House of Commons
CANADA

Standing Committee on Access to Information, Privacy and Ethics

ETHI • NUMBER 015 • 2nd SESSION • 40th PARLIAMENT

EVIDENCE

Wednesday, April 22, 2009

Chair

Mr. Paul Szabo

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● (1600)

[*English*]

The Chair (Mr. Paul Szabo (Mississauga South, Lib.)): Order.

This is meeting number fifteen of the Standing Committee on Access to Information, Privacy and Ethics, pursuant to Standing Orders 108(2) and 108(3)(h)(iv), a special report of the Information Commissioner entitled *Report Cards 2007-2008 and Systemic Issues Affecting Access to Information in Canada*, referred by the committee. This is on the access issue, for those who want just the issue.

Our witness today is from the New Brunswick Office of the Ombudsman, Mr. Christian Whalen, legal counsel. He was referred to us by the access to information commissioner's office because of the extensive work.

The reason I started the meeting is that to hear witnesses we only need to have three members. With the votes, I know that other members are going to be slightly delayed. Since Mr. Whalen does have a travel commitment to be out of here in time to catch a flight, I want to start as soon as we can.

With that, we've had a brief discussion, Mr. Whalen. Welcome. Thank you for coming.

It is an issue that has seized us as a consequence of the report of the access to information commissioner. The report is on 10 of the departments, as well as the fact that, as you're probably aware, this particular act has not been amended in over 25 years. There are issues, and I know you have some words of wisdom to share with us.

So I'm going to turn it over to you for your opening comments. I know the members will have some questions. Please proceed.

[*Translation*]

Mr. Christian Whalen (Legal Counsel, New Brunswick Office of the Ombudsman): Mr. Chairman, members of the committee, thank you very much indeed for giving me an opportunity to make this presentation about the advisability of reforming the Access to Information Act.

The New Brunswick Office of the Ombudsman acts as an officer of the legislature in matters pertaining to access to information and privacy. It is our firm belief that it has taken a very long time for an in-depth reform of the federal act, as you said yourself, Mr. Chairman.

The New Brunswick legislature is also involved in a thorough review of its access to information and privacy laws. We are sure that the leadership that the federal Parliament could show in this area would have an impact on all the laws on this subject in the country.

In recent days, Mr. Chairman, I have read with interest the testimony you heard from Mr. Marleau, his assistants, our colleague, Mr. Loukidelis, and other witnesses who appeared before the committee this winter. I am particularly encouraged by the contribution made by committee members, by the insightfulness of their questions and by the commitment to improving the administration of this legislation in Canada. Too often in our province, New Brunswick—as I was telling the committee clerk—legislation is passed without careful study in committee, and the work of Parliament is cut short and becomes little more than a political game. I think Canadians expect more from their elected representatives, particularly when it comes to open government and to promoting their democratic rights. I am pleased to see that it is exactly this type of parliamentary concern that motivates all members of this committee.

I would like to say at the outset that our office supports all 12 of the recommendations made by the Information Commissioner of Canada. Could we go further? Yes, definitely. However, I maintain that the recommendations put forward by Mr. Marleau are relevant, strategic and easy to implement. The idea is therefore to make these essential changes quickly so that his office can defend and promote the main objective of the Access to Information Act for the benefit of Canadian taxpayers. We think this approach would enable committee members to achieve the broadest possible consensus and to speed up the reform process that Canadians are seeking.

In the time I have, I would like to discuss briefly two of Mr. Marleau's recommendations, and to raise two related issues, one general in nature and the other specific, having to do with the interpretation of the act being reviewed by the committee. Finally, as a native of New Brunswick, Mr. Chairman, I will be making my presentation in both official languages.

The first question has to do with the nature of the rights protected by the Access to Information Act. As Mr. Loukidelis said so well, access to information regimes are essential to the protection and promotion of democracy. However, I think it is important that the act reflect not only this fundamental democratic value and right as an objective—as is stated in section 2 of the act—but also that the entire act be reviewed so that it properly explains the fundamental nature of the rights it protects.

Let me explain what I mean. In our most fundamental piece of legislation, the Canadian Charter of Rights and Freedoms, we Canadians do not have explicit guarantees regarding access to information or even privacy. As you know, section 7 of the Charter guarantees every Canadian the right to life, liberty and security of the person, while section 8 refers to the right to be secure against unreasonable search or seizure. We compare poorly to other countries or to other constitutional law systems. However, sections 7 and 8 of the Charter were modelled on provisions of the Universal Conventions of Human Rights that guarantee the right to privacy.

In Canada, we have had to develop an entire body of case law on constitutional law, in order to make the guarantees set out in sections 7 and 8 of the Charter into a genuine privacy guarantee. I am talking here about privacy, even though we are discussing access to information, but access to information legislation in Canada essentially guarantees two things: the first is the right to know what public bodies may know about Canadians; and second, the right to access government documents to ensure transparency and a well-informed electorate.

So the sources of this fundamental right are taken from the concepts of liberty and security of the person that are set out in section 7.

● (1605)

In Canada, the courts have recognized that these rights have a quasi-constitutional value. Mr. Marleau made this point as well. These are rights that protect our fundamental rights and freedoms. As a result, statutes such as the Access to Information Act must take precedence over other acts passed by Parliament in cases where there is a conflict. The exemptions set out in the Access to Information Act must be interpreted restrictively by the courts in order to give the legislation a purpose that is dominant and corrective.

These approaches to interpreting statutes are solidly rooted in Canadian law. In my opinion, Parliament can nevertheless be more explicit regarding the nature of these fundamental rights. For example, I am thinking of section 2, but also section 4 of the act, which talk about the guarantee for access rights. There are other things Parliament could do, including the insertion of a preamble, references to constitutional guarantees and to international law or to the principles for drafting laws.

I think that Mr. Tromp, who appeared before the committee a few weeks ago, referred you to drafting principles regarding the right to information that have been adopted by the United Nations. It is important to take these principles into account in the context of reforming the act, and to recognize the fundamental nature of the right being guaranteed. That was the first main point I wanted to make.

[*English*]

The second, more specific submission I have is an example of the need to take access rights seriously as fundamental human rights, together with the need for Parliament to be explicit about this order of priorities. I am coming to the point of solicitor-client privilege and the recent experience in New Brunswick, with that exemption.

I note that Mr. Marleau has remained silent on this topic. But the fact is that a year ago, in February, Mr. Marleau's best lawyers, along with Mr. Loukidelis's, and lawyers from the Ontario and Alberta privacy information commissioners' offices and the New Brunswick ombudsman's office were down the street at the Supreme Court intervening in a case where an order of the Privacy Commissioner of Canada was under review.

The Supreme Court's decision in Blood Tribe came out last summer. The court decided that the Privacy Commissioner did not have the authority under PIPEDA to review solicitor-client records in the private sector for the purpose of verifying those claims. I know that Blood Tribe is distinguishable from the practice before the Information Commissioner, and the provisions of section 36.2 are fairly strong and would help distinguish Blood Tribe and the arguments there. But section 36.2 is not explicit about giving the commissioner access to solicitor-client records for the purpose of verifying these claims.

The purpose clause in the Access to Information Act is in fact no stronger than the purpose clause in PIPEDA. PIPEDA had a very strong purpose clause, talking about the fundamental nature of the rights protected there, and the court made no reference to this. It didn't really count for anything. In fact, the court, in its decision, has left the door open and invited litigation and argument on whether or not a purpose clause like section 36.2 would be sufficient and would pass scrutiny with respect to the law of solicitor-client privilege in Canada, as decided by the court.

That's basically the Supreme Court tossing the ball back at Parliament and saying that their job as magistrates is to defend the rule of law. Now, Parliament is supreme and Parliament can decide the circumstances under which solicitor-client privilege, as a fundamental aspect of Canadian law, may be breached. But Parliament has to be explicit. I think in this instance Parliament should be clear about maintaining the right of the Information Commissioner and the Privacy Commissioner to review these claims for the purpose of verifying the claim.

My submission is that when Canadians go into their own private lawyers' offices for advice, their expectation of confidence and privacy is clear. But we have, I submit, a much more reasonable and clear expectation of privacy in that context than would a public official if he was doing something that the Attorney General had advised him that he should not be doing. You can't compare solicitor-client privilege in the public sector with the validity of those claims in the private sector. Canadians generally recognize that the advice you seek and receive from your lawyer has to be treated confidentially, but the overall expectation of Canadians is that in appropriate cases crown claims of solicitor-client privilege should be waived or may have to yield to the imperatives of transparency.

Even though as a general rule such claims must be as rigorously defended in the public sector as in the private sector, the existence of the privilege has to be founded on a credible system of independent verification. Otherwise, we open the door to impunity.

I think that's pretty much what's happening in New Brunswick today. Canadians won't lose faith in their legal system if ministers and crown lawyers have to "fess up" and submit claims of privilege, based on solicitor-client privilege, to Mr. Marleau's review. But if Parliament or the courts come and say that Mr. Marleau has no authority to review records over which such exemptions are claimed, they'll lose faith not only in Mr. Marleau's office but also in the courts and in Parliament.

In my province, the government is on the cusp of adopting a legislative carve-out based on federal access legislative provisions exempting cabinet confidences. This would exempt, in New Brunswick for a first time, not only cabinet confidences but solicitor-client records as well. It would go beyond that and it would carve-out, according to the provisions of Bill 82, which died on the order paper but is probably coming back, all records in the Attorney General's office, excluding them from the application of the act.

● (1610)

Those are our submissions, Mr. Chairman. It's imperative that Parliament reaffirm the fundamental nature of the access rights protected under the Access to Information Act and insist on the commissioner's access to all records, without exception, for the purpose of verifying the validity of any exemption claimed. This would be consistent with the UN drafting principles 1 and 4, dealing with maximum disclosure and a limited scope of exemptions.

I know my time is up, but I would like to touch briefly on two of the recommendations the Information Commissioner has made. The first is the recommendation with respect to executory decision-making over administrative matters. I certainly read with interest the exchanges between Mr. Marleau and committee members concerned with the gulf between amounts charged to users and the cost of administering the system. I submit that the problem lies not in raising the amount of fees collected or trying to find a user-pay principle. That would only constitute a cost disincentive. The answer to that problem is in doing what the commissioner has recommended, and that's to increase the commissioner's authority to deal effectively with administrative matters such as delay and fee issues, and to put in place, through his order-making power, appropriate benchmarks for the way these types of complaints have to be handled down the line. That's going to diminish the overall cost of administering the system.

Again, comparing our experience in New Brunswick to the federal experience, we really do have a very light regime. We're one of those early legislative models. The act probably hasn't changed much since 1978. But it has the merit of having a thirty-day turnaround time limit, with no possibility of extension, and a $5 access fee. Things move at a slightly faster pace than under the federal system.

Finally, my last point is with respect to the express mandate to advise Parliament on legislative matters related to access to information and to educate the public about their rights and how to use them. We think this is also a very central recommendation that the Information Commissioner has brought to Parliament. It's the best way of achieving the act's purpose, which is to improve the quality of our democracy.

I will again bring the UN principles on drafting access to information legislation to the attention of committee members. Principle three of those nine principles asserts that access laws should require the promotion of open government. To read from the UN text:

> Public bodies must actively promote open government
>
> Informing the public of their rights and promoting a culture of openness within government are essential if the goals of freedom of information legislation are to be realized. (...) Promotional activities are, therefore, an essential component of a freedom of information regime. (...) The law should require that adequate resources and attention are devoted to the question of promoting the goals of the legislation.
>
> As a minimum, the law should make provision for public education and the dissemination of information regarding the right to access information.... Ideally, such activities should be undertaken both by individual public bodies and a specially designated and adequately funded official body—either the one which reviews requests for information, or another body established specifically for this purpose.

I think there's also a training component in that principle, but it would have to be a central ATIP office that would look after training government employees on the administration of the act.

The piece that Mr. Marleau's office can do, and can do well, is the public promotional piece, which is going to help Canadians use the legislation responsibly, in a way that will diminish delays and yield results in terms of a more informed electorate.

● (1615)

[*Translation*]

I would like to thank you once again, Mr. Chairman, for giving me this opportunity to appear before the committee today. The interest of committee members in this issue is noteworthy. In the context of a minority government, this may be the best opportunity to move this matter forward. I think the recommendations made by Mr. Marleau are meant to be consensual. I therefore hope that committee members will be able to work together to find this consensus and make the changes that Canadians want to see.

Thank you.

[*English*]

The Chair: Thank you, Mr. Whalen, for your input.

The committee decided to embark on this pursuant to a report of the commissioner and report cards on certain departments. As I know you are aware, a number of the departments received failing grades, and a couple, in fact, had red alerts.

The word "leadership" came up in the commentary of the access commissioner. It has also come up at our hearings, and depending on how you look at it, it seems that leadership is either by the commissioner, or the government, the head of the Privy Council Office, the Prime Minister, or the ministers themselves.

We have backlogs. We have human resources problems, which exacerbate the backlogs. We have a vintage piece of legislation. I think the committee is hoping that we're going to be able to find solid recommendations on how we can address the issue of getting this act to respond to the accountability of the government with regard to access to information.

Is there anything happening in the New Brunswick model or other models you are aware of that would specifically address the problem of getting the intent of the act to work?

● (1620)

Mr. Christian Whalen: I think the recommendation that's most helpful from Mr. Marleau, among the 12 you have before you, is probably the notion of giving the Information Commissioner executive order-making powers with respect to matters of administration. That's where the Information Commissioner can play a role in prompting government agencies to address issues with delays and with respect to fees, which may be of concern to Canadians. That's probably the best thing you could do from the 12 recommendations.

The Chair: How about requiring the approval of the commissioner for extensions beyond 60 days? Does that make sense to you?

Mr. Christian Whalen: Well, the challenge that we have in Canada—which I think you already heard of from Mr. Tromp—is really bringing our legislation into line not just with Canadian standards, but also with world standards.

Honestly, my concern in trying to advocate for law reform in New Brunswick has been that the current federal practice and federal delays have had somewhat of a drag-down effect on this type of legislation in Canada. So yes, curtailing the possibility of extension after 60 days would be a step in the right direction. I think the federal Parliament could afford to go further.

The Chair: Mrs. Simson, please.

Mrs. Michelle Simson (Scarborough Southwest, Lib.): Thank you, Chair.

Thank you, Mr. Whalen, for taking the time to provide us with some expertise. Wading through a vintage act, as the chair mentioned, has been fairly onerous.

In reading over the material for today, I see that New Brunswick introduced their legislation in 1967. I'm just curious, but has the legislation undergone any substantive change since its introduction; and if so, is it done on a regular basis? I ask this because one of the recommendations is that we revisit it every five years.

Mr. Christian Whalen: Yes, we're in the same boat. The legislative reform process that's under way in New Brunswick started about two years ago with the appointment of a working group to report to the legislative assembly. It was long overdue—almost 30 years out—and the committee itself brought forward a recommendation for a regular eight-year review. In our submissions on a proposed bill in response to the committee considering the working group's recommendations, we recommended that an amendment be brought in with the possibility of a five-year review and that the first review be done in three years.

The law amendments committee, which considered those recommendations, actually reported to the House last month and is recommending a four-year review. So we're still waiting to see what the revised legislative proposal in New Brunswick will look like, but we're hoping that the recommendation for a regular four-year review will be accepted.

Mrs. Michelle Simson: Thank you.

We've heard testimony that it isn't really necessary to build in a timeframe for a review. But would that not give other stakeholders the opportunity? It's not only about parliamentarians taking a look at it but, let's say, outside stakeholders may have suggestions or can push the issue, based on the fact that there's a set timeframe. Do you think that would be helpful?

● (1625)

Mr. Christian Whalen: I think it would be very helpful. The experience in New Brunswick and federally in Canada amply demonstrates the need for that type of system. I would reaffirm what I was saying about the opportunity here in the context of a minority Parliament to advance law reform efforts. I think invariably what you see in practice in Canada and around the world is that governments-in-waiting are always interested in law reform in this area, and it's something that dissipates, unfortunately, often very quickly after they come into power. I think a regularly mandated parliamentary review is a necessary check against that tendency.

Mrs. Michelle Simson: In this way, regardless of who happens to be in power, that particular function will be performed.

You stated in your opening remarks that you've thoroughly reviewed the recommendations of Mr. Marleau and, in your words, found those 12 recommendations to be “relevant, strategic and easily done”. In the absence of a total overhaul, or starting from square one, would it be your testimony that this would be an excellent start and a quick fix to get the ball rolling? As well, are there any enhancements that you could offer to any of the 12 recommendations that Mr. Marleau has?

Mr. Christian Whalen: Again, based on our experience in New Brunswick—and we've had to sort of work through the same issues—we did recommend an independent information and privacy commissioner's office in our province with full order-making powers. I think that would be a natural and desirable next step federally as well.

I understand and appreciate the context of Mr. Marleau's recommendation. It's my own sense, not necessarily having discussed the matter with the federal Information Commissioner, but from my read of the proposals, it really strikes me that the Information Commissioner has put forward a series of proposals that were meant to try to achieve consensus and to get a good start on work that is long overdue. I think the committee and all parliamentarians should really seize that opportunity.

Mrs. Michelle Simson: Based on your opening statement, too, I want to ask straight out, do you believe access to information to be a basic human right?

Mr. Christian Whalen: If anything, I'm glad you can take that from my opening remarks. I would encourage the committee to try and find ways. I don't think Mr. Marleau, as a former Clerk of the House—and I used to be a legislative drafter—

Mrs. Michelle Simson: But I'm curious, do you personally believe that?

Mr. Christian Whalen: Yes, I think it's an issue of fundamental human rights. It's tied to notions of liberty, and I think in Mr. Marleau's submissions they're referenced to more argument in that vein.

Mrs. Michelle Simson: Believing that, then, this committee or our government should in no way be influenced by the fact that access to information for people maybe isn't revenue neutral. We've heard testimony about how expensive it is for investigations vis-à-vis the request for information, such as the $5, and how much it costs to provide that information, but if it's a basic human right, it would seem to me that we shouldn't be swayed necessarily by the fact that this is not a cost- or revenue-neutral exercise.

Mr. Christian Whalen: To comment on that, I know the ombudsman had the same question from the Legislative Assembly Standing Committee on Law Amendments in Fredericton, and his comment was that increasing user fees basically amounts to a tax on democracy. It's not really a path that we would encourage the committee members here to endorse or go down.

In New Brunswick we have, I think, the benefit of having the lowest costs for accessing information. It's just a $5 filing fee and 10¢ a page for photocopies. And the practice invariably is that access requests for one's own personal information have the fees waived. In Quebec I note that there's no access fee; there's just a photocopying charge.

When we've sounded out New Brunswickers on this issue, they've come and told us, “Wait a minute, I'm looking for information from government. I'm a taxpayer. I've already paid for your salary, I've paid for everything that you're producing, and now you're going to charge me again to get a copy of it? I don't think so.” I think that if members of Parliament went back to their own constituencies and asked their constituents those questions, they'd probably get an earful.

● (1630)

The Chair: Thank you.

Madame Thi Lac, s'il vous plaît.

[*Translation*]

Mrs. Ève-Mary Thaï Thi Lac (Saint-Hyacinthe—Bagot, BQ): Thank you.

Good afternoon, Mr. Whalen. I apologize for being late. I would also like to apologize to the committee.

With me today are some of my constituents who are being members of Parliament for a day. I'm sure you know that it is hard to move around Parliament Hill as a group. However, this is for security reasons. My "members of Parliament for a day" are here with me and are listening to our proceedings in order to get a better understanding of the role of MPs. As a member of Parliament, I would invite you to do this with your constituents. It is a very enriching experience. Unfortunately, I missed the beginning of your presentation, so some of my questions may deal with matters you covered in your remarks.

As you know, our act is over 25 years old. No one had even thought about the Internet when it was passed. The cultural makeup of our country was very different then, and my colleague beside me had not even been born. That shows you how hold this legislation is, and why we have to bring it up to date. In his fourth recommendation, Mr. Marleau would give the ombudsman discretionary authority to decide whether or not to investigate complaints. However, recommendation 11 says that dissatisfied complainants may go directly to the Federal Court if the Commissioner rejects their complaint.

Would it not be simpler to continue to require the Commissioner to investigate all complaints, to avoid recourse to the Federal Court, which could be very expensive for the people involved. People who chose to do this, would have to have a lawyer, among other things. If the Commissioner investigated all complaints, recommendation 11 would not be necessary.

Mr. Christian Whalen: I think that the recommendation would provide a choice. At first glance, I would say that this recommendation is realistic and appropriate, in that this is the practice we follow in New Brunswick. Citizens can inform the ombudsman of a request to review a decision made by administrative authorities regarding an access matter or they can go directly to the Superior Court. Costs are involved in proceedings before the Superior Court. Not everyone can hire a lawyer, but that is what is generally done if they choose this route. In New Brunswick, lawyers do this, but because they are accustomed to the procedure. They have clients who are prepared to pay, and they are familiar with this practice.

Sometimes the media do as well, if the matter is particularly urgent or involves an interpretation of the Access to Information Act. In these cases they go directly to the courts to get a binding decision quickly.

Eventually, I think Canada's legislative framework should provide for a commissioner with decision-making authority, not only regarding administrative matters, but also substantive matters. And the courts would acknowledge this authority and would intervene only where necessary to correct errors in enforcing the act. That is the model used in Quebec, Ontario and British Columbia. I think that generally speaking in Canada we are far enough advanced to do this. Can it be done in two steps, as Mr. Marleau suggests? I think that at the very least it would be appropriate to take a first step in this direction.

● (1635)

Mrs. Ève-Mary Thaï Thi Lac: Thank you for your answer. You spoke about the costs requesters have to pay for access to information requests. We have also heard that some requesters make repeated requests. We've been told that often when information is requested on a particular subject, the material the requester receives has been redacted or blacked out. That means requesters have to make another request, pay the fee and state that the information they received is incomplete. That means that the people who work in the Commissioner's Office have to start over and work on the same issue again.

Should we not be making a recommendation about this? I think there may be some abuse as regards the redacted information; this does not help citizens or requesters who are trying to get information. And I do not think it is helpful to the bureaucracy, because people have to make repeated requests for the same information.

Mr. Christian Whalen: We are certainly aware of the concerns of the people of New Brunswick, which are exactly what you have described. I think there is something new in the way access to information commissioners are working in the country, and that is to rely more and more on mediation and reconciling the parties, and to ensure as well that the access request is done right in the first place. To do that, we have to start by telling people about the objectives of the act. The act includes some exemptions, and they are absolute and necessary. So we have to expect that it will be impossible to disclose some information. However, I think that when people are informed about their rights and about the exemptions, and when the parties are encouraged to sit down together... Too often in Canada, since everything is done on paper, the people involved cannot really talk to each other. The practice at the federal level is still to preserve the requester's anonymity at all times. I can tell you that this is not our practice in New Brunswick, and I see that this can cause some problems.

[*English*]

The Chair: *Merci*.

Mr. Siksay, please.

Mr. Bill Siksay (Burnaby—Douglas, NDP): Thank you, Chair.

Thank you for appearing today, Mr. Whelan. Your testimony is very helpful, as were the documents you distributed ahead of time.

I just want to note that in the submission of the ombudsman to the law committee on Bill 82, there is a really good summary of the statement around fee structures and penalizing taxpayers for access to information that they've already paid for. I think that was a very helpful statement for me. I know you've already talked about that with Ms. Simson.

You referenced a couple of UN agreements or declarations: the UN principles on freedom of information and the Universal Declaration of Human Rights. Is it helpful to explicitly mention those in access to information legislation as part of that legislation or in the preamble? Does that have an interpretive value? Or is that something you would recommend?

Mr. Christian Whalen: Well, I think it's difficult. Those are probably questions the committee could leave to the drafters and seek advice of legislative counsel on.

On the UN document with respect to drafting principles, I'm not sure you would typically see something like that in a preamble. I think certainly those are principles that committee members should be well acquainted with and keep foremost in mind as they deliberate and make recommendations to Parliament.

● (1640)

Mr. Bill Siksay: I find your explanation of the Blood Tribe decision very interesting, and it's not something that I personally knew about, being new to most of this. Not being a lawyer, I wonder if you could review that in a layperson's discussion of client-solicitor privilege and the differences between what an ordinary Canadian would expect and what you're saying are the issues related to solicitor-client privilege when it relates to the crown and the advice the crown has just had.

Mr. Christian Whalen: Mr. Siksay, if I can say with respect, what I think is regrettable in the Supreme Court's decision...and it was clear for the counsel present, in terms of the court's questions and thought processes, that they really zeroed in on the law of solicitor-client privilege. It has been a hallmark of our Supreme Court and our bench in recent years to affirm how important that privilege is in Canadian law.

At the same time, the Blood Tribe case was about a woman who had been fired from the Blood Tribe department of health and who was looking to get to the bottom of the reasons for her dismissal. She was able to apply to the federal Privacy Commissioner's office to access personal information that her employer held about her, under PIPEDA. It was very much an access issue.

The purpose section in PIPEDA speaks to the fundamental nature of that privacy interest. Usually, if you apply provisions of interpretation guiding the interpretation of quasi-constitutional documents, you would try to give effect to Parliament's dominant purpose and to interpret exemptions like solicitor-client narrowly, but that interpretative approach was completely discarded in favour of solicitor-client privilege.

Is it surprising? Well, who are judges? Judges are former lawyers. What's the average Canadian's perspective on that? I think they would expect that a federal Privacy Commissioner, with a bevy of lawyers like Ms. Stoddart has in her employ, would be equally competent to review a claim of solicitor-client privilege as a Federal Court judge. There's a real risk if that judicial tendency continues. Unless Parliament makes it clear that we want our parliamentary officers doing this work, the Federal Court and other superior courts in Canada are going to be clogged up with those issues. That doesn't seem, to me, terribly effective.

Mr. Bill Siksay: By speaking of clogged up, you said that problems with the federal act have a drag-down effect on other legislation in Canada at the provincial level. Could you say a bit more about how you see that operating?

Mr. Christian Whalen: Well, maybe that's not entirely fair, but I think there's concern about delays at the federal level. There are concerns about the possibility for lengthy extensions of time in terms of responding to requests.

I think in terms of the fee structure we have, we're trying to maintain one of the positive attributes of our existing legislation, yet there's the fact that the federal access to information legislation is subject to an application fee and then photocopying charges and then search fees on top of that. I know the Parliament of Canada isn't alone in that; it's a legislative model that exists elsewhere in Canada. But it's not the best legislative practice. Quebec has the best legislative practice, and New Brunswick isn't far behind. I think that's the direction Parliament should be headed in.

● (1645)

The Chair: Thank you.

Mrs. Block, please.

Mrs. Kelly Block (Saskatoon—Rosetown—Biggar, CPC): Thank you very much, Mr. Chair.

Welcome to our meeting today.

Mr. Whalen, are you familiar with the Federal Accountability Act?

Mr. Christian Whalen: Yes.

Mrs. Kelly Block: Are you familiar with the reform to the Access to Information Act that came about as a result of the Conservative Federal Accountability Act?

Mr. Christian Whalen: Yes, I had a chance to discuss it with officers of the Office of the Information Commissioner who are here today.

Mrs. Kelly Block: Thank you.

Since September 1, 2007, the Government of Canada has been more accessible, with a larger number of institutions covered under the Access to Information Act. A total of 186 institutions were subject to the act in 2006-07. Since the coming into force of the Federal Accountability Act, some 255 institutions are now subject to the Access to Information Act. The institutions include 19 departments and ministries of state; 141 other government institutions, such as foundations, agencies, commissions, tribunals; 42 crown corporations; and 53 wholly owned crown subsidies.

In his testimony before this committee on March 9, the Information Commissioner told us that the Conservative Federal Accountability Act was the most significant reform to the Access to Information Act since its inception in 1983. On March 11, David Loukidelis, Information and Privacy Commissioner of B.C.; Stanley Tromp, author of *Fallen Behind: Canada's Access to Information Act in the World Context*; and Murray Rankin, a lawyer specializing in information law and author of the preface for *Fallen Behind*, also all agreed that the Federal Accountability Act was the most significant reform to the Access to Information Act since its inception.

On April 1, Vincent Gogolek, legal counsel for the B.C. Freedom of Information and Privacy Association also agreed that the Conservative Federal Accountability Act was the most significant change to the Access to Information Act since its inception. That same day, Ken Rubin told this committee that all of these witnesses were being too polite to this committee and that the Federal Accountability Act was not the most significant reform to the ATIA since its inception in 1983.

My question is a simple one. Do you agree with Mr. Marleau and others who testified that the Federal Accountability Act was the most significant reform to the ATIA since its inception in 1983?

Mr. Christian Whalen: What I can say, Ms. Block, is that I anticipated your question. I read with interest the proceedings. I hadn't gotten down as far as that most recent intervention, so I wasn't sure that you had a "no", and I wasn't sure I wanted to be added to the "yes" list. In fairness, when I read the transcript of Mr. Tromp's response, I think he gave you the answer you wanted to hear, but I think the "yes" really reads more like "no".

I'd make two points. One is that I think the most significant aspect of the Federal Accountability Act reforms in terms of access to information wasn't the addition of...I think it was 69 new crown agencies, and the extension of the application of the act in that context, partly because, as Mr. Marleau pointed out, by simply expanding the scope of the act in the context that we know, we're just expanding the problems in terms of administration, in terms of delay. So that's something that government and this committee have to be concerned with.

The most significant aspect of the reforms—and I don't think it has really come out in the discussion at the committee to date—was the addition of the duty to assist. I think I really want to give the government credit for that aspect of law reform introduced most recently. Duty to assist is something we don't have in New Brunswick that we think is sorely needed. I think it's the type of reform that's consistent with everything Mr. Marleau was presenting here. It's about getting better results for Canadians in terms of access. It's about addressing concerns about delay. It's getting to the heart of the issue and seeing what information Canadians are after.

Mrs. Kelly Block: Are you familiar with subsection 67(1) of the Access to Information Act?

● (1650)

Mr. Christian Whalen: No.

Mrs. Kelly Block: I wasn't either before April Fool's Day.

I would like to give the rest of my time to Mr. Dreeshen.

The Chair: Okay, you have a minute and a half.

Mr. Earl Dreeshen (Red Deer, CPC): Thank you very much.

I appreciate your coming here and your testimony.

Your written brief dated November 5, 2008, is critical of Manitoba because it doesn't include a general public interest override. You were quoted as saying, "Manitoba's statute is exceptional in Canada in that it has no general public interest override. We should not follow the model in Manitoba." Could you explain your position with respect to public interest override? Also, are there any situations you see where information is clearly in the public interest and should or should not be disclosed?

Mr. Christian Whalen: The advice I would have for committee members, to begin with, in terms of a policy direction to take on that issue would be to look at the UN document. It talks about harms tests and public interest overrides as essential features of right to information legislation. I have the text in French in front of me, but you have it there because the clerk of the committee has circulated copies to committee members.

At the very back of this document, "Inside and Outside the Box" you can find annex II and that statement of principles. Principle 4, on page 33, talks about a three-part test in terms of harms tests and public interest tests:

> The information must relate to a legitimate aim listed in the law;
>
> Disclosure must threaten to cause substantial harm to that aim; and
>
> The harm to the aim must be greater than the public interest in having the information.

It's that type of broad public interest override we'd like to see in New Brunswick, and I think the same would apply federally in Canada as well.

The Chair: I just wanted to let the committee know that we're going to have to move on because we were a little late starting with the witness, and he has a flight at 6:30. He's going to have to leave at about twenty past, and we have five more members. I have Mr. Wrzesnewskyj, Mr. Dreeshen, Madam Thi Lac, Mr. Dechert, Mr. Siksay, and Mr. Hiebert. That's six, so we're tight. We will keep it down to five minutes.

Let's go.

Mr. Borys Wrzesnewskyj (Etobicoke Centre, Lib.): Mr. Whalen, in New Brunswick are parliamentarian requests amber-lighted?

Mr. Christian Whalen: We don't have a process of amber lighting. I'm not exactly sure how that practice actually translates in terms of federal government policy. I know that in his report cards Mr. Marleau has raised concerns about that. We, too, in individual ombudsmen recommendations under the Right to Information Act, have remonstrated public agencies for their tardiness in responding to MLA requests. I'd say that the practice is exceptional, but there have been occasions when it just seemed that waiting until the end of a session to release documents raised a concern about an appearance of bias in terms of the way members of the legislative assembly might be treated with respect to access requests, and we wanted to make sure there would be no such possible perception and recommended that public sector agencies give due consideration to that concern and expedite those processes.

Mr. Borys Wrzesnewskyj: At the federal level, we perhaps have a slight infection of the same sort of disease in terms of amber lighting.

Are there any other provincial jurisdictions that have issues with the same problem of delaying responses to parliamentarians' requests, or is this mostly a systemic problem at the federal level of government?

● (1655)

Mr. Christian Whalen: Mr. Marleau's advice is that it is a systemic issue federally. I suspect it's the type of issue that replicates itself throughout the system in Canada. But certainly in our jurisdiction we've attempted to take measures, through our recommendation-making authority, to address it squarely. We have seen some slight improvements in that issue—or no significant recurrence, if you like.

Mr. Borys Wrzesnewskyj: Madame Thi Lac referred to the fact that when this act was first put in place we didn't have the Internet, so we had to physically have a space where files could be kept. People were there to oversee the processes, etc. We had to do it in that manner because there wasn't any other method.

People have referenced the New Zealand system, where you automatically place.... But doesn't it make sense that we don't necessarily need a legislative change? This is just process. I think the intention of the act is quite clear. You stated that it's a fundamental principle of democratic rights in a society such as ours. So why wouldn't the executive branches of government take on that open government concept and immediately file these things on the Internet, instead of using the antiquated processes we have at the present time?

Mr. Christian Whalen: Do you mean file access requests that have been responded to, so there's an inventory?

Mr. Borys Wrzesnewskyj: No. Instead of having all these files in storage rooms with people overseeing the whole process, why not automatically file all this information on the Internet so it's truly accessible? Unfortunately we've seen an evolution where these people who were supposed to be employees, whose role was to provide access, are becoming more and more like gatekeepers. They slow down requests by members of Parliament, whose role it is to hold the government to account on behalf of the people of Canada. It's almost Orwellian. It has become the opposite of what the intention of the act quite clearly was.

We have the capacity technologically today to do this. Why not begin the process? Why hasn't it been started in some of the provincial jurisdictions, if they've done it in places like New Zealand?

Mr. Christian Whalen: It is change that is quickly upon us. You're exactly right that Canadians expect us to be Internet savvy and enter the information age with access to information issues. Mexico has also been offered up as an example of a jurisdiction, with presumably lesser means than ours, that is doing great things in online access to information.

There's the issue of making the access to information process amenable to Internet usage; then there's the proactive disclosure aspect of trying to anticipate common access to information requests, and making sure that information is publicly posted in advance of people asking for that information. I think both those things are important, and information commissioners across Canada—the federal commissioner included—are very much oriented toward encouraging those types of practices.

The Chair: Thank you.

Mr. Dreeshen, please.

Mr. Earl Dreeshen: Thanks.

I have three or four questions so I'll try to be as quick as possible. Some of them require just yes and no answers.

As someone who is responsible for overseeing access to information in your jurisdiction, do you believe there are any specific areas where access to information laws should not apply?

Mr. Christian Whalen: I'd have to say no, as a rule. I think the basic principle has to be that the act applies to all records within government. There have to be exemptions, but we want a system where there's independent oversight to administer the application of those exemptions. When you develop a tendency to have legislative carve-outs, whether it's for National Defence, solicitor-client privilege, or cabinet confidences, that's taking you down the wrong path.

● (1700)

Mr. Earl Dreeshen: Yes, you don't believe that right to know should have any boundaries or limitations other than what you've just stated, then?

Mr. Christian Whalen: I think the limitations have to be clearly set out in the exemptions and I think it's important that Canadians understand the exemptions under access legislation, the reasons therefore.

Mr. Earl Dreeshen: Then to go to the next level, when we speak about the global reach, opening it up to anyone in the world and so on, opening it up to foreign nationals so possibly including people who are not friendly to our country, giving access to them, is this something that you've discussed or thought about from the provincial level, that maybe we in the federal level might have to look at somewhat differently?

Mr. Christian Whalen: Quite frankly, until I received the invitation to the committee and I was able to look at the exchanges with other witnesses, I really wasn't aware of that aspect of the Canadian Access to Information Act, and it's not consistent with Canadian practice generally. There's no limitation in New Brunswick with respect to who may apply. There's no limitation for citizens only. I don't think that extending or implementing that particular recommendation of Mr. Marleau's would have any sort of impact.

Mr. Earl Dreeshen: If I could expand a bit, one of Robert Marleau's recommendations includes cabinet confidences in the Access to Information Act, and I think you've already looked at that. You perhaps said that there are certain circumstances where you believe they should be kept in confidence, is that true? I'm just wondering whether or not you believe there are certain circumstances where cabinet confidences should be indeed kept—

Mr. Christian Whalen: I think the exemption for cabinet confidences is fundamental in Canadian law. It's something that has to be maintained. The only question I'm raising is whether or not there shouldn't be an opportunity for independent oversight of those claims of privilege.

Mr. Earl Dreeshen: I'd like to take you to the next level, and perhaps if you've listened to the commentary, you'd recognize this.

We've heard that a small fraction of Canadians actually use the ATI. And in fact a small number of these users have a vast majority of the requests. So I suppose what I'm looking at is, should there be a merit in having some of these high-volume users be the subject of ATI requests with respect to their own activities? If they're going to be using this, should they not be subject to information as well, and do not all Canadians then have the right to know what is happening there?

Mr. Christian Whalen: I would think not. I think the committee wants to be careful about putting limitations on the ability of Canadians to bring forth individual access requests as frequently as they do. I think in every jurisdiction there tend to be frequent flyers, and I know that Mr. Marleau has been seeking a recommendation for the discretionary authority to deal with those.

In New Brunswick, we chose specifically not to recommend the addition of a provision to dismiss frivolous and vexatious claims expeditiously. We haven't had that in our legislation and we've been able to manage well without it.

Mr. Earl Dreeshen: The Federal Accountability Act says that it has a duty to assist all requesters without regard to identity. I notice that none of the recommendations indicate that requesters are allowed to operate in anonymity, nothing that we see in these twelve.

So again, I come back to the point I was at before. Should these frequent requesters not be subject to the possibility that their activities would be important for other Canadians to know about? Should we be looking at a threshold, a certain percentage that you would have, a certain number, and if you reach that, then all of a sudden people should know you're doing that?

Mr. Christian Whalen: I think that at any point the Information Commissioner.... Certainly our view is that the ombudsman in New Brunswick, as the master of his own process, has inherent jurisdiction and authority to deal with abuses, of one's process of abuses.

● (1705)

Mr. Earl Dreeshen: Does New Brunswick have those kinds of abuses?

Mr. Christian Whalen: But we haven't had that experience really of those repeat—

Mr. Earl Dreeshen: So it's just unique, then, to the federal level?

Mr. Christian Whalen: It's so difficult to deal with.

The Chair: You're getting very good at stretching the five. Thank you.

We also have to remember that if you did have those kinds of problems, someone would simply revert to proxies to launder their requests anyway, so it's almost like you can't get there from here.

Madam Thi Lac.

[*Translation*]

Mrs. Ève-Mary Thaï Thi Lac: Thank you.

You talked about the confidential nature of complaints. Since we have very little time, I will ask all my questions at once, and you can then answer them all.

First of all, do you think everyone should have the right to information, or only Canadian citizens?

We know that the media often use the Access to Information Act and they made requests in order to provide clear, accurate information. The purpose of the media is to inform the public. Before the media releases any information from a single source, it must be validated and corroborated. Often the Access to Information Act is essential to members of the media for validating the information they provide to the public. If we impose limitations on people who use the system frequently, in spite of the fact that the media have a role to play and an ethical code to respect, we will be denying access to information and perhaps people will get biased information as a result.

You saw some major similarities between the recommendations made by Mr. Reid, and those made by Mr. Marleau, but did you see any major differences? Do you think Mr. Marleau should have reintroduced some of the recommendations that Mr. Reid made?

Mr. Christian Whalen: I will have to refer your third question to Mr. Marleau and others.

As I said, the Office of the Ombudsman in New Brunswick sees no point in restricting access to information. We think that limiting the right of ordinary citizens would run counter to the nature of this fundamental right.

With respect to preferred status for the media, some witnesses have mentioned this to the committee. If I understood correctly, this is the approach used in some American states. I think the idea deserves study, but before we get that far, there should be greater use of access to information by the media. I do not know whether there really is a problem at the federal level because journalists and other members of the media use the system frequently. However, I do think that the committee should be very concerned about any attempt to limit the number of ATI requests made by the media, in particular. In New Brunswick, the most frequent users of the Access to Information Act are the members of the legislative assembly. Here again, we can talk about the importance of the transparency provided by parliamentarians, as by the media. There is the issue of privileged status, but the challenge for us is rather to ensure that the media use the system properly. There are not too many requests from the media in New Brunswick, and we organize seminars to encourage the media to use the tools available to them under the act. I think this should be done at the federal level as well.

● (1710)

[*English*]

The Chair: Thank you.

[*Translation*]

Mrs. Ève-Mary Thaï Thi Lac: You have not answered my first question. Should information be provided to Canadian citizens only, or to anyone who makes a request?

Mr. Christian Whalen: Information should be provided to everyone.

Mrs. Ève-Mary Thaï Thi Lac: Very good. Thank you.

[*English*]

The Chair: Mr. Dechert, please.

Mr. Bob Dechert (Mississauga—Erindale, CPC): Thank you, Mr. Chair.

Good afternoon, Mr. Whalen.

I think you mentioned in your opening remarks that historically New Brunswick had a fairly old access to information regime. I think you described it as a light regime. How many requests for access to information per year has New Brunswick had historically?

Mr. Christian Whalen: It's a small province, so we're probably talking about 400 to 500 access requests per year across government.

Mr. Bob Dechert: That sounds fairly modest. And I think you said there are not many complaints.

Mr. Christian Whalen: I'm not sure how that compares in terms of our population of 700,000 to the 35 million or so across Canada. I think it's not quite as active a use of the legislation as we see federally. We probably have about 70 to 80 access petitions in the course of the year.

Mr. Bob Dechert: So it sounds like the usage is fairly light, and therefore the cost of providing that system is probably fairly modest.

In answering one of Mr. Dreeshen's questions, you mentioned that you don't believe there are a lot of foreign users of the access to information system in New Brunswick. Perhaps the federal system is different, given the scope of the federal government's activities, which tend to be more international. We have things such as foreign affairs, international treaties, and that sort of thing.

In terms of the question on the cost of providing access to information, you mentioned that charging fees that were close to approximately the actual cost of providing the information would be a tax on democracy. What do you say with respect to a foreign user who didn't pay that tax in the first place? Where is the benefit to the people in New Brunswick or to the people in Canada in providing that?

I think you know Mr. Marleau mentioned that the average cost of complying with an access to information request at the federal level is about $1,425 per request and the recovery is about $5. Where is the benefit to the Canadian taxpayer who funds that system to provide information, for example, to a foreign government that may want to know the basis for a decision on a Canadian position on a foreign treaty?

Mr. Christian Whalen: I think if a foreign government was looking for a Canadian position on a foreign treaty, they probably wouldn't get access to that based on the exemptions available under the act—

Mr. Bob Dechert: That's currently, but one of Mr. Marleau's recommendations is that we open up our access to information to anyone in the world.

Mr. Christian Whalen: But I think we could do that and still rely on the exemptions applicable under our legislation to protect against that type of disclosure that you were just mentioning.

Mr. Bob Dechert: In what sense? Perhaps if it was a cabinet confidence, but Mr. Marleau is suggesting that we open up cabinet discussions to access as well.

Mr. Christian Whalen: I think Mr. Marleau is suggesting that the Information Commissioner have the ability to review cabinet records in order to verify claims in terms of cabinet confidences.

Mr. Bob Dechert: I actually think his recommendation is to generally make cabinet confidences available after a certain period of time.

Mr. Christian Whalen: After a certain period of time, right, and that's consistent also with FOI practice. So I'm sorry, your question was—

Mr. Bob Dechert: My question is, where is the benefit to the Canadian taxpayer in paying for foreign requests?

● (1715)

Mr. Christian Whalen: I think the benefit to the taxpayer is a healthier democracy. I think that the notion behind the right to information process is that the more the citizenry is informed, the more likely it'll be that there will be good public debate on matters of national significance. The fact that we can invite the review of our peers beyond our borders to matters that may be of concern to Canadians, I think, is a testimony to the strength of our democracy. Are we going to be—

Mr. Bob Dechert: Could you foresee a situation where a foreign country that does not have a reciprocal freedom of information or access to information regime would get information on the negotiating position of the Canadian government and yet not be in a position to have to make that same information about their position available to the Canadian government or to a Canadian citizen?

Mr. Christian Whalen: I think it's maybe a question of cost-benefit analysis. I'm not sure how those concerns are addressed in other nations where there are no similar limitations in place. I think there would be a greater benefit to allow relatives of Canadian residents and friends of Canadian residents residing abroad to inquire into Canadian administrative practices based on an access regime with respect to issues that may be of concern to them as individuals.

The Chair: Mr. Siksay, please.

Mr. Bob Dechert: Mr. Chair, could I borrow a little bit of the time that you used at the beginning of the session?

The Chair: Do you want ask Mr. Hiebert if you could have some of his time? Mr. Whalen will probably be walking out of the door and I don't—

Mr. Bob Dechert: I wanted to hear his views on data brokers. Mr. Marleau said that significant numbers of the users of the Canadian system are what he would describe as commercial data brokers, who are then fishing for information and then selling that information to customers for a fee.

Mr. Christian Whalen: I think there is a risk that the practice of precluding foreign residents from accessing our access and forcing them to go through data brokers actually exacerbates the tendency and makes a business case available to those data brokers. I don't think that's necessarily in our democratic interest.

Mr. Bob Dechert: There are data brokers who are simply in the business of accumulating information and then selling it as a commercial property, tax-free. It's like a free good that we're providing to these commercial enterprises, which are then charging a fee to consumers to access that information. Does it make sense to you that the taxpayer should fund that?

Mr. Christian Whalen: No, I think it's something that should be of concern. But I'm wondering whether in fact that problem is exacerbated by our legislative framework and whether it couldn't be alleviated by the modifications that Mr. Marleau has proposed.

The Chair: Thanks for your comments.

Mr. Siksay, please.

Mr. Bill Siksay: Thank you, Mr. Chair.

Perhaps if we had better proactive disclosure, we wouldn't have so many requests to have information released; it would be easier to find.

I wanted to ask a very brief question, and maybe Mr. Hiebert will benefit from a brief question and a brief answer.

Has the question of the creation of records been an issue in New Brunswick, the Archives Act of New Brunswick? I know there was a recommendation that it be rolled into or combined with the access to information act in New Brunswick as well. Has that been an issue, and has there been any particular discussion about whether any reforms need to be done in that area?

Mr. Christian Whalen: What we were recommending in New Brunswick was the integration, I guess, of our right to information legislation and our Protection of Personal Information Act, which are two stand-alone pieces. That's not the Canadian model. There's the federal model, but we sort of stand apart from the federal government in that respect.

We were actually looking and making recommendations for an informational privacy rights code, again bringing forward the fundamental human rights nature of the interests protected. At the same time, the ombudsman currently administers complaints under the Archives Act, and our only preoccupation there was that some attention should be given to the wording of proposed legislation and existing wording under the Archives Act to make sure that exemptions are carried forward. It's almost like a parallel regime, the right to information regime.

I think the creation of records is a legitimate concern for information commissioners, and I think Mr. Marleau's recommendations in terms of having a consultative role to Parliament in terms of legislation that may impact—like the National Archives Act, which may impact record holdings—is a good recommendation. It's the same type of recommendation that Mr. Justice La Forest made, and I think that's probably the process forward in terms of addressing those types of concerns.

The Chair: Thank you very much.

Mr. Hiebert, please.

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

I have a couple of questions along the lines my colleagues Mr. Dechert and Ms. Simson have asked. Do you believe it's a fundamental right for foreigners to have access to Canadian information at the cost of Canadian taxpayers?

● (1720)

Mr. Christian Whalen: I would not go that far, but on balance, I think Canadian democracy would be better served by having an access to information regime that is not exclusive to Canadian residents or Canadian citizens.

Mr. Russ Hiebert: So you don't believe they have a right, but you like the idea of opening it up, perhaps at a fee?

Mr. Christian Whalen: Well, I think they should be consistent with the fees under the legislation.

Mr. Russ Hiebert: You talked about cabinet confidences. Do you believe that at some point cabinet confidences should be made available after a certain period of time has elapsed?

Mr. Christian Whalen: Yes, I do think so. I refer committee members to the recommendations of Professor Donald Savoie, who spent a fair bit of time in his report in New Brunswick on that issue and suggested a relaxation of the Westminster model and the traditional period of time during which cabinet confidences will remain confidential.

I think Canadians would benefit from some relaxation of those rules. Again, Mr. Marleau's recommendations, and certainly Professor Savoie's, are better references than I could provide to the committee.

Mr. Russ Hiebert: Now, we've talked a little bit about the high-volume users, though. And I'm not talking about people who make 10 or 20 applications a year, but the people who we've discovered actually consume 50% of the resources of the office. There's a very small number of them—less than, what, about a dozen—who made up 50% of the complaints, anyway.

Do you not think there should be a limit or some cost recovery for these extreme users?

Mr. Christian Whalen: Yes. I think that type of situation you're describing, in our view, is tantamount to an abuse of process. Had we that experience in New Brunswick, I think we would use powers under the Ombudsman Act to try to address it. I know that our colleagues in Newfoundland have been grappling with that type of issue, and it's been litigated before the courts just how far they can go with respect to provisions they have regarding frivolous and vexatious claims. I think it may be in part for those reasons that Mr. Marleau is recommending here some discretionary authority over which complaints to accept or not.

I think there's always a problem for an administrative tribunal or administrative decision-maker to invoke wording like "frivolous or vexatious claim". You've inviting contention. So the recommendation from Mr. Marleau may be most sensible.

Mr. Russ Hiebert: This is probably my last question.

Along those lines, when I think about these individuals—these characters that legitimately are using the system because it's been made available to them, but they absorb half the time provided by the officers to fill their requests—in many respects these individuals are placing themselves into our Canadian story. They're part of the action; they're part of the players. I don't understand why, when people go to that extreme, their behaviour should not become available to the public. These individuals, who are so involved in our government, why shouldn't their story be made public? Why should their number of requests and the nature of their requests—but not their identity—not be ATIable?

Mr. Christian Whalen: I haven't heard that suggestion before today, so I'd really have to take it under advisement. But it strikes me that it's a little bit of adopting a vendetta approach as a matter of public policy, so I'd be careful about that.

Mr. Russ Hiebert: But there's no vendetta here, because we're still talking about preserving their identity. We're simply saying just give us a little bit more information about who these individuals are. We still have a duty to provide the information without consideration of who's asking for the information.

Clearly, there's a number of public servants who have knowledge of who they are and the nature of their requests, because that's simply how the process works. But by the fact that they are so heavily engaged and take up so much of the government's resources, they are imposing themselves into the system. It would seem only fair that Canadians have the right to know who these individuals are.

Mr. Christian Whalen: I may have misunderstood your question. I'm still not clear, in fact, whether I agree with your suggested solution, but I think we're agreed there's a problem that has to be addressed.

● (1725)

The Chair: Mr. Whalen, I don't know what kind of latitude you have, but I promised to get you out of here as soon as I possibly could. Thank you, on behalf of the committee.

We had a little discussion before the meeting. I look forward to hearing from you. And I can tell you that the information you provided, as well as your response to the members' questions, has been extremely helpful to our work.

Thank you kindly. You're excused.

Mr. Christian Whalen: Thank you very much, Mr. Chairman.

The Chair: Colleagues, just to give you the benefit of what's happening next Monday, we have Christiane Ouimet, commissioner, Public Sector Integrity Canada. That was a request of Mr. Poilievre, I believe, that she appear before us.

We also will have on that agenda Mr. Poilievre's motion vis-à-vis Google Street View. By the way, I noticed in a news story that Google Street View was doing Ottawa, so obviously there have been some discussions and developments.

On Wednesday, we're very hopeful, but it hasn't been finalized, that the public safety minister, Mr. Van Loan, will be with us for the first hour. If that works, we will also deal with the draft report on privacy. Remember the 12 items we went through? I think we ought to have that preliminary discussion again.

You probably know we don't have the Privacy Commissioner herself coming back to see us until May 11.

Mr. Russ Hiebert: Mr. Chair, did we get a response from the people you sent that nasty letter to, asking them to reply with information? Have you received any information as a result of that inquiry?

The Chair: Oh, to all of the undertakings?

Mr. Russ Hiebert: To the people who promised to provide us information.

The Chair: I wasn't going to call some Canadian departments and their representatives nasty people.

Mr. Russ Hiebert: No, no, I said your letter was nasty; I didn't say they were nasty.

Some hon. members: Oh, oh!

Mr. Borys Wrzesnewskyj: There's a nasty streak to the chair; that's what he's saying about his letter writing.

Some hon. members: Oh, oh!

The Chair: No, no, I will circulate my letter; it will speak for itself.

The Canada Border Services Agency and the Canadian Security Intelligence Service have responded. The Treasury Board Secretariat, that is, Mr. Cochrane; the RCMP, or Chief Superintendent Paulson; and Justice Minister Nicholson have not responded. So two out of five have responded.

Mr. Russ Hiebert: I find it a little bit ironic that at a time when we've had discussions about the power to subpoena witnesses and the authority of Parliament, you're seeking to preserve our privileges, on the one hand; but on the other hand you're not willing to follow up even further to make sure that people fulfill the commitments they've made to this committee.

The Chair: I hear you and I understand. They made those commitments or undertakings, so we'll get you that information. Three of them have not responded, including a minister. You know I can't subpoena the minister. I could call for information. It could get a little bit messy.

However, in my own view, the bottom line is that the minister has indicated he will not be appearing before us again vis-à-vis the Privacy Act. What I said before still stands.

I encourage you and those who haven't read it to read his views on the current Privacy Act and its state of affairs. Once you've read that, I think you will understand more why I'm not terribly concerned about forcing out more information, because I doubt it's going to change the outcome of our work in any event. Okay?

We could continue to push, but I don't think it would be a good use of the time. We'll just take note of those who have decided not to respond to us. Maybe I might just get back to each of them and say that we are going to complete our work and haven't received a response, and say that if they are not going to respond, it's unfortunate, but we will be proceeding. But I'm not going to push in a formal way.

Okay, so we'll do—

● (1730)

Mr. Borys Wrzesnewskyj: Mr. Chair, on that point, it may not have an impact on the final report in a significant way. It may or may not. The odds are, you seem to be indicating, that it will not.

But there's a different principle at stake here. When commitments are made by institutions such as the RCMP to respond to a parliamentary committee, and if we are to function as an oversight body, when we allow these sorts of things to slide, it undermines the very roles and responsibilities we take on as parliamentarians and our committee work.

The Chair: Okay, let me help you there.

With regard to the Treasury Board Secretariat and the RCMP, in both cases we asked them to give us specific statements and reasons why they supported or didn't support the 10 items, because they didn't cover it in their testimony. They commented only on the ones that they wanted to and didn't comment on others, and weren't asked about others except at the very end...you know, we'll provide more testimony. I think they commented on the items that were really most relevant to them. It was not specific information that a member requested that was vital to understanding the essence of something. They ignored issues. They didn't want to talk about them and they have nothing to offer. I will accept that.

Your point is well taken, though. You have to take each on its own merit. We were trying to fill out a chart: here's what the various witnesses said on each of the 10 points. If some of them didn't give us details on all 10, do we push them to give us responses on matters that maybe are not relevant to them or on which they didn't think they had anything serious to offer? I don't consider that to be a major breach of withholding information. It's simply that they don't have any opinion. I suppose they could easily slough us off by saying they have no further opinion.

I'd rather save our clubs for bigger game. With regard to the minister, probably some more substantive meat to the request for him to provide information...but he's the minister. I think he has made his views fairly clear on this, so we'll move forward. We have him for the estimates. If anybody is bold enough, they could sneak in a little question or two on the Privacy Act at some point. But let's move on.

We'll try certainly with the Integrity Commissioner, Mr. Poilievre's motion, on the Wednesday. We'll be dealing with Mr. Van Loan, and possibly the 10 recommendations on privacy, to give us an idea and to get us prepared, because coming down within about a week and a half thereafter is our final meeting with the Privacy Commissioner herself. We'll have an idea of how the committee feels about these items, and we'll have one last go-around with the commissioner. Then we will have a subsequent meeting to discuss doing a report. We'll have a draft report and instructions for the researchers to do a draft report on our behalf, whether it's on an item-by-item basis or whether basically it will be what items to consider, a lot of people for and against—interesting. Notwithstanding that, I think they are worthy of consideration by your department vis-à-vis any potential changes to the Privacy Act.

It may be that simple, or it may be if there are one or two or three there that we really would like—because I thought we got some interesting stuff there. The justice department has been monitoring our activities and has all of the documents as well. It's helpful to them as well. But it will really ultimately be their call if there are going to be any amendments to the Privacy Act. We just have to get something to the House that says there are some interesting things on the table. To the extent that we respond or put in detail, that's up to the committee to decide. So we'll have that little discussion at the right time simply to make sure we continue to use the full two hours of our allotted committee time.

Okay, we are finished. Thank you.

The committee 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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