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Chair

Mr. Paul Szabo

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● (1535)

[*English*]

The Chair (Mr. Paul Szabo (Mississauga South, Lib.)): This is meeting 19 of the Standing Committee on Access to Information, Privacy, and Ethics. Our order of the day is to continue our work on Access to Information Act reform.

Today we're welcoming as our witnesses the Canadian Bar Association. We have Gaylene Schellenberg, a lawyer from the legislation and law reform directorate; David Fraser, vice-chair, national privacy and access law section; and Priscilla Platt, executive member, national privacy and access law section.

Welcome to all of you. It's always good to hear from the Canadian Bar Association on a variety of issues in a variety of committees. I know that you do a lot of work and are very helpful to Parliament and to its committees.

I understand you have some opening statements, and then we'll take questions from the members on the so-called quick fixes that were raised with us as a consequence of the report cards from Mr. Marleau.

Gaylene, were you going to start off?

Ms. Gaylene Schellenberg (Lawer, Legislation and Law Reform, Canadian Bar Association): I will.

Good afternoon. I'm Gaylene Schellenberg, a lawyer with the legislation and law reform directorate of the Canadian Bar Association.

The Canadian Bar Association is pleased to have this opportunity to present our views on reform of the Access to Information Act to you today. The CBA is a national association of over 38,000 lawyers, law students, notaries, and academics. An important aspect of the CBA's mandate is seeking improvement in the law and the administration of justice, and it is from this perspective that we appear before you today.

With me are two representatives of the CBA's national privacy and access to information law section, both of whom specialize in access to information law and privacy law. David Fraser is the current vice-chair of the section, and is from McInnes Cooper in Halifax, and Priscilla Platt is an executive member of the section from Heenan Blaikie in Toronto.

Mr. Fraser will begin with a general perspective, and Ms. Platt will then highlight some specific issues we've raised.

Mr. David Fraser (Vice-Chair, National Privacy and Access Law Section, Canadian Bar Association): Thank you very much for the opportunity to come and comment on this very important piece of legislation.

The history of the Canadian Bar Association's involvement with the legislation really goes back and predates the legislation itself. In 1979 the Canadian Bar Association actually passed a model bill related to access to information and privacy; that model bill had very strong similarities to what became the Access to Information Act and our federal Privacy Act.

In 1981 the Canadian Bar Association, with a special task force on access to information law and privacy, made a submission to the Standing Committee on Justice and Legal Affairs, and then subsequently made further submissions in 1986 as the legislation was in its infancy. In 1986 the CBA national council also passed a resolution endorsing the Access to Information Act.

We're here because we've been invited to make comments on the quick fixes, as Mr. Szabo just characterized them, and we do have comments on all of those quick fixes. We will also raise two other issues that we'd like to bring to the committee's attention.

You'll find that all these are basically consistent with everything the Canadian Bar Association has said about the Access to Information Act, and having re-read this morning the documents produced in the early 1980s, I found it interesting that a number of the issues pointed out at that time as being important for consideration still remain important considerations.

My colleague Priscilla is going to talk about the recommendations, or at least our responses to the so-called quick fixes, but first I'd like to bring to the committee's attention a topic that has been mentioned by previous witnesses but probably not discussed in great detail: the system that was known as CAIRS. It was a computerized system for the coordination of Access to Information Act requests. It had been in place for some time, but was discontinued by the Privy Council in May of 2008. It was a centralized system into which all Access to Information Act requests were entered, ostensibly for the management of those requests across the government.

It was discontinued in May of 2008 primarily because there was a perception of what's been called amber lighting, or red alert, so that politically sensitive Access to Information Act requests would go to the attention of the appropriate people in ministers' offices or to those on their communications staff.

The CBA's national privacy and access law section has considered the fact that it was discontinued, and has also carefully considered the fact that during the time it was in place, the system itself was subject to Access to Information Act requests. It was used by journalists and others with a strong interest in Access to Information Act issues in order to keep track of those issues and essentially be able to tell how the act itself was working and what sorts of requests were going through. It was an important insight into what was happening inside government.

The national privacy and access law section of the CBA thinks the system should be restored, and that it should in fact be restored in a wider way that would make all the information on it publicly accessible, other than information that would disclose sensitive personal information about requesters or information about individuals whose information is being requested.

This would be consistent with the Canadian Bar Association's view that the Access to Information Act, which has been characterized as quasi-constitutional by many courts and in a number of court cases, is a critical tool in making sure that our form of Canadian responsible government maintains the characteristic of being transparent and open to everybody. It increases accountability, and the restoration and expansion of this CAIRS system would go a long way towards doing that.

The second issue I'd like to touch on has only been touched on in a glancing way by some of the witnesses before this committee. It's the question of solicitor-client privilege. The Canadian Bar Association has obviously, and for quite some time, taken a very strong and consistent position in protection of solicitor-client privilege.

● (1540)

We would like to ask this committee, although it's not contained in any of the quick fixes, that if any of the suggestions coming out of this committee in its final report touch upon the important matter of solicitor-client privilege, it be done very carefully and in consideration of all the issues that this committee has already dealt with on that topic, and also consistent with the very high value placed on solicitor-client privilege in our legal and constitutional system.

Again, thank you very much for this opportunity. I'll hand it over to my colleague Priscilla.

Ms. Priscilla Platt (Executive Member, National Privacy and Access Law Section, Canadian Bar Association): Thank you very much.

I want to join my colleagues in thanking you for inviting the Canadian Bar Association to make comments to you today. We are very grateful.

I'm going to take you through the 12 recommendations the commissioner has made. I can tell you in advance that we have particular comments that are a little different in respect of recommendations 7, 8, and 11. We support recommendations 1 to 6 as they're drafted.

I can take you through them or I can just go to the ones for which we have specific alternative options, recommendations 7, 8, and 11. I'm in your hands.

The Chair: Why don't you very quickly summarize the main reason for support, but spend more time on those where you need to develop a position?

Ms. Priscilla Platt: In respect of recommendation 1, which is the recommendation that there should be a specificied period of review of every five years, the current situation under the act is, as you know, that it's supposed to be permanently reviewed, but there's no particular timeframe. That has caused some difficulty. I think it's wonderful that there is this special committee now, which reviews this particular statute. This is enormously helpful. It's very common, if you look across the country in a sort of environmental scan, to see that there is a review every five years. I think it might heighten the importance of making specific changes to the legislation in a regularized fashion.

As to recommendation 2, currently, as you know, you have to be present in Canada to make a request. That is easily circumvented through agents and so forth, which is, I understand, a substantial reason that one of the departments at Citizenship and Immigration gets a substantial number of requests. Individuals are asking for their own personal information, but they must do it through agents, and they do it under the Access to Information Act. If you look at the statutes across the country, there's no requirement for permanent residency or residency at all. In our submission, it's not something that is a modern take on this legislation; the legislation should be open to everyone. We're not entitled, under this legislation, to ask individuals where they live, where they're from, why they want it, and so forth. Our recommendation is to support this one.

On recommendation 3, we also support giving the Information Commissioner order-making power for administrative matters. These matters fall into a kind of limbo, because there's no recourse to the Federal Court, although there's no denial of access, and while the commissioner can make a recommendation, there's no real need to follow the recommendation under the current regime. We support giving the commissioner order-making power, but we note here that the Federal Court process would have to be revised accordingly. The current process is based on the assumption that there's an investigation report by the commissioner. If there are order-making powers, maybe there would be less recourse to the Federal Court, to an appeal on a question of law or something of that nature. We believe, as we note here, that there would need to be some thought given to how one would judicially review this power.

Recommendation 4 is the discretion to investigate complaints. This really involves giving the Information Commissioner power like that the Privacy Commissioner has under PIPEDA, which is the private sector privacy law, to not consider a complaint. Currently, anytime someone makes a complaint, the commissioner must investigate and render a report. There are examples here on page 4 indicating that under PIPEDA there are three grounds upon which a complaint may be disregarded: one is that the complaint is more appropriately dealt with by means of another procedure under our law; the next, that the length of time that has elapsed would make the matter moot; the other, that it is "trivial, frivolous, or vexatious", which is something that most commissioners have the power to deal with, as the courts do in terms of litigants. In our respectful submission, this would be appropriate for the Information Commissioner as well.

Recommendation 5 is giving the Information Commissioner the express power to conduct public education and research, where such power is express. Obviously, the commissioner would be doing this within the mandate. Right now, the act is silent in this respect.

Recommendation 6 is an advisory mandate for the Information Commissioner on legislative initiatives. We support this; we also offer other options for achieving it. One is of course through statute; there are examples of that in other jurisdictions in Canada. The other is through a Treasury Board policy, which might be equally effective.

● (1545)

On recommendation 7, we think there should be a bit more study before we can fully recommend this option. This has to do with the administrative records of the Senate, the House of Commons, the Library of Parliament, and the judicial branch. Here again, we note on page 6 of our submission....

I'm sure you're aware of the policy in 2006 of Treasury Board of proactive disclosure, which has been enormously successful. I don't think it is talked about enough in Canada, but the government-wide publication of travel and hospitality expenses was immediately successful as soon as it was implemented. There is no need to make an access request for this information; it is right on the website.

The submission of the CBA in this respect is that we should look to that as a model in respect of the administrative records of some of these entities. To say that you could exclude certain privileges and so forth would be very awkward, because as you know, with independent oversight, exclusions are reviewed by the commissioner, and you would get into records that ostensibly are not going to be covered. You want to disentangle the administrative from other records of the courts, etc., and it would be very hard to disentangle them from the process once they're involved. If the goal of this particular recommendation is to have more openness and transparency about, say, spending on the administrative side of these entities, that can be achieved, in our respectful submission, in the same way in which proactive disclosure was successful. We agree with what the commissioner is trying to achieve in terms of openness, but we disagree on the manner and suggest that other options should be reviewed.

In respect of recommendation 8, we agree again with the commissioner that the way cabinet records are dealt with currently is unsatisfactory. The problem we have is that it's not an exclusion, and you have the independent review by the commissioner. We disagree first of all when the commissioner suggests that it be a discretionary exemption. We, with respect, believe it should be a mandatory exemption. If it's discretionary, one government can make hay of it in respect of a former government's records. We believe it is appropriate for it to be mandatory. Cabinet confidence is essential for the Westminster style of government that we have, and the Supreme Court of Canada has commented on this very recently as well, in a case called Babcock. There has to be cabinet solidarity, and if cabinet ministers were concerned that they couldn't speak openly in cabinet for fear that their comments might be disclosed in some manner, that would not enhance our democracy in Canada.

What we're suggesting is that this be studied further, but also that if we wanted to look at this for the purposes of amendment, taking it out of the exclusion zone and putting it into the exemption area would be appropriate—but only if it's a mandatory exemption.

Secondly, the point we make on page 7 is important because, in contrast with the other jurisdictions in Canada, the federal government has national security records and records of diplomatic relations and other things of that nature that provinces and territories don't necessarily have. We believe that what the Supreme Court of Canada said in a case called Carey back in 1986 still holds true: that these records are different. In that case, the Supreme Court of Canada said that even judges shouldn't see those sorts of records, and maybe for a very long time.

We think those particular kinds of records could be carved out and maybe still remain an exclusion, but that the question certainly should be studied further in terms of an approach to those records.

In respect of recommendation 9, respecting the approval of the commissioner for extensions beyond 60 days, right now we have in section 9 of the Access to Information Act no limit on the extension. What we're saying is that if you look across the country, it's not uncommon to see a limit on the time for an extension, and we agree with the commissioner that there should be a timeframe for the length of time that a department can extend the time for responding to a request.

● (1550)

In recommendation 10, you'll find the timeframes for completing administrative investigations.

This is quite interesting, because there are other statutes, notably in British Columbia, that require all the investigations and decisions to be completed by the commissioner within a one-year period. This recommendation, which we support, is that the commissioner would have to respond within a particular timeframe only for administrative matters.

I have read some of the comments of other witnesses who have come before this committee, and I think the biggest criticisms now are on the huge delays, as they have indicated. Some of the delays of most concern are with regard to timeframes, fees, time extensions, and so forth. This would give the commissioner an obligation, once he receives a complaint, to respond within a fixed period of time. That might enhance the efficacy of the legislation. I know that the commissioner supports that.

Recommendation 11 has to do with direct recourse to the Federal Court for access refusals. This would take place in accordance with this recommendation if an individual made a request to a government department and the department declined. They, the individual requester, would then have a choice as to whether they wanted to complain to the commissioner or to go directly to Federal Court.

We agree again here that there's obviously a problem in responding quickly enough on these complaint matters, but we believe giving the commissioner the tools to undertake his mandate efficiently and appropriately is preferable to giving complainants direct recourse to the Federal Court.

Our prime concern is that most individuals would not have the wherewithal to get through the myriad of complexities of the Federal Court. Second, there would still be a delay in the Federal Court, as that's not immediate. Third, and I think most important, is that it would take an enormous amount of resources. Only the so-called wealthy, the requesters who have a lot of money, would be able to properly have recourse to the Federal Court, so we don't think it's the way to go.

In fact, if you look across the country, the more modern approach to all of this is to have binding order-making powers at the commissioner level and to have very limited recourse to the courts through judicial review only, and not through appeal. This would go against the kind of trend that is trying to establish itself, and some of your witnesses have already commented on the need to have a simpler, quicker process to resolve these issues.

Finally, recommendation 12 is a reference to time extensions for multiple and simultaneous requests from the same requester. In section 9 there are only two reasons for a time extension on the part of the department: when there is a large volume of requests to be searched or produced, or when consultations necessary to complete the request can't be completed within the timeframe. Experience across the country and in other jurisdictions in Canada has shown there are other reasons, legitimate reasons, for a department not to get to a request within 30 days, and that's not reflected here, so we support the commissioner's submission in this respect as well.

We recognize that some of these recommendations and some of the things we have suggested may have certain resource implications, but as my colleague David has indicated, we think the legislation is very important for the strength of our democracy. We think these recommendations, at the very least, are appropriate.

Thank you very much.

● (1555)

The Chair: Thank you, and thank you for recognizing that we weren't doing a comprehensive review of the entire act. This really, as you know, spawned out of the last series of report cards, in which there were some difficulties in some areas. These quick fixes are somewhat a split between administrative and legislative.

I'm not sure whether there is any consensus that could be reached, or whether or not any or all of these are going to have the intended results. But they do at least call for a more consistent and regular review. I don't know how you feel. Maybe in your answers to the members you can deal with such things as whether, if we did a five-year review, it would deal with the fact that we haven't had a serious review of the entire act. And how does that happen? It might be beyond the scope of a parliamentary committee that has other responsibilities; it takes up a fair a bit of resources and expertise.

I'm sure the members have lots of questions for you, so we're going to go right to those.

We're going to start with Mr. Wrzesnewskyj, please.

Mr. Borys Wrzesnewskyj (Etobicoke Centre, Lib.): Thank you, Chair.

I'd like to thank the panel of witnesses for their submission and the expertise they bring to the table.

As the chair has noted, these recommendations are continuously referred to as “quick fixes”. My worry is that what we're proposing —and it's clear that this is what we're proposing—is an attempt to temporarily solve what is a real issue and a real problem, a problem that goes to the very principles of our democratic system: the transparency of government.

Some of the other terminology that's been used by witnesses before the committee when referring to our access to information system as it currently is includes calling it ineffective, an embarrassment. The access to information ombudsman for New Brunswick stated that the very officials who are to help expedite have evolved into a very different role when it comes to access to information: they've become gatekeepers.

We hear constant reference to the fact that members of Parliament, elected officials acting on behalf of the electorate, are amber-lighted. The commissioner himself has said that this whole section has a “culture of non-disclosure”, the exact opposite of what we're looking to achieve. In an interview on February 9, he even pointed a finger; he said, “My understanding is there is a stranglehold in the centre on communications”, referring to the PCO.

My worry is that we'll put these proposals forward but we are really not addressing the fundamental issue here: that this system is currently dysfunctional. It's actually doing the opposite of what was intended a quarter century ago when it was enacted.

I thank you for the expertise you've brought on each one of these quick fixes, but I'm more interested in your preamble. In your preamble you noted that this is quasi-constitutional. It actually zeros in on a fundamental principle. In fact, a very different regime has come into power in the United States, with a very different approach from that of the previous regime. President Barack Obama—you quoted him in your preamble—stated that "A democracy requires accountability, and accountability requires transparency." And then, referring to their legislation, he goes on: "In our democracy, the Freedom of Information Act...which encourages accountability through transparency, is the most prominent expression of a profound national commitment to ensuring an open government."

Do you see these quick fixes as demonstrating, on our behalf, a profound commitment to this fundamental principle of ensuring that our government here in Canada is an open government as well?

● (1600)

Mr. David Fraser: We agree entirely that this piece of legislation is critical. It's a critical tool for citizens to fully participate in the democracy we have. Our governments are accountable to the electorate at election time. This piece of legislation is a critical window into the operations of government, so that when it's time to cast their ballot, the citizens fully understand what it is that the government has been doing and is able to call the government to account on a regular basis between elections.

Our committee would have preferred to see a comprehensive review of the Access to Information Act, similar to what we called for with the Privacy Act. We were somewhat constrained by what appeared to be the parameters of the discussion here, which is to take a look at these quick fixes.

In this instance, I can only speak on my own behalf, rather than on behalf of the CBA. Do I expect that, with the implementation of all of these recommendations—the ones we support from the commissioner and the ones we have put forward—we will we have a spectacular improvement in the administration of this legislation and in the transparency and accountability of government? I do not expect it to the extent to which I think a significant number of people would like to see it go. These will make marked improvements but will not go to the core of the sentiments you were just repeating from other witnesses.

Ms. Priscilla Platt: A lot of these recommendations will enhance openness. If you want to have a wholesale review of the legislation, these recommendations might get you where you want to go, if the act were required to be reviewed every five years. There are gradations. All of this legislation, if I look across the country over the years I've been working in this area, starts off in one way, and as the technology and the times move, slowly moves over. There's often inertia. This would be one step; it's not perfect.

Mr. Borys Wrzesnewskyj: The judicial branch of government works under the principle of an open court system. Everything gets put out there. With the exemption of cabinet confidences within the parameters that you've suggested, how would you feel about that same principle having been applied 25 years ago? Once again, the mechanics just didn't allow it: we had to have physical access to information sections within buildings; we needed someone at the door to help expedite; etc.

It's also very handy to keep information isolated, and because there's a procedural aspect, it has become a procedural way of delaying and stopping. I referenced amber-lighting of members of Parliament's requests. With the current situation, I have numerous examples of not month-long but year-long delays of requests from members of Parliament on substantive and important issues of public interest.

Shouldn't we move to a modern system whereby we can just post all this information? We should just revamp the whole system. What are your thoughts on that?

● (1605)

Ms. Priscilla Platt: I think we could be using technology much better. I mention this proactive disclosure example from 2006 with Treasury Board. It's been enormously successful. Everyone's always interested. We all know what prompted the interest in how much people spent for their lunches and so forth: it was taxpayers' dollars.

We could use that system in some of the ways we're recommending here to make the system more open, without requiring people to go through even an access request at all. I think President Obama spoke about that too, of using technology to achieve more transparency at a time when we have the means to do it —not of everything immediately, cabinet being a good example. In the policy development process, you can't say...or you could, I suppose, but most jurisdictions in most democracies allow public service to develop policy in confidence until it's at some point when they can disclose it or get input from members of the public. There are reasons for some exemptions, but I agree with you that we could use technology much better to achieve transparency.

The Chair: Thank you.

[*Translation*]

Mr. Nadeau, it's your turn.

Mr. Richard Nadeau (Gatineau, BQ): Thank you, Mr. Chairman.

Good afternoon, Ms. Platt, Ms. Schellenberg and Mr. Fraser. I find it interesting that you quote Mr. Barack Hussein Obama in your brief. That's good; it's a breath of fresh air from the south. I'd like to know whether we could also cite our previous prime ministers, if they said as much about such fundamental things as access to information. That will be a job for later.

When I think of the Access to Information Act, the image I have is that of an individual who, in accordance with the rules he must obey because he is a government employee, draws lines on sheets of paper with a big marker pen to make sure no one has access to much in that document, but the semi-colons don't disappear.

The minister recently appeared before the committee. We asked him when his government would be introducing a new access to information bill to modernize the current act. Requests have been made for that purpose for 20 years now, if not more. The committee has even introduced motions in the House of Commons asking the minister to table a bill to modernize access to information by May 31, 2009. Just back from Niagara Falls, he absolutely wanted to have nothing to do with it. It was a case of logorrhea in a desert of ideas, which boiled down to the fact that it was out of the question.

The fact nevertheless remains that you've done a certain amount of work. I was a good student; I read your brief. I'm a teacher by training, not a lawyer. I found your remarks interesting. Ms. Pratt, earlier you made a good presentation. If I had to make a brief comment, I would say thank you very much for the work you've done with regard to Mr. Marleau's remarks.

Today, we know that Mr. John Reid, Mr. Marleau's predecessor, previously drafted a bill to suggest amendments to the Access to Information Act. Historically, you probably know more about the subject than I do. You don't seem to agree on Mr. Marleau's three recommendations. You agree on certain points, such as points 7, 8 and 11, which you cited earlier, which deserve to be reconsidered, in your view.

For my part, I wonder about point 8, which concerns Cabinet. If I correctly understood the documentation I read for the meeting with the present Minister of Justice, Mr. Nicholson, in some Canadian provinces, people have access to documents from the cabinets of those provinces. Are you aware of that situation? If that's the case, why would people be able to access those documents at the provincial level, but not the federal level? I'm speaking to the three of you. You're experts.

● (1610)

[*English*]

Ms. Priscilla Platt: Well, I think the issue about cabinet records is that under the Access to Information Act here federally, it's an exclusion, and there is a certification process to determine whether in fact it's a cabinet record. Either the Clerk of the Privy Council or the Attorney General certifies it, etc.

The same process does not exist anywhere else in Canada that I'm aware of. Most of the time it's an exemption, as opposed to an exclusion, so it's like any other record: the person makes a request, and if it involves a cabinet record, they come back saying that it's exempt based on this cabinet record exemption. In most provinces they have a right to appeal to a commissioner, and the commissioner views the record and makes a determination.

I don't think it's the case anywhere in Canada that cabinet records are open. I know that in British Columbia they do post certain cabinet decisions on the Internet, and you can see in the Access to Information Act that there are some exceptions to the exclusion—which means it falls within the act—for decisions that have already been made by cabinet if the record is 20 years old or if the decision was made in the four years....

I forget; I'd have to look at it. In other words, there are some exceptions that fall within the act, as opposed to its being excluded. I think that's the real distinction in the federal act.

The exceptions occur if the decision discussion papers have been made public, if it's been four years since the decision's been made, or if the records are over 20 years of age. In Ontario, for example, if the record is over 20 years of age, it's not exempt. Typically cabinet records fall into exemptions, and the difference here in the federal government is that it's an exclusion, which means it doesn't even fall within the act at all, as long as it's truly a cabinet record.

[*Translation*]

Mr. Richard Nadeau: At the federal level, it's 30 years for Cabinet secrets, isn't it?

[*English*]

Ms. Priscilla Platt: Well, it says here that it's confidences that have been in existence for more than 20 years. Then the exclusion doesn't apply, and it falls within the act. It may still be exempt under some other exemption, or it may be disclosed. Twenty years is what is common at the moment.

[*Translation*]

Mr. Richard Nadeau: It wasn't until 2000 that we were able to know more about the decisions made by the Trudeau government during the October crisis in 1970, when taxi drivers, poets and other individuals were imprisoned for reasons we can understand. Citizens were stripped of their fundamental rights, and we nevertheless had to wait 30 years to realize that those decisions were completely random and partisan.

In Recommendation 11, Mr. Marleau suggests allowing requesters direct recourse to the Federal Court for access refusals. However, you downplay that recommendation. Can you give us a further explanation?

[*English*]

Ms. Priscilla Platt: Our main concern about Federal Court access is that it is expensive and complex. Our view is that we should explore other avenues, because the trend across the country is to have quicker and simpler recourse to some kind of adjudication.

For example, if a department refused access, the trend across the country is that there's a binding order. You go to a commissioner or a tribunal or to specialized expertise; you get a decision quickly, and that's it. If you have to go to court after that, it's in a very narrow context.

To tell people who haven't got what they wanted from a department that they can go directly to the Federal Court would require revising all the provisions that now envisage going to the Federal Court under the act, because it's all predicated on going to the commissioner first, getting an investigation, getting a report, and having a summary hearing. You'd have a whole different process.

Second, it would be very costly. Not every requester could afford to go there, so you would have two levels of justice. Most folks would still have to go to the commissioner because they wouldn't be able to afford to go to the courts, and the ones who could afford it would go to the courts to get a different resolution. The CBA feels that wouldn't be fair and is not an appropriate way to deal with the backlog. If there is a backlog and a difficulty getting resolution from the commissioner, we should ensure that the commissioner has the tools to do his job.

● (1615)

The Chair: Thank you.

[*Translation*]

Mr. Richard Nadeau: Thank you, Mr. Chairman.

[*English*]

The Chair: Mr. Siksay, please.

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

Thanks to all of you for being here today. It's been very helpful.

Ms. Platt, just to follow up on what you were saying in terms of the commissioner being given the appropriate tools in that case, one of them, as you suggested, was the order-making power. There has been some concern expressed that when you give the commissioner order-making power, things end up in court anyway. Have you seen any evidence in other jurisdictions where the order-making power exists that it also involves a lot of cases ending up in court anyway, clogging the courts or putting a burden on them?

Ms. Priscilla Platt: No. I think you have to look at the numbers.

I'm very familiar with Ontario. I've worked in that system for 20 years, and I can tell you that there are very few judicial reviews relative to the number of decisions the commissioner makes. In Ontario, the commissioner makes about 40 decisions a month. I'd have to say that if one of those is judicially reviewed every month, that would be a lot. It's very rare.

Also, because they are judicial reviews and not appeals, the courts give a lot of deference to the commissioner for his or her expertise, and it's very difficult to be successful on a judicial review. As a matter of recourse, most people get a fairly quick and final decision from the commissioner and then go away. And they usually go away happy—happy in the sense that they got recourse to justice, that they got an adjudication.

I know that the commissioner here is not requesting order-making power across the board. Of course, there are huge resource implications, but he is asking for it in a manner that I think would assist with the backlog, because on those particular matters, there is no recourse to the court in any event.

Mr. Bill Siksay: Are there other tools that would be helpful in dealing with the backlog, tools that you haven't talked about in the brief or that you might know from other jurisdictions?

Ms. Priscilla Platt: Well, I know that a certain amount of resources is required to get the job done, and I think at the federal level there is a myriad of things one could consider. One of them is having more proactive disclosure, because if you have more proactive disclosure, you're going to have the need for fewer requests.

I think there should be and must ways in which—and I say this with the greatest respect to Treasury Board—to ensure that deputy ministers are required to find ways to be more open. Certainly they've tried to find ways in Ontario. There are ways within the public service where you can achieve that without even having to resort to statutory amendment.

Mr. Bill Siksay: Offhand, can you think of an example where this kind of initiative has been taken in the public service, an initiative that you found helpful?

Ms. Priscilla Platt: As I've mentioned a couple of times now, there is the proactive disclosure for hospitality. I think it's a model for this country. As much as the Access to Information Act is antiquated now in many respects, that is a model, and that is using the technology. There is no need to make an access request for these things.

In most of the country, we're still making access requests for expense claims of public servants and elected officials. We shouldn't be doing that.

Mr. Bill Siksay: Mr. Fraser, you mentioned the CAIRS management system and how the Bar Association sees that as having been a helpful thing. You mentioned that it seemed as though one of the concerns with its discontinuance was around amber-lighting. Do you want to say a bit more about that? Or were there other concerns raised about the system when it was discontinued? Was amber-lighting one of the key ones?

Mr. David Fraser: My understanding is that, at least of the reasons put forward publicly, it was the concern about amber-lighting. It was the fact that it was a system that might have been used in order to flag politically sensitive or otherwise problematic access to information requests for special attention or special treatment. That may in fact have completely been the case.

But in connection with your previous question about efficiency, one of the advantages of a system like that, which keeps track of access to information requests across the country or throughout the federal government and crown corporations, would be in order to determine what sort of information is being asked for routinely.

If you think of the incremental cost of having to deal with an individual access request for the same sort of information over and over again, contrast that to having a policy within a government department or across the government to proactively disclose that information on a monthly basis—all policy documents related to whatever—and put them on a website. All of a sudden you're taking information out of a system that's currently overburdened and putting that sort of information disclosure into a completely separate column that's more efficient.

One could also keep track of on what date the request was received and on what date it was responded to, even at the largest level, in order to call to account government as a whole and also individual departments for the amount of time that it is taking to process these requests.

● (1620)

Mr. Bill Siksay: So it might have been a baby with the bathwater kind of situation, where you address one problem and we lose out on a whole other area of possibilities?

Mr. David Fraser: I think that's a good way to characterize it.

Mr. Bill Siksay: There's been some concern raised about the request around discretion to investigate complaints and to dismiss a complaint as trivial, frivolous, or vexatious. Have you seen any indication in other jurisdictions where that power exists, that it's been a problem in terms of dismissing legitimate complaints?

Ms. Priscilla Platt: In most jurisdictions the commissioner has the power, at least in respect of frivolous and vexatious, as does the court. It's not abused. As far as I can see, it's very judiciously dealt with. But it is useful, because there are individuals who would try to monopolize the system and overwhelm it.

It's very easy to overwhelm the system when you only have to pay five dollars, or whatever the minimal amount, to make a request. It's very easy to see that it could be used in negative ways. But I don't think it's abused, in my experience, in any event.

Mr. Bill Siksay: You said frivolous or vexatious, but is “trivial” necessarily a word used in other jurisdictions?

Ms. Priscilla Platt: Well, ”trivial” is used, yes, from time to time.

Mr. Bill Siksay: Okay. I didn't know if there was some importance to that or not.

Ms. Priscilla Platt: No.

The Chair: Last question.

Mr. Bill Siksay: Similarly, in terms of dealing with large volumes of requests from a single requester, are there concerns about denying access on the basis that you make multiple requests? What's your experience of multiple requesters, and why do those situations arise?

Ms. Priscilla Platt: We have experience in Ontario where our commissioner in Ontario has had to deal with situations—not frequently—where somebody is asking for the same record over and over again and it is overwhelming the system, because they have to go and get it and they have to process it.

One of the things that has been done about these individuals is to say they can make two requests in a certain period, which is hard to manage, but at least they've been told. So this allows for other people to make requests. If you have no provision like that, then someone can make a thousand requests a day if they're inclined to, and everyone else is using the system properly.

I'm not saying making a lot of requests is not proper, but it can be an abuse, and this is a way of managing this so that resources are fairly used by everyone and can be available for everyone.

Mr. Bill Siksay: Thank you.

The Chair: Thank you.

Mrs. Block, please.

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

Thank you to our witnesses for joining us today.

I couldn't help but note in the comments made by Mr. Wrzesnewskyj that he pointed to the leadership of President Obama. I guess our Liberal colleagues are continuing to look to the United States for leadership. What I want to do is bring us back to the leadership that's been provided here in Canada.

My first question is in regard to recommendation 1, and it doesn't matter to me which one of you answers it. Maybe you all want to take a turn at it. The Information Commissioner recommends that Parliament review the ATIA every five years. Is it not true that the reforms made by the Conservative Federal Accountability Act are the most significant reforms to the ATIA since the act was passed in 1983?

● (1625)

Ms. Priscilla Platt: They are significant, and in particular, subsection 4.(2.1), which requires there to be assistance provided to requesters. There are a number of them, but they aren't a comprehensive review of the legislation. It did extend to 67 more crown agencies, which is very good, but it also had a lot of exemptions in there for those particular ones.

In other words, it did a lot of very positive things, but I think what recommendation 1 is meant to address is this. It's comparable to other jurisdictions in Canada, where there's an express requirement to review every five years, and that may enable a more comprehensive review of the act. I agree that this was very significant, but the question is did it address the particulars of the act, as some of the members here have been raising the issue around using the Internet more? Again, in 2006 that proactive disclosure was a good example, but can we do better? Can we make things more transparent and modernize the act to achieve openness and maybe curtail the number of requests in that respect? If everything's open and things are there, you'll still have requests, but you may not have the numbers you have today.

Mrs. Kelly Block: Thank you.

Mr. David Fraser: The only thing that I would add to that is that given the nature of the legislation and its importance in terms of the transparency and accountability of government, it's obviously in our view a very important piece of legislation. It gives citizens, residents, and even members of Parliament the ability to find out what is happening inside government.

It relates very strongly to how government operates. It needs to keep pace with the way the government operates in order to make sure that the two sides, the government side and the access side, actually work well together. Since the early 1980s the amount of information in government and how it's managed has changed dramatically. One would expect that the pace of that change is going to continue, if not accelerate.

So given the importance of this legislation, it makes a lot of sense to periodically take a quick look, or a comprehensive look, to make sure that this important piece of legislation is keeping up with the machinery of government.

Mrs. Kelly Block: So given the actions taken by this government in just over three years—we added 69 organizations that are subject to the Access to Information Act—would it be fair to say that we are following the recommendations in practice anyway?

Ms. Priscilla Platt: I think it's laudable, the amendments that have been made and extending the access regime to a whole host of other entities that get public funding and so forth. But even these recommendations do not touch on a wholesale review of the legislation. The purpose of recommendation number one is to ensure that the very good things that have been done here—in the last three years, for example—can be reviewed. Everything can be reviewed. The act can be improved even more so, to the point where it is efficient and it is a model for Canada. I think that's the goal of recommendation number one.

Mrs. Kelly Block: Thank you.

I'm also interested in asking questions about recommendation number four. In his testimony before this committee on Monday, the Minister of Justice cautioned that recommendation number four and recommendation number 11 appear to be in conflict. Given this fact, would you recommend moving forward with number four and number 11?

Ms. Priscilla Platt: We see number 11 a little differently, as I've indicated. We don't think that is the way to go in terms of direct. I read the honourable minister's comments, and if you say to people that they can go to the federal court in order to get justice.... I guess we're saying that it would be better if the commissioner had the tools to expeditiously resolve complaints, as was intended.

As far as number four, I guess we would respectfully disagree that it is going to hamper access to justice. To say that requests are moot by the time they get to the commissioner—so even if they're resolved, they would be meaningless, because the time has expired, the person got the record or whatever.... To say the commissioner should never have any tools to investigate.... It's not always a black and white situation where this person is going to be deprived of access to justice.

It's a sensible and reasonable approach. In fact—and I'd have to say that I'm sure the minister is aware—even the courts can dismiss actions if they're frivolous and vexatious. Those are the words used in the courts. I think these are there for good reason. One of the reasons that we're suggesting here is the individual complainants have other recourse under our laws. So I'm just saying they wouldn't deprive them of access to justice—quite the contrary.

● (1630)

Mrs. Kelly Block: Okay. You have made mention of your support for recommendation number four, in which the Information Commissioner is seeking discretion on whether to investigate. Are you not concerned that he might be able to use this power for partisan purposes? Does this not risk politicizing his office?

Ms. Priscilla Platt: I think that could be said about anything that you say a commissioner might do. I don't think there's an implication that would be the case.

If you look at the rationale that we have suggested here for why he would not, it's the same as the ones under PIPEDA. The same could be said of anyone, like the Privacy Commissioner, etc. These are the standard kinds of grounds. If you're concerned about that, then there could always be recourse to the court, I suppose, if he decides not to investigate a complaint based on one of these grounds.

In Ontario the commissioner has the ability to not hear appeals. If the person was inclined, that decision could be challenged in the courts through judicial review.

The Chair: To comment on that point, the issues with regard to officers of Parliament are kind of interesting. It's a separate group, and a very distinguished group, but they also serve at pleasure, to the extent that if there would be a loss of confidence on behalf of Parliament, they could be removed. So there is some safeguard in the system.

We're going to the second round. We're at five minutes. I understand that Mr. Wrzesnewskyj's going to split his time with Ms. Duncan, who's joining us today.

Welcome, Ms. Duncan.

Mr. Wrzesnewskyj.

Mr. Borys Wrzesnewskyj: Thank you, Chair.

I'd like to begin by thanking Ms. Block for noting that the Liberal Party has an open mind when it comes to looking to other jurisdictions for best practices, whether they're provincial or as mentioned in previous submissions, with mention being made of New Zealand having, once again, this proactive, open system, where you post things proactively.

We certainly do align ourselves with the principles that the Canadian Bar Association stated in their preamble when they referenced the current President, Mr. Obama, about the importance of transparency in a democracy. Unfortunately, the current government seems to be aligning itself and standing shoulder to shoulder with the previous administration, whose guiding principle seemed to be the opposite—secrecy.

Let's see if there's actual support for that type of premise. Looking at some 200 requests submitted since May 2007, up to this point right now, 25 of those remain unprocessed, meaning they're still outstanding. Let me give you examples. These are things that are of fundamental public interest. If not addressed, they undermine public confidence in democracy, in our government.

One of those requests was to the Department of National Defence for information on the acquisition of Chinook helicopters. It's been delayed 330 days. That deals with the whole issue of how we go about our military contracting. There are two requests to the Department of Foreign Affairs for information on detainee transfers. Those requests have been delayed for 290 days. That goes to the fundamental principle of whether we support our proclamations of support for human rights.

There are substantive principles at issue here.

When I look at these quick fixes, quick fix number nine, I believe, is the recommendation that the commissioner be required to provide extensions past 60 days. Yet there are no penalties and no way for him to guarantee that's going to happen. When we look at the record, we see that we've gone from 30-day or 60-day periods under the previous Liberal government to, currently, 150 to 250 days.

If a government's intent really is secrecy, and if their modus operandi is secretive, if that's the guiding principle of a Prime Minister and his operatives within a PMO and PCO, will these quick fixes actually work? For instance, in number nine, if we say, well, we're going to tell the commissioner he has to give permission, but right now virtually nothing happens within 60 days, why pass a recommendation that's just going to get ignored unless there are some firm penalties that are attached to this, or at least some way of shaming a government, of publicly exposing a government in a way that would make it move?

Could I just have your thoughts on this?

● (1635)

Ms. Priscilla Platt: I guess the idea of this particular one is that they would have to respond within 60 days and they would have to actually take an affirmative step in order to get permission to go beyond there, which they don't have to do right now. Right now, it's just sort of in limbo.

I agree with you that there are other mechanisms one could use in order to ensure that departments respond in a reasonable time. This particular one might be of assistance. It doesn't mean they'll always get the approval. If they don't get the approval, presumably they'd have to respond. I realize what you're saying: there's no penalty.

Mr. Borys Wrzesnewskyj: If the average right now is 150 to 250 days, when it's questioned why it's taking so long and the answer we get over and over—nine of ten times, departments answer today that it's in PCO consultations....

The Chair: I'll have to stop you there. You're past time.

Maybe you can give a quick rebuttal.

Ms. Priscilla Platt: I think it might be worth exploring other options in addition to these things that might achieve the goal, in the end, of getting a quick response.

The Chair: Mr. Dechert, please.

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

Mr. Chair, I was interested earlier to hear Monsieur Nadeau's comments about a former Liberal government arresting and detaining taxi drivers for partisan purposes. Perhaps that's something this committee could study at some point in the future. We might want to examine that.

The Chair: I'm sure our steering committee will consider all reasonable requests.

Mr. Bob Dechert: I appreciate it and just want to know we're raising that.

Good afternoon, ladies and gentlemen.

Mr. Fraser, you mentioned the CAIRS system and the practice of amber-lighting. Can you tell us when the CAIRS system and that practice was introduced?

Mr. David Fraser: I don't have that information.

Mr. Bob Dechert: It would have been several years ago. I think in your brief you said it was eliminated in May 2008.

Mr. David Fraser: It was. The system was discontinued as being mandatory for entering access to information requests in May 2008.

Mr. Bob Dechert: Do you believe it was in place prior to 2006?

Mr. David Fraser: I don't know.

Mr. Bob Dechert: Thank you very much.

Earlier, Ms. Platt mentioned it's easy to overwhelm the system we currently have, especially given there's only a $5 fee. The Information Commissioner has told us that the workload of the government in terms of complying to access to information requests has increased dramatically in the last couple of years and the complaints to his office have increased dramatically. He also told us that the average cost of complying with access to information requests is about $1,425. One of the recommendations is that the access to information system be opened up to everyone in the world, not just Canadians. I have a number of questions, if we were to do that.

First, how would you handle a Canadian request versus a request from somewhere else in the world? Do you think Canadians, given they're funding this rather expensive access to information system, deserve some kind of priority in response, or should they wait until several million other requests, perhaps, were fulfilled from abroad?

Secondly, there are commercial users of the system, as the commissioner mentioned. He mentioned there were a number of users he would describe as data brokers who are in the commercial business of requesting information from the government and then reselling that information to their customers. Should they pay a different fee?

Thirdly, how would you handle the multiple requests from a single user? There was a gentleman who made submissions to this committee a few weeks ago who said he personally made several hundred requests per year on average. I believe he was in a business of looking for information, writing stories, and then selling stories to news organizations.

Perhaps you could give us a sense of how you would handle those situations if we were to open it up to everyone, unfettered, worldwide.

● (1640)

Ms. Priscilla Platt: First of all, I don't think there's another jurisdiction in Canada that restrains the right of access to anyone who has to be a resident or residing in Canada. Even as it is now, it's not just Canadian citizens; it's just someone who happens to be here at the moment. I think there's awkwardness in applying the access to information scheme if we ask people why they want it, if they want it for commercial or personal purposes, or if they're a Canadian citizen. All of that doesn't work in an access scheme. Yes, we might get more requests. It's not clear to me that we necessarily would, from around the world, just because we would take that requirement out of it, which is why we're supporting recommendation 1.

That's why I think the five-year review would be so useful. Let's have a mechanism for looking at the whole act to see, first of all, if we can make more things publicly available to avoid people having to make access requests. Can we investigate other ways in which we can be more open and transparent rather than having to go through the access regime? Then just leave the processing of requests for the very significant things like cabinet and things we want to protect for legitimate reasons for a fixed period of time. That would require looking at the whole act.

If we take just one side of the act and imagine that someone from China or someone else might want to make a request, whether that's fair, I think because of this legislation it's impossible to know who's really behind the request and why they want it.

Mr. Bob Dechert: They're not about to put at least one step in the way if they want information from the Canadian government. They have to at least find someone in Canada to make that request.

You mentioned that in Ontario they have the right to limit the number of requests from an individual for a certain period of time. Is that something you would recommend the federal system adopt?

Ms. Priscilla Platt: It's under the frivolous and vexatious provision, so it's rarely used. It's not just based on the fact that someone made a hundred requests. They may have made a hundred perfectly legitimate requests for different records because they were very interested.

Mr. Bob Dechert: So you wouldn't make any special rule for someone who was making say 500 or 1,000 requests a year at $5 per request, where each one of the requests will cost the taxpayers of Canada $1,400 more to respond to?

Ms. Priscilla Platt: I think we're saying here with these quick fixes that we're supporting the CBA's recommendation on recommendation 1 to open it and take out the residency requirement, which is being avoided anyway through using third parties and so forth. But at the same time, we're supporting a review of the act in five years because of the very things you're suggesting. If people could go to a website and get a lot of information they're currently getting through access requests, you wouldn't have the stark problems of the cost of processing, the delays, etc.

● (1645)

Mr. Bob Dechert: Of course there are privacy implications, so a lot of information would have to be protected for privacy reasons.

On the fees, you mentioned that $5 was rather low. Would you suggest a higher fee?

The Chair: Excuse me. Good try, but we're going to Madam Thi Lac right now.

[*Translation*]

Mrs. Ève-Mary Thaï Thi Lac (Saint-Hyacinthe—Bagot, BQ): Good afternoon everyone and thank you for being here.

I'm going to ask my general questions, and you will decide who should answer them.

Earlier we talked about people who make numerous requests and it was said that a new management method had to be found to prevent abuses. However, we know that the media are major users of the Access to Information Act and that their role is to inform the public. To document and inform the public by respecting their code of ethics, journalists must obtain documentation and report true and verified facts. You talked about abuses. What are they? Witnesses have often told us that the media make excessive use of access requests. Do you think this is an abuse or simply a form of professional ethics that journalists have established for themselves by validating the information they report?

In the same line of thinking, as my colleague said so well, under the current disclosure process, when we request information, it is virtually struck out and the information we need isn't there. It isn't unusual for one of us who submits a request to have to repeat the same request in order to obtain additional information. I believe that also contributes to an increase in the workload of the commissioner's office.

[*English*]

Ms. Priscilla Platt: In response to your first question, the frivolous and vexatious provision, as it's applied by the courts and in other jurisdictions where they have this type of legislation, requires bad faith. These are not instances where the media or individuals are making requests for information that is important. These are situations where individuals are asking for the same thing over and over again. Usually it's very rare to make a finding of frivolous and vexatious. There must be sufficient evidence to discern that they are abusing the system because there is bad faith involved. This would not be applicable to the media, as you've outlined, or to individuals who simply want information. They're entitled to ask for it.

On your second question, about redaction, that's a good point. It goes to the recommendation of the CBA and the commissioner for a review of the legislation to modernize the manner in which information is made available, what exemptions should apply, and how they should be managed, etc. These are all things that in the modern technological age can be facilitated in a way that wasn't envisaged when this act was crafted.

Mr. David Fraser: Perhaps I could just add one thing that's interesting in the context of the act as a whole. When it was originally introduced it wasn't meant to be the only way that people could get access to information about what's happening in the government. It was meant to be a bit of a backup for general openness and transparency.

I think a lot of efficiencies can be gained by improvements on the government side and within the operations of government to make it easier for people to actually get the information that they're wanting and to make it less confrontational between the government and the people who are asking for the information. In many cases you're dealing with individuals who don't exactly know what the record looks like that they want to have access to, because they haven't seen it in the first place. So they craft an access request as well as they can, in many cases not understanding how government records are kept. That request is not completely responsive and they get back something that's redacted or something that is not what they're looking for.

If there were greater assistance offered to individuals, even though we now have an obligation on the part of the department to assist, I think some of these access requests.... Two or three access requests, one after the other, at a cost of over $1,000 each, as we're told, could be whittled down to just one. The individual who's looking for the information will ultimately get the information they're looking for, and they'll be happy with it at the end of the day and it will be at much less cost.

● (1650)

The Chair: Madame, *je suis désolé*, we have to move on.

Mr. Braid, please.

Mr. Peter Braid (Kitchener—Waterloo, CPC): Thank you, Mr. Chair.

I'm of course just parachuted in today as a substitute. I've quickly read some of the material.

Thank you very much to the witnesses for being here this afternoon and as always for the very thoughtful perspective of the CBA.

I just wanted to focus on two areas, first of all, with respect to recommendation 5. Again, I profess I'm new to this issue, but I have some dismay that there might be a burning desire out in the Canadian public to learn more about access to information. Could you elaborate a little bit on perhaps what might be behind this recommendation and what the goals and the purpose of public education in this area might be and what they might achieve?

Ms. Priscilla Platt: Well, for example, in Ontario they go into schools, they go into libraries, and they educate people on their rights under the legislation and on what it means to be in a democracy and so forth, and it's very useful.

It's one thing to have legislation that allows you to do something and then have only a very small percentage of the population that knows this. I think what's really behind this is the commissioner wants express ability to do some of what he's already doing through his website and through speeches and various things that he does. Giving him the express opportunity to do this as part of his jurisdiction means he can do it in a more comprehensive fashion, I'm assuming, and we certainly support that.

The goals of the legislation, as you've heard my colleague David mention earlier, are sufficiently important that there should be more information about it out there in the public domain.

Mr. Peter Braid: Okay.

And is there not an opportunity to perhaps expand public education within the framework of the current mandate of the commissioner?

Ms. Priscilla Platt: Well, arguably, yes. But you know how if he's given a certain number of dollars and they ask what he's going to do with that money, he's going to have to fulfill the mandate that he's been given. And this isn't written in the statute at this time. It is in other jurisdictions.

Mr. Peter Braid: Do you have any sense or estimation of what dollars might be required for this sort of effort or initiative?

Ms. Priscilla Platt: No. I think it would depend on what he chooses to do, but that, to me, at least in our submission, is a separate question. I think it may be embellishing his website. It may be going out and speaking to other groups that he doesn't go to now. I don't know, but I think it's a laudable goal.

Mr. Peter Braid: Okay. What do you think, from your perspective, would be the return on the investment in public education?

Ms. Priscilla Platt: Well, if you look at this act as a business, it would probably be in receivership, so I don't know it's a business in the sense of return on investment. I think the return is not in dollars, but in enhancing public awareness of the legislation, and perhaps even openness of government would be a very good return if it's not expressed in dollars and cents.

Mr. Peter Braid: Specifically, then, what do you think enhanced public awareness would help to achieve? What would be the end results or what would be the benefits of that?

Ms. Priscilla Platt: I think we've heard other witnesses talk about how other countries perceive our country in relation to this legislation. I think if we had more awareness and maybe better legislation, then we'd have more pride in our democracy as being vibrant. That's something we can't put a dollar figure to, but I think it would be important. Certainly our Supreme Court of Canada considers this legislation to be quasi-constitutional. So it's significant, and people should be aware of it.

● (1655)

Mr. Peter Braid: Okay.

Finally, moving to recommendation 12, with respect to multiple requests, is the recommendation from the commissioner designed to address or prevent abuse in the system?

Ms. Priscilla Platt: Well, this really isn't something that deals with abuse. Right now, section 9 is a bit antiquated. It talks only about two instances in which you can go beyond the 30-day timeframe. Now, maybe there aren't enough penalties in the system, in any event, to prevent departments from going beyond 30 days, as was mentioned earlier. But section 9 of the Access to Information Act just talks about the need to search or to consult.

This really relates to the question of allowing time extensions in other contexts. You see some examples where, for example, if an institution were flooded with requests in some fashion or an unmanageable volume, there could be some kind of blackout, or there could be other events that occur that prevent requests from being processed. So this would be an opportunity for the commissioner, or a department, in effect, to give an extension in extraordinary circumstances.

The Chair: Thank you very much. You're at six minutes already.

Mr. Siksay, then Ms. Duncan, then Mr. Dechert. That might be it.

Mr. Bill Siksay: Thank you, Chair.

I wanted to ask you if the Bar Association has supported or indicated support for former Information Commissioner Reid's bill on open government, the private member's bill by NDP member Pat Martin, which is now in the House. Did the Bar Association ever take a position on that piece of legislation as suggested by the Information Commissioner?

Mr. David Fraser: I don't believe we did.

Ms. Priscilla Platt: No, we didn't.

Mr. Bill Siksay: Every time Mrs. Block asks her question of witnesses in a somewhat self-congratulatory tone of how great the Conservative Party has been in bringing in the expansion of and some of the changes to the Access to Information Act, I feel like I have to drag out the Conservative platform from back in 2006, which included a lot of other things.

I'm just going to go through the list and ask if you know if the Bar Association has taken a position on some of the other issues raised there. I know this is going beyond the commissioner's recommendations, although one of them did pertain to Commissioner Reid's specific legislation. We may have covered some of these, but I'm just going to read them anyway.

Has the Bar Association ever taken a position to give the Information Commissioner the power to order the release of information, that you know of?

Mr. David Fraser: I don't believe so. We certainly have talked about it, but it's not a point we've come out on.

Mr. Bill Siksay: Okay.

What about expanding the coverage of the act to all crown corporations, officers of Parliament, foundations, and organizations that spend taxpayers' money or perform public functions?

Ms. Priscilla Platt: I believe the Bar Association did respond to the Federal Accountability Act and did support that.

Mr. Bill Siksay: So that would cover everything, or all—

Mr. David Fraser: And originally in 1981 and 1986 we did call in our submissions for the extension of the Access to Information Act to crown corporations, subject to limited exceptions related to those crown corporations engaged in business and competitive activities.

Mr. Bill Siksay: What about subjecting the exclusion of cabinet confidences to review by the Information Commissioner?

Mr. David Fraser: We just did.

Mr. Bill Siksay: And obliging public officials to create the records necessary to document their actions and decisions?

Mr. David Fraser: I don't believe we have.

Mr. Bill Siksay: And what about providing a general public interest override for all exemptions, so that the public interest is put before the secrecy of the government?

Mr. David Fraser: I don't believe we have.

Mr. Bill Siksay: Okay.

Next, what about ensuring that "all exemptions from the disclosure of government information are justified only on the basis of the harm or injury that would result from disclosure, not blanket exemption rules"?

Ms. Gaylene Schellenberg: Perhaps, if you could send us a list, I could do a search. It may be in a different context that we have addressed some of these issues.

● (1700)

Mr. Bill Siksay: Sure. I appreciate that.

There's just one more that I'll run by you, although I realize that this is a bit unfair to you.

Have you ensured "that the disclosure requirements of the Access to Information Act cannot be circumvented by secrecy provisions in other federal acts, while respecting the confidentiality of national security and the privacy of personal information"?

Mr. David Fraser: Not on that specific point, no.

Mr. Bill Siksay: Okay.

I just wanted to say that there was a much larger agenda around access to information that we're still hoping the government may indeed come through on at some point.

Thank you, Chair.

The Chair: Madam Duncan, please.

Ms. Kirsty Duncan (Etobicoke North, Lib.): Thank you, Mr. Chair.

Thank you to the witnesses. I've enjoyed listening to your testimony. It's such an important area.

I have three questions, if I may. First, what would you consider guiding principles in creating an access system? Accountability, transparency, and, I'm thinking, ethics and governance might be there. What would you consider the key building blocks in a cutting-edge or state-of-the-art access system? What pieces do we have, and where are we lacking?

That's all the first question. Then—

The Chair: Why don't we let them answer that first. It's a good question.

Ms. Kirsty Duncan: Okay, fair enough.

Ms. Priscilla Platt: I think the principle of the legislation is already in the act. It just says that government information should be open, and individuals should have a right of access, and there should be independent review. Those are the standard principles. As well, if it's personal information, there should be protection of that. Those are the standard principles for a statute of this nature.

As to the key building blocks, I think we have to look at coverage. We know that coverage has been expanded, but it's the principles of who gets covered and why, which entities.

Then we have to look at what types of information should be available, and maybe they should be proactively available. With the current tools, it's a bit different than it was in 1982. The proactive disclosure is a great model, as I said before, so I think there is that. Then there should be exemptions that are limited and specific.

Those are the kinds of principles that inform most of this legislation.

Ms. Kirsty Duncan: Does governance enter this at all?

Ms. Priscilla Platt: I think it's an implication of the act, for sure.

Ms. Kirsty Duncan: Can you expand on that, please?

Ms. Priscilla Platt: If entities that are governed by this legislation know that there is this legislation, know that they have to be transparent, know that there are these principles of a quasi-constitutional nature, then they should be governing themselves in that manner. The senior levels of government and the senior levels of these agencies as well ought to have that as part of their mandate.

That is, I think, one of the governance principles implicit in this act.

Mr. David Fraser: Related to this is the way in which organizations within government have governance over their assets and then governance over their information.

A comprehensive system would include a way for government to manage their records on a day-to-day basis that is most efficient for the way that they have to operate but that is also mindful of the obligations of having those records available to individuals who want to have access to them.

I think that's an important piece of governance that would fit into that as well.

Ms. Kirsty Duncan: Thank you.

Could you perhaps describe what the current culture is regarding access within the public service?

Ms. Priscilla Platt: Well, now, that's a loaded question.

I think there probably have been improvements. I'm not intimately familiar with the culture of this government as compared to others. I think all—

Ms. Kirsty Duncan: No, I'm not looking to score political points. It was a legitimate question.

Ms. Priscilla Platt: But I think culture is very important. When this legislation comes in, if at the top they exude an interest and reflect the significance of these principles, then that will be the message all the way. So I do think leadership is very important in achieving the goals of the act.

● (1705)

Mr. David Fraser: I think that very often through a long period of time there's just a general culture of secrecy that pervades many levels of government and a notion that individuals requesting information should get only the information that they're specifically and legitimately entitled to, and nothing more.

So a lot of effort goes into making sure that only that limited subset of information is released, which I think is contrary to the general principles in the act. Certainly the preamble sets out that the default position has to be openness and access, but when it's mechanically applied in a very rigorous way, the culture kind of gets twisted around so it's actually the opposite of what was intended.

Ms. Kirsty Duncan: I appreciate your comments.

I'll ask one more question, if I may. How do we change that culture? I've worked with organizations, and leadership and how to change culture is an important discussion. How do you change that?

Ms. Priscilla Platt: I do think it comes from the top. I think deputy ministers, etc., have to show that this is significant. It can be in people's performance appraisals. It can be reflected. Maybe they should be getting rewarded in some way for finding ways to make things more open.

A lot of the technology that exists to make things more open is expensive, so there are a lot of balances in terms of where you're going to spend money and so forth. But on the culture and the ideas, I think that instead of rewarding people for keeping things secret and not disclosing, there should be rewards for and appreciation shown to individuals who find ways to be more open and who exude the principles in the legislation.

The Chair: Thank you.

Mr. Dechert.

Mr. Bob Dechert: Thank you, Mr. Chair.

I just want to come back to the idea of opening up the access to information system to anybody in the world. The commissioner did mention that his workload and the workload of the government in replying to access to information requests have increased significantly. That has resulted, in many cases, in long delays in processing.

I take your point about being more proactive about putting information up on the Internet, for example, so I assume you wouldn't recommend that the government move on the recommendation to open it up to everyone in the world without also recommending that they put up a lot of information just freely on the Internet.

You should know that a number of witnesses made the case that there's a benefit to Canadians in making more government information accessible to, for example, academics from around the world. They suggested that there would be an uptake by people internationally if more information were made available to them and if access to information were made available to them. I assume you wouldn't recommend that we do one without the other.

Ms. Priscilla Platt: I think we are prepared to go forward on the basis of these recommendations, which don't include having more access. I think there are many phases and many levels in which you can look at revisions to this legislation, the culture, and the opportunities for openness.

I don't know, because I haven't done the statistics, how many people from other countries have made requests through third parties, and I don't know if anyone knows. They don't have to be formal. They could be made through a family member, a friend, or someone they might know in Canada who has then made a request. I'm not sure you're going to get more. You might get less or you might get more. I don't know.

Mr. Bob Dechert: But if you made it easy for people to fire in an access request over the Internet and you didn't charge them any fee, then there would be no barrier at all.

Ms. Priscilla Platt: Well, on the fee issue, certainly what we know anecdotally is that having no fee at all is not a good idea, but having a small fee is a good idea.

Mr. Bob Dechert: People generally abuse free goods.

Ms. Priscilla Platt: If you have a small fee, it's sort of more sensible, but as for going too high on the fees, I believe that some years ago Australia raised it to $100 and got no requests. They realized that was too much. I think one has to look at that very carefully.

Whatever you want to do, you want to allow people to be able to use this process as widely as possible. If there are issues around numbers and so forth, I think that just goes back to our recommendation for a five-year review. There needs to be a review frequently, mostly because of the technology that's changing so rapidly. The manner in which we keep records in government and so forth is changing.

That can address some of these issues. I don't think you address it by saying that you have to be a resident and thus causing people who might legitimately have a need to get something to go through hoops.

● (1710)

Mr. Bob Dechert: Do Canadians have a right to know if a foreign government or an enemy combatant is asking for information? Do they have a right to know who's asking for the information? Should the commissioner, at least, be able to know who's asking?

Ms. Priscilla Platt: Typically under this legislation, you don't have that right now. At the same time, if we have a situation where—

Mr. Bob Dechert: But they do know, don't they? When they submit a request, there's a name on the request. Somebody in the government knows who's making the request.

Ms. Priscilla Platt: But do you? I mean, they could use whatever name they want; they could also use their next-door neighbour. That goes back to a question—

Mr. Bob Dechert: But I assume if Mary Smith from Mississauga, Ontario, is asking how many tanks the Canadian government is storing in a warehouse in Montreal, and what the plans are to ship them to Afghanistan, you might wonder why Mary Smith wants to know that information.

Ms. Priscilla Platt: When you look at this legislation, it's not so much why someone wants it, it's the question of looking at the record itself, on its face. Forgetting the name of the individual who might be requesting it, should that record be disclosed? And either our exemptions are robust enough to deal with issues like that, or they aren't. My read of this statute is that there are robust exemptions.

Mr. Bob Dechert: But given that our system is not working well at the moment, that there are these long delays, how would you handle making changes that would increase the number of requests? How should that be handled? Where is the limit at which taxpayers should have a right to have some form of cost-recovery for supplying that information?

I know B.C. has a differential fee for commercial users, and I know there are commercial users who collect information and resell it to their clients, sometimes at a very high cost. I know that sometimes law firms spend a fair amount of money or make a fair number of requests for information, and then charge a fairly high hourly fee, as I did in my law practice, reselling that information, in essence, to their clients. So is there a case to be made for a more reasonable cost-recovery fee structure?

Mr. David Fraser: Perhaps I might touch on both your points. On the first one, I'm not sure we would actually see a dramatic increase in the number of access to information requests, if it's expanded.

Mr. Bob Dechert: There are witnesses who think there would be. They think there are hundreds, if not thousands, of academics around the world who would like to have more information about the things the Canadian government does, which they can include in their studies. They've made that known and they've suggested to us there's a benefit to the Canadian taxpayers in making this information available to academic researchers worldwide.

Mr. David Fraser: It would be interesting to find out statistics on that. To base it in my own practice—that would be for institutions, public bodies that are subject to access to information provincial equivalents—the number that have come from outside Canada, or even from outside the province in question, is a really trivial percentage.

When you're talking about resource allocation, I do think it makes a lot of sense to fully understand what it is you're potentially getting into on any of those particular issues.

I've forgotten your second point. I apologize.

Ms. Priscilla Platt: The costs.

Mr. Bob Dechert: Costs.

Mr. David Fraser: Oh, the issues with respect to cost.

I think they're very difficult to try to pin down exactly. And one should not actually be in a position to ask people why they're asking for that information and how they intend to use it, because if there's one cost for an individual and one cost for an institution, all the journalists would be making their requests in their own names, rather than in the names of their institutions.

There may be ways of reducing the cost to the government. For example, information brokers—it's probably incredibly inefficient for them to be asking for the same sort of information over and over again to get it updated monthly. Government departments should be entering into licence agreements and providing that information on a fee-for-service basis, then recovering their costs.

There may be ways of getting a lot of disclosure of information completely outside of the Access to Information Act.

● (1715)

Mr. Bob Dechert: Are you familiar with what is done in British Columbia? I was wondering if you—

The Chair: Mr. Dechert, you're actually over eight minutes now in the five-minute round. We do have another colleague who would really like to have a chance.

Mr. Bob Dechert: Okay. If you'd put me on the list again, I'd appreciate it.

Thank you.

The Chair: Okay.

Mr. Hiebert.

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

I'll let my colleague finish his question.

Mr. Bob Dechert: I was asking if you're familiar with the British Columbia system, which I understand does have a differential fee for commercial users, and if you could comment on how that works.

Mr. David Fraser: I don't have first-hand experience with it.

Ms. Priscilla Platt: I don't know. Did the commissioner mention how it works?

Mr. Bob Dechert: Yes. Well, the B.C. commissioner said they do charge a differential fee for commercial users. I'm just wondering if any of your members have made a comment one way or the other about whether that's a good idea or whether they've had any concerns about it or any problems with it.

Ms. Priscilla Platt: I'm not familiar with the—

Mr. Bob Dechert: That system does exist in Canada, and it's maybe meritorious taking a look at it.

Thank you.

The Chair: Mr. Hiebert.

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

I thank you all for being here.

My first question has to do with recommendation 3. It deals with order-making power. I note that you agree the commissioner should have enhanced powers to address administrative issues. You also note that there is a consequence to providing that power, in that you believe all parties should have a right to seek review in the Federal Court.

I am wondering if there are not other possible consequences that should be considered if we extend order-making power to the commissioner. A general comment would be that when you give or augment the power of an organization, it tends to grow or entrench itself in the bureaucracy. Would there not be an argument for greater checks and balances in exchange for giving the commissioner more power? Are there not some other steps that should be taken to make sure that additional power is in some sense compensated with other accountability or other responsibility?

Ms. Priscilla Platt: Sir, I am not following.

Mr. Russ Hiebert: The general idea here is that if you give an office a greater budget or more power or greater authority, it tends to grow and expand over time. But generally, there's a principle of providing commensurate accountability with the increase in power. I'm talking about at a high level, the principle of to whom much is given, much is required. So if we give them more power, is there not an additional check, apart from providing a right to seek review in the Federal Court, that should be put in place?

Ms. Priscilla Platt: There are many tribunals in Canada that have binding powers over the legislation that they manage, and the recourse to the court is the check and balance, if you will.

But I think in this case it would solve a problem that is really existing under the act right now, because for administrative matters, even though the commissioner can investigate and can render a report, there is no recourse anywhere. So it doesn't solve the delay problem or excess fees being charged, or whatever. It doesn't really allow for those determinations to be made in a final and binding way. Those determinations are a key to some of the complaints about this legislation—delays not being workable, and so forth. So if we have a statute put in place, we should have a reasonable manner in which people can get recourse. And if the commissioner had binding order-making powers, which is very standard across the country in modern access to information statutes, then there will be a mechanism for that to be addressed and perhaps eliminated. And that's the way in which, if they can make a binding order, you must obey, and then institutions will act accordingly.

Mr. Russ Hiebert: And do you think the redress through the Federal Court is a sufficient check on that order-making power? If people disagree with his decision, they can always take it to court, as opposed to arbitration or some other binding body. Do you think the Federal Court—

Ms. Priscilla Platt: Typically, it's recourse to the court that is the result of binding order-making power on the part of a tribunal.

● (1720)

Mr. Russ Hiebert: And that hurdle is not too great for the average Canadian who disagrees with the commissioner's decision to perhaps not follow through with their request? It's incumbent upon them to hire a lawyer and take it to court. Is there no easier or more simple way to address this issue?

Ms. Priscilla Platt: What one hopes is that the commissioner makes a final and binding order that is abided by and there is no need to take it further. You want to have some finality, and right now with a recommendation you just don't have it.

Mr. Russ Hiebert: Okay, thank you.

The Chair: Thank you.

Monsieur Nadeau.

[*Translation*]

Mr. Richard Nadeau: Thank you, Mr. Chairman.

I believe it was you, Ms. Platt, who said that the Access to Information Act needed to be “revamped”. Perhaps it was one of your colleagues who said it; you'll tell me if I'm mistaken. What did you mean by that? What arguments should be advanced in order to “revamp” the act and bring it into the 21st century?

[*English*]

Ms. Priscilla Platt: Well, I think what we were referring to there was the idea of the five-year review, to be able to have a look at the entire act to see how it works. There are a number of options. For example, in light of technology, one could have a different manner of making requests, one could have a different manner of disclosure, one could have proactive disclosure as a feature of the legislation. There are a myriad of options, and that would be the benefit of having a comprehensive review done every five years, because technology has changed so dramatically.

It may be that some of the exemptions would disappear. Maybe we would get different ones, differently framed, but maybe there would fewer. I don't know. I think it would be up to the parliamentary committee at that time to look at it.

These are quick fixes, as the commissioner describes them and as the clerk has described them, so these are small things one can do just to ameliorate particular problems, but there is a broader issue raised by many of you here that could be addressed in a more comprehensive review.

[*Translation*]

Mr. Richard Nadeau: So there has to be a political will, regardless of whether the government is red or blue. I understand you.

That will be all, Mr. Chairman. Thank you very much.

[*English*]

The Chair: Okay.

Ms. Block.

Mrs. Kelly Block: Okay. I didn't realize I was on the list, but thank you.

In regard to recommendation 9, the Information Commissioner notes there are no penalties associated with delays at present. Do you believe penalties for delays in response are appropriate, and if so, what would they be, who would enforce them, who would be the person who would be receiving the penalty, and would the penalties be included in the Criminal Code?

Ms. Priscilla Platt: I don't know of any statute, really, that has that manner of penalty, whether they be fines or whatever. What's involved in recommendation 9 is just allowing departments to have a longer period of time when it's essential, other than the two grounds that exist right now. If the approval of the information for the extension beyond 60 days is required, if you didn't give that approval, then presumably they'd have—whatever—those few more days to actually process the request. That seems to be how it works in most jurisdictions, although there are binding order-making powers, typically.

Mrs. Kelly Block: Right, so there are delays at present and there is an opportunity to extend the delays for whatever reason. If the delays went on and on, would you think it would be appropriate for a penalty to be put in place eventually?

Ms. Priscilla Platt: Well, I think the commissioner now has report cards for every department, and I think that's been effective. You heard from the minister, who's apparently done very well in his report card lately. I think there are a number of tools one can use. This particular one will put a timeframe, which is not currently in place, of 60 days in which you need approval, so that means you'd have to go to the commissioner and actually ask for approval beyond the 60 days. It might be a step a department wouldn't want to take for fear of being refused, and that may encourage them to expedite processing requests.

There are sometimes very good reasons that a request cannot be processed expeditiously.

● (1725)

Mr. David Fraser: My apologies, but I'm going to have to depart in order to catch a flight.

The Chair: As a matter of fact, there is a vote. The bells are going to ring at 5:30, and our meeting is going to have end in any event.

Why don't we just cut it there?

Your presentation, commentary, and additional commentary of other things to consider are beyond the call of duty from the CBA, as usual. I'm delighted you were able to spend some time with us. I know everybody is going to have to disappear momentarily, but on behalf of the committee, thank you kindly for your presentation and information. I know we will have you back again one day on one of these acts we're involved in. You're excused now.

I have one thing I want to discuss with the committee before the bells ring.

We didn't get a chance to get on to the other item on our agenda about the other matters for consideration under the Privacy Act. The researchers, however, have updated their draft report for consideration of all the other stuff we've done. That's going to be circulated to the members. On the other items on the issue of training and resources, they've already written up some stuff here. Obviously training and resources is the whole Treasury Board issue, etc.

Other witnesses have suggested a couple of things. On the order-making powers and the duty to let someone know their privacy rights were violated, etc., we have an interesting predicament. It's useful to know these are for consideration, but they were the views of a party. The other witnesses were unaware of them, and we don't have any commentary to give to it. Right now the researchers are recommending that we take note of these items and when we look at the Privacy Act again these are matters we would have to want to carry forward.

What you see on these items here will likely be the same in the next draft, and that will be circulated to you. The reason I want to get you a new draft is that, as you know, next Monday the Privacy Commissioner is coming before us to give us her last views on this whole process we've just gone through. If you have your latest draft in front of you as she's going through her rebuttals or additional arguments for things she would like to see, you'll be able to note them. I don't know how long that's going to take on Monday, but if we're finished with a half hour left we may very well go in camera to give further direction to the researchers about updates, modifications, etc., to the draft you would have in front of you. We'll push that forward as time permits.

Looking a little further forward, on Wednesday we have Mr. Marleau on his estimates. The following week Madam Stoddart will be here on her estimates. On the 27th we'll have Mr. Marleau on our draft report on the access. It's the same process we went through on the privacy with the quick fixes. We'll go through it in camera, kick it around a little bit, etc. We'll go through that same process and move it forward as we make progress in getting to a draft report and ultimately incorporating everyone's comments and getting that tabled in the House, I hope.

We are going to be belled out.

Mr. Wrzesnewskyj.

Mr. Borys Wrzesnewskyj: In referring to access to information and the draft, this wasn't in the recommendations, but it's an issue that has been raised in almost every one of our sessions. It's an issue that as a member of Parliament I have a grave concern about. It's this whole business of amber-lighting and whether we should have something in our draft that recommends that this process of amber-lighting for a member of Parliament's access to information requests are not acceptable and something that should not take place. I know it's not a written policy, but it's a policy that a number of people said has evolved and exists. It's something I think colleagues should be quite concerned about.

● (1730)

The Chair: We have a lot of time. We haven't even started the process of reviewing the quick fixes or any other items. You might want to bring that up when we deal with the draft report. You may want to develop it and how it fits in. Everyone can do that. When we do a report I don't think we will restrict ourselves to the items specifically raised to the extent that witnesses have raised things. The minister asked us to give our views and tell what we've heard. Let's add to the body of knowledge about what the state of the union is in terms of the current act and what the state of the art is in terms of the access.

The bells are now ringing. There'll be no further business.

The meeting is adjourned.

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