on whether the House of Commons concurs in the committee report. If a concurrence motion carries, the report becomes an order to the House of Commons. That is what sometimes happens, but sometimes it is simply recognition of the committee's view. It depends on the way in which the report has been written and what has been said. Has a specific action been requested? Has the House of Commons given its consent?

Mr. Jean-Yves Roy: I am going to ask you a very direct question. If the committee tables a report in the House but is convinced that one of the witnesses has lied, what options are open to the House if it accepts the report?

Mr. Rob Walsh: It can initiate contempt proceedings.

Mr. Jean-Yves Roy: To what effect?

Mr. Rob Walsh: The House of Commons would first have to issue a resolution stating that there had been contempt. I imagine that the next step would involve summoning the person in question to appear at the bar in the House of Commons to explain the situation. Finally, if no satisfactory explanation was forthcoming, the House of Commons would be able to sanction or punish the individual.

Mr. Jean-Yves Roy: What sort of punishment?

● (1025)

Mr. Rob Walsh: It is difficult to say because, in theory, it would involve a visit with The Queen in... I do not have any precedents or examples to give you.

Mr. Jean-Yves Roy: There are no precedents. It has never been done.

Mr. Rob Walsh: There was one instance, a few years ago, if I'm not mistaken.

Mr. Robert Marleau: I believe there was one case where somebody was sentenced to prison.

Mr. Rob Walsh: It is very rare.

We are faced with a problem. As I have said to the committee on a number of occasions, this question raises legal issues relating to the Canadian Charter of Rights and Freedoms. If someone is accused of contempt and imprisoned, it is unclear whether he would be able to rely on the Charter. In my opinion, it is not clear whether the Charter can prevent—

Mrs. Carole Lavallée: I have a very quick question.

The Chair: Sorry, we do not have enough time.

[*English*]

We have Messrs. Martin, Pearson, and Van Kesteren at the present time.

Mr. Martin.

Mr. Pat Martin: I would bring us back to the subsection 15(1) issue. As I understand it, that's for issues of national security, not issues of government embarrassment; and the arbitrary, or perhaps politically influenced, blacking out under that reasoning is what's of most concern to us.

I guess there are three things we were hoping to get to the bottom of. Did DFAIT officials perjure themselves when they came before this committee? Did they contravene the act when they denied the existence of those documents?

My Liberal colleague read out some information, but we now know that the office of primary interest notified Jocelyne Sabourin on March 12 that such documents existed, that they had the relevant documents. By the end of March, they were telling another applicant that no such documents existed. There seems to be a real contradiction here.

Then it took another full six weeks to actually release, as if there were a great deal of turmoil over what to do with these documents prior to their being released to the applicant. So they had them March 12, but I believe they didn't give them to the applicant until April 24. In that interim, we believe people got to them and said for God's sake, strike out anything that says torture, because ministers have been standing up month after month denying any knowledge of torture of Afghan detainees. That's what some of us believe happened, and I don't think it's paranoid.

Under what authority are ATIP coordinators exercising ministerial discretion? From a legal point of view, what gives them the authority to exercise discretion?

Mr. Robert Marleau: The legal authority is a delegation of authority by the minister under section 73 of the statute whereby the ATIP coordinator exercises, on behalf of the ministers, the authorities under the statute.

Mr. Pat Martin: That's exactly what I was looking for. In your view, would it be more helpful if the ATIP coordinators worked for you instead of working for the department or the minister? Because really they're administrating the wish of the minister. Would that and having your agents planted in these agencies help turn the whole freedom of information system on its head? Wouldn't that be an idea?

Mr. Robert Marleau: I'm glad you didn't ask me that question during confirmation hearings.

The essence of the statute is that the head of agency has the responsibility to serve Canadians—

A voice: The minister.

Mr. Robert Marleau: Well, the minister and whoever he delegates the authority to has the duty to serve Canadians who are looking for information. That's the spirit of the entire statute.

My role comes in when someone says someone has not exercised proper conduct or has not absolved themselves of the responsibilities of a statute of Canada, so please inquire.

Mr. Pat Martin: Mr. Marleau, as you know, the experience of using the access to information system is the polar opposite of the spirit. Ask anybody who uses the system regularly: It's just a headache from one end to the other, with really crude barriers and obstacles thrown in the way of virtually everybody. Well, I won't go on with that.

I have a question regarding the RCMP. Could I ask you if you have requested the RCMP's cooperation with respect to the complaint filed by Professor Attaran regarding the RCMP?

● (1030)

Mr. Robert Marleau: As I responded earlier to the other honourable member, that investigation is underway, and I am precluded under the statute from making any comment while it is underway.

Mr. Pat Martin: Even to answer whether or not you have asked for the cooperation of the RCMP? Do you believe that fits under that category?

Mr. Robert Marleau: I think section 62 of the statute is very strong. It says “any information”.

Mr. Pat Martin: Okay. Fair enough.

Mr. Daniel Brunet: May I add something to Mr. Martin?

The Chair: Okay.

Mr. Daniel Brunet: The commissioner does not have jurisdiction to carry on criminal investigations. I hope that is quite clear for everybody. To that extent, he has no authority whatsoever to ask the RCMP to assist in an investigation by the commissioner.

The Chair: Thank you.

Mr. Pearson.

Mr. Glen Pearson (London North Centre, Lib.): Thank you, Mr. Chair.

Commissioner, I have a couple of quick procedural questions, and then just a comment.

In the course of your report, will you be doing a forensic audit of the documents—all of them, following that paper trail? Also, will you be trying to determine who in the minister's office was briefed and when?

Mr. Robert Marleau: I can tell you that in any investigation, the investigators will follow the trail to wherever intervenors on the file are, whether they are in the minister's office or in the Prime Minister's office. We have access to all of that, so if there is an indication that someone intervened at one point or could have added to the rationale in any way, shape, or form, the investigators will go there.

Mr. Glen Pearson: And will you also be able to determine, in the course of that, whether there was political intervention in the process?

Mr. Robert Marleau: As I said, the investigator will evaluate the rationale, whether it's under subsection 15(1) or another section, and political intervention as a substantive support to using a section is highly unlikely to be accepted by us.

Mr. Glen Pearson: For the sake of time, Mr. Chair, I have just a comment to the commissioner.

You mentioned earlier that you didn't really have the luxury of being emotional about this or having your own emotions involved in it. I don't have the luxury of not doing that. We as a committee are very concerned about this going on, because at the end of the day it is about lives and about torture. If any of this is true, it's very important to us, and we have a responsibility.

So I would only encourage you, sir. You've done a great job, a very professional job, in your time there, but I'd encourage you to act as expeditiously and as professionally as you can. I hope it can come within the 90 days, because there are people at the end of this who are affected by whatever happens here.

Thank you.

Thank you, Mr. Chair.

Mr. Robert Marleau: Thank you.

The Chair: Mr. Van Kesteren.

Mr. Dave Van Kesteren (Chatham-Kent—Essex, CPC): Thank you, Mr. Chair.

The last time I spoke, I had just 30 seconds. I have a little bit more this time.

The Chair: You have five minutes, sir.

Mr. Dave Van Kesteren: Oh, wonderful.

Thank you, witnesses, for coming, and I'm glad you had this opportunity to come.

There's an expression, that “beauty is in the eye of the beholder”. I think we could apply truth, also—that “truth is in the eye of the beholder” many times.

I think that, should you ask for a consensus on this side of the table, you would probably hear a different story. You weren't here when the witnesses were questioned at the last meeting, but most people would agree on this side that they were quite badgered and were treated with great disrespect, as a matter of fact.

We argued at the outset that we should wait, and that you, Mr. Marleau, in your investigation would come to an outcome; that the truth would...that if we have done wrong, then we have to face the music.

Mr. Wallace spoke eloquently, I think, and he's been quoted in the press. The unfortunate thing is that of course this looked like an attempt by us to try to squash the truth, but we tried to convince the committee that your office would come out with a proper outcome. You've told us that the truth will come out.

I know I asked some pointed questions at the very end. I think I had 30 seconds and I asked, “Did a minister ever ask you to change or redact something, and would you do it?” She gave straightforward answers, so that's on the record. That's going to be addressed as well.

But you also tell us—and this concerns me and this is part of my question—that the report cannot be made public unless the requester agrees to making it public—

A voice: Or the government.

● (1035)

Mr. Dave Van Kesteren: Or the government.

So I'm wondering, is there no recourse for the witness? Never mind the government; that's par for the course. We get embarrassed, and oftentimes we argue that we don't need to do this; the opposition says to do it, and it causes some embarrassment.

But if this is never made public, what about these public servants, the public servants who, somebody mentioned, served three governments and I think have 17 years of unblemished record? Is there no vindication, for their good name to be cleared, and from the unfair and inflammatory charges that were made? Is there no recourse for those witnesses? That concerns me. I guess I didn't read your whole book, but is there nothing there for the witnesses, to clear their good name?

Mr. Robert Marleau: Sir, first, by way of the premise of your question, I cannot guarantee to this committee that an investigation by the Information Commissioner will get to the truth. Mr. Walsh has avoided defining what the truth was in his comment, so I'll avoid commenting on that, but that's not the purpose of our investigation. The purpose of our investigation is to review the application of exemptions on a particular document, to review the rationale that was used in arriving at that conclusion, and in agreeing or disagreeing with that conclusion, and with the express intent of making sure that the requester gets what he is entitled to under the law.

As for the witnesses before the committee, that process is entirely outside my scope either to comment on or review, for that matter. It may well be that through the process of our investigation, its outcome, and if the document is made public by the department, if the document is made public by the requester, that people can draw conclusions on the status of the reputation of the witnesses, if you want, but I will certainly not go there.

The only thing I can do, as we did on page 54 of the annual report, is report a summary of the case...in the Maher Arar case, where our intervention calls for a lot more information to be released. We don't need to revisit that case, but my predecessor feels very strongly that were it not for access to information, Mr. Arar would not be where he is today.

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

The Chair: Colleagues, that's it as far as the list is concerned.

Gentlemen, we very much appreciate your appearance today and your guidance.

We wish you, Mr. Marleau, all the best in trying to conclude your investigation within the 90-day timeframe. That would fit perfectly with our coming back so that we could see what happens.

Mr. Walsh, thanks for your candid comments to us. We would look forward to your legal opinion with respect to the Security of Information Act at the earliest opportunity that is reasonable for you.

Colleagues, we'll just let the witnesses leave and then I just want to talk to you about some of the witnesses.

We will pause for two minutes.

● (1035)

(Pause)

● (1040)

The Chair: We are back.

What we're going to discuss now, colleagues, is a report by me and by the clerk on certain people we have suggested as witnesses and certain facts.

What I'd like to do is suggest to the committee that we go in camera for this discussion. It's not because I as the chair don't want the public to hear our discussions. Quite frankly, I don't want any potential witnesses to hear our discussions so that they might get a particular heads-up as to an approach or who we're thinking of until and unless we make that decision.

I wonder if I might have agreement that we could go in camera at the present time.

Some hon. members: Agreed.

The Chair: Thank you.

We will pause for a couple of minutes so the technicians can do what they have to do and we'll ask everyone who has no business here at an in-camera session to clear the room.

[*Proceedings continue in camera*]

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