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## Thursday, November 22, 2012

## Chair

**Mr. Joe Preston**

# Standing Committee on Procedure and House Affairs

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● (1205)

[*English*]

**The Chair (Mr. Joe Preston (Elgin—Middlesex—London, CPC)):** I call the meeting to order.

Good morning. We will begin again, and hopefully we can get through this hour without any further interruptions.

I apologize to our witnesses for some votes and such in the House that have caused us to have to do this a different way. It may not be as productive as it might have been the other way, but we will see what we can do.

We have Madame Legault, the Information Commissioner, and Monsieur Drapeau. We did have you as two separate panels, but we are going to try to put it together and we'll see what we get. If we need more of your time, we may ask that of you.

Madame Legault, I will ask you to start. You have an opening statement for us.

Monsieur Drapeau, do you have an opening statement?

**A voice:** I do.

**The Chair:** Madame Legault, please also introduce the associate you've brought with you. After opening statements, we will go to questions by members.

Please go ahead.

**Ms. Suzanne Legault (Information Commissioner of Canada, Office of the Information Commissioner of Canada):** Thank you, Mr. Chair.

I'm accompanied today by Ms. Emily McCarthy. She is the Assistant Information Commissioner of Canada. Thank you for asking me to appear before you today. I've been following the committee's work on this matter, as I was notified of the application to the Federal Court that triggered the study before your committee, so I welcome this opportunity to provide information about the Access to Information Act.

Mr. Chair, how access to information rights intersect with parliamentary privilege is a complex matter, and I certainly do not purport to be an expert in the field of constitutional law or parliamentary privilege. Our representations are drawn from my perspective as the independent oversight on disclosure decisions of government institutions that are covered under the Access to Information Act.

[*Translation*]

As Information Commissioner, I have a statutory duty to investigate any complaint made in relation to requesting or obtaining access to records under the Access to Information Act.

The act contains a number of exemptions and exclusions upon which disclosure may or, in some instances, must be refused. These include exemptions for personal information, for information that could reasonably be expected to threaten the safety of individuals, information that is an account of consultations or deliberations involving government employees, and information protected by solicitor-client privilege.

However, there is not currently an exemption or exclusion in the act addressing explicitly parliamentary privilege.

[*English*]

The act also provides that a request must be responded to within 30 days. This period may be extended for a reasonable period of time to consult other government institutions or third parties in two circumstances.

First, an institution may consult a third party if consultations are necessary to comply with the request. The validity of such extensions, including the reasonableness of the length of time and the necessity of the consultation, is considered on a case-by-case basis by my office. When such consultations are conducted, there is no recourse set out in the act should the institution disagree with the recommendations made by the consulted third party.

Second, a government institution may extend the 30-day response period to consult a third party when the record at issue may contain third party information that is confidential commercial, technical, or financial information or when the disclosure of the information could result in injury to contractual negotiations or the competitive position of a third party. The third party consultation process set out in the act in these circumstances has strict statutory timelines and provides a specific judicial recourse should the institution not agree with the response of the third party to the consultation.

As an aside, it is not readily apparent to me that the type of information that may be protected by parliamentary privilege would qualify as the type of primarily commercial information that is protected under section 20 of the Access to Information Act.

I mention this specifically, Mr. Chair, because this seems to have been the process that was followed in the case with the Office of the Auditor General, but it's really not clear to me how that process was actually appropriate under the act.

● (1210)

[*Translation*]

Given that the act is silent with respect to parliamentary privilege, its intersection with access to information rights raises a number of pragmatic issues. The list of examples I am providing you with today is certainly not exhaustive.

For instance, in the absence of a specific statutory provision for parliamentary privilege under the act, there is currently no obligation for government institutions to consult Parliament prior to making a disclosure decision.

This means that there is no way for Parliament to know whether information that could be protected under parliamentary privilege is being identified as such or released by government institutions. There is no process for government institutions to determine who has the authority to invoke or wave parliamentary privilege. It appears that, in the few cases Mr. Bosc brought up before this committee during his testimony, representations were made concerning the existence of parliamentary privilege by individuals other than the Speaker of the House.

I am not an expert on parliamentary privilege or parliamentary procedure. That is why all of you here may correct me if I am wrong, but, according to my readings, the Speaker of the House is the only person with the jurisdiction to make a prima facie determination of what constitutes an issue of parliamentary privilege. When he is unable to determine whether the issue is a prima facie parliamentary privilege, that question or decision must be transferred to the House of Commons.

In the face of an assertion of parliamentary privilege, government institutions are faced with a dilemma because there are no specific exemptions or exclusions dealing with parliamentary privilege under the act. However, such a decision affects third parties that submit requests to institutions covered by the act.

If the assertion of parliamentary privilege is the basis for not releasing information to a requester, is the decision to refuse disclosure by a government institution a valid one under the Access to Information Act?

[*English*]

If the assertion of parliamentary privilege is the basis for not releasing information to a requester but the government institution listening to an assertion made by someone who works in the House of Commons or the Senate uses other exemptions or exclusions to withhold the information, notwithstanding that no exemption or exclusion under the act applies directly, what is the impact on requesters' rights when they are provided with, in effect, a false reason or a misleading reason to refuse disclosure?

Would this information have been provided to the requester in the absence of this assertion of parliamentary privilege?

What is the impact on transparency in the process, and further on the ability of my office to effectively review a government decision to withhold information when a false pretence might have been used?

These are only a few of the questions, Mr. Chair, that actually come to mind when one considers some of the instances that have been referred to this committee in its review of this issue. In my view, the best way to protect requesters' rights and to ensure transparency, accountability, and effective oversight would be to amend the act to cover the administrative records under the control of Parliament, while adding a specific exemption to deal with parliamentary privilege.

This amendment should also clarify who has authority to assert the privilege for purposes of the act. Both the Standing Committee on Justice in 1986 and the access to information review task force in 2002 have made this recommendation.

Internationally—and I believe I've provided the committee with a table with a short international benchmarking—two Westminster jurisdictions have actually addressed this issue specifically in their freedom of information legislation. The U.K. legislation applies to Parliament and exempts records if their disclosure would infringe the privileges of Parliament. In Australia, the Freedom of Information Act specifically addresses the question of parliamentary privilege as well.

● (1215)

Within Canada the provinces of Alberta, Prince Edward Island, and Newfoundland and Labrador have an exemption for parliamentary privilege. In addition, other jurisdictions cover, in one form or another, the parliamentary institutions. Quebec and Ontario, for example, cover some specific records.

[*Translation*]

Thank you, Mr. Chair.

I will now yield the floor to Mr. Drapeau.

I would be happy to answer your questions.

[*English*]

**The Chair:** Thank you very much.

Go ahead, Monsieur Drapeau.

**Colonel (Retired) Michel W. Drapeau (Professor, Faculty of Law, University of Ottawa):** Mr. Chair, thank you for inviting me to speak on this particular subject.

I am certainly not an expert in parliamentary privilege. I do claim an expertise in access to information and privacy. I make the point also that the comments I am about to make apply equally to the Privacy Act. The two acts were enacted together. They are basically a mirror image of one another. Whatever we may want to do in amending the Access to Information Act, the same commentary would be made for the Privacy Act.

In the interest of time, let me present my commentary in six rapid-fire points.

First, the House of Commons or its members are currently not subject to the Access to Information Act or the Privacy Act because the House of Commons is not considered to be a government institution.

Second, records from the House of Commons or members of Parliament received and stored by a government institution are deemed to be under the control of that government institution, and therefore subject to the act.

[*Translation*]

Actually, there is a difference in the terminology used in section 2. The English version states the following:

[*English*]

> under the control of a government institution

[*Translation*]

However, that part is absent from the French version, which mentions federal administration documents. The nuance is significant.

[*English*]

Third, because the purpose of the Access to Information Act and the Privacy Act is to provide a right of access to information in records under the control of a government institution, unless these records are excluded or exempted, they are accessible. The Access to Information Act excludes a small number of records from either of these two acts. Examples of these exclusions are cabinet confidences, published materials, and materials that are before the library or the museum. These exclusions indicate that these records don't come under the ambit of the act, but there is no exclusion for parliamentary privileges.

My fifth point is that the Access to Information Act also provides for 13 exemptions. Some of those are the personal information of an individual, client-solicitor privileges, and third party information. Again, there is no exemption in the act at the moment, as the commissioner said, that provides an exemption for parliamentary privileges. I find it odd that the code inside the act, which covers third party information, has been used as a way to provide notice to Parliament that some information has been requested, and hence engage and start the notification process. That's not the purpose of section 20. Section 20 specifically identifies commercial, scientific, and financial information that operates within a commerce function and not a parliamentary function. At the moment, there is no exemption and no solution.

Sixth, there is no obligation on the part of an institution that is faced with a request asking to disclose records under the Privacy Act or the Access to Information Act to consult with Parliament—none whatsoever. It might have been a *conduit* or a facile method to alert Parliament that these records may be disclosed, but there is absolutely no provision for it.

If a requester were not to be provided with his rights under the act, either because of a delay or because of an extension of the delay, or simply not provided with a complaint, in my opinion, should that individual make a complaint to the Privacy Commissioner or the Information Commissioner, his complaint will be withheld. If it were not withheld, then this complainant will probably have a very valid case. I would probably advise him that if he were to take it to the Federal Court on judicial review, the Federal Court would likely, in my opinion, provide him with a win in that circumstance.

What should be done if parliamentary privilege is something that ought to be taken into consideration by a government institution? You have to amend the act. How do you amend the act? My proposition would be under section 13. What is section 13? It's information obtained in confidence from a government. At the moment, you can do so from an aboriginal government, international government, or a province. For some reason, the House of Commons is not covered in it. That would provide a way whereby the information would be excluded or exempted, if that were to be your wish.

That concludes my comments, Mr. Chair.

● (1220)

**The Chair:** Super. Thank you very much for your comments.

We'll go to questions so that we can get in as many as we can.

Mr. Lukiwski, let's try five minutes.

**Mr. Tom Lukiwski (Regina—Lumsden—Lake Centre, CPC):** Thank you very much, Mr. Chair.

Thank you, Madame Legault and Monsieur Drapeau, for appearing before us.

Thank you, Madame Legault, for your letter, which prompted the invitation to both of you here, although it perhaps raises more questions than it provides answers. I think it's a very worthwhile discussion we're having.

The difficulty, obviously, is the fact that the act doesn't have any reference made to parliamentary privilege, but the Constitution certainly does. From a legal perspective versus a constitutional perspective, that's where we get into almost competing interests. What we're trying to do here as a committee is provide clarity so that we don't end up in court the next time a situation similar to what we've seen in months past occurs again.

I expect, Madame Legault, that it's even more problematic for you, inasmuch as not only do you have to, in your position, respect and almost defend the act, but as an officer of Parliament you also have to respect and uphold the Constitution, so within your decision-making purview you have a bit of a conflict there, I would suggest.

I find it interesting that both of you have recommended that the way to get out of this quandary we find ourselves in is to amend the act itself.

I also note that in your presentation, Madame Legault, you said there had been two recommendations in the past, one in 1986 from the Department of Justice and one in 2002, to do exactly that.

I am not sure, frankly, because that was before my time, why Parliament didn't act on those recommendations. Can you provide us with a little recommendation or a little insight perhaps, if you have that information, as to what specifically those recommendations might have been?

It's one thing to say, yes, you can amend the act, but although Monsieur Drapeau made some reference to it under section 13, what specifically—and I'd like to hear from both of you—would you suggest in terms of clarity of words, precision of words, might we want to consider if we chose to make a recommendation to amend the act?

**Ms. Suzanne Legault:** There are a lot of questions there, sir.

I think, first of all, we really did not look into specific amendments or specific language. At first glance I would not recommend doing it in section 13, because it's a mandatory exemption. I think it should be a discretionary exemption, which would actually give Parliament the option, in its discretion, to disclose information nonetheless—to waive its privilege, basically. I think we should keep that option open.

The task force in 2002, which is the text I have before me, sir, recommended that:

> the Act apply to the House of Commons, the Senate, and the Library of Parliament;
>
> the Act exclude information protected by parliamentary privilege, political parties' records and the personal, political and constituency records of individual Senators and Members of the House of Commons; and
>
> Parliament consider whether the appropriate second tier of the redress process is judicial review following a complaint investigation by the Information Commissioner, or some type of review by Parliament itself.

Again, the task force in 1986.... I have the text on my BlackBerry, but I can forward that to the committee.

Essentially, I think what the committee is grappling with is what you posited in starting your question, sir. We have the Access to Information Act and we have these constitutionally protected rights of Parliament—fair enough. I think if you had several constitutional scholars and several scholars in terms of House of Commons procedures, you could have quite a lot of arguments in relation to the interaction between these two statutes. I don't think I can try to give you a definite answer on that. I don't think I have the expertise to do that.

What I'm trying to explain to the committee is that regardless of how you determine that question, the way the act is silent right now is going to lead us to court if we don't amend the act to actually clarify the protection of the privilege and the process by which this privilege is asserted.

I am extremely concerned from what I heard was presented before the committee: that some form of informal process seems to have developed among government institutions and parliamentary representatives whereby someone—and I don't know who and I don't know under what authority—asserts that information is protected by parliamentary privilege, and that government institutions are actually refusing disclosure to requesters using the exemptions in the act, when in fact they're refusing disclosure because someone has asserted a claim of parliamentary privilege.

This means that the requesters are actually not apprised of the real reasons that they're being denied disclosure, and if they complain to my office, I will have very little means to know this is actually what has occurred unless there is some note in the processing file in the government institution that states that's what happened.

So I'm very concerned. Regardless of how we decide the constitutional issue here about what is happening to requesters' rights and how it affects my ability to review and provide oversight of government decisions on disclosure, that's really my concern, sir.

In terms of how we specifically amend it, I think we should look to what's done in other jurisdictions in Canada and what's done in the U.K. or Australia. Frankly, I have not had the opportunity to speak with my colleagues in the U.K. and Australia, but I think it's quite instructive that two other Westminster parliamentary democracies have found it necessary to actually provide for the issue of parliamentary privilege specifically in the access to information legislation, and really it's to avoid the type of issue that we're now faced with.

● (1225)

**The Chair:** Thank you very much.

I'm sorry, Tom, but you're well over.

**Mr. Tom Lukiwski:** That's fine. Are we going to be able to hear a response from Monsieur Drapeau?

**The Chair:** Well, we hope that through others' questions we're going to get there. I would bet that Mr. Scott's going to help you out with that right now.

[*Translation*]

**Mr. Craig Scott (Toronto—Danforth, NDP):** Mr. Drapeau, could you continue, please?

[*English*]

**Col Michel W. Drapeau:** If I can answer the question, I agree fully with Mrs. Legault that at the moment if this were to go to court, Parliament would lose. There's no other way I can say it, and none of us wants that.

Therefore, if you want to impose and assert parliamentary privilege, the act has to be amended. My recommendation, after consideration, was that it be mandatory exemption, so that there's no if or but and no political debate every time over whether or not it ought to be. Then when that information, the fractionary information, was provided to a government institution, it would come under their control, and it would be well known that this information was protected and was excluded under access or privacy.

That's my recommendation on it.

**Mr. Craig Scott:** If I could follow up on that point, one of the areas parliamentary privilege applies to, at least from the parliamentary privilege expertise side of things, is documents prepared for a House committee but never actually submitted. At least at the moment, it's one view that parliamentary privilege would attach to such documents. If we had a mandatory exclusion, I would worry that even if we, as Parliament, had no objection to those being disclosed, would your solution not actually prevent that from being disclosed?

**Col Michel W. Drapeau:** It wouldn't prevent Parliament, in specific instances, from consenting to disclosure.

● (1230)

**Mr. Craig Scott:** You'd have that exception.

**Col Michel W. Drapeau:** Otherwise, unless such a consent were to be made in a positive sense on each and every occasion for specific documents, an exclusion would apply. “Make it simple” is what I would say, so that there isn't a debate every time on whether discretion was applied properly.

**Mr. Craig Scott:** This is for both of you, Madame Legault and Colonel Drapeau.

On the whole question of invoking a ground in the act to deny disclosure where somewhere behind it there's been representation made that parliamentary privilege has been engaged, you have expressed very well why that would be of concern. Nonetheless, there is potentially some overlap in the grounds of exemption under the act and some of the reasons for parliamentary privilege.

Do you have a sense of how much of an overlap there is? If government institutions were very clear that they were exempting this, that they were not disclosing it because of this reason and that they had received some representations related to parliamentary privilege and this was the reason, would that clean it up at all?

**Ms. Suzanne Legault:** Well, certainly there is overlap. There's no question about it. There could be information under the control of the institution being exchanged between a parliamentary committee and a government institution. It may deal with personal information or deal with other types of exemptions under the act. If that's the case and those are the exemptions being applied, that's not an issue.

**Mr. Craig Scott:** So it's section 19 kicking over to section 3 of the Privacy Act. That would be one of the main ones.

**Ms. Suzanne Legault:** Of course, and that I have no issue with.

The question you raise is the question of notice to the requester. I'm quite sure that if a requester saw this, and then saw also that we basically applied parliamentary privilege after consulting with Parliament, that again would raise the other issues I was raising. The question would be who made this assertion, because that's the basis of making a claim of parliamentary privilege. There are rules that apply in terms of what is parliamentary privilege. The Vaid case actually made it very clear that if parliamentary privilege is asserted and has an impact on third parties, the court will give this claim of parliamentary privilege a lot more scrutiny.

That's the situation we're in, if that is the case. Frankly, I would think that would lead to litigation.

**Mr. Craig Scott:** I'll ask my final question and then colleagues will perhaps allow answers to continue.

I recognize, Madame Legault, that you've not asserted expertise in constitutional matters as such. Monsieur Drapeau, public law is a broader area of expertise for you, though.

We have general principles of law that guide how statutory regimes interact. We have a constitutional basis for parliamentary privilege, but it's also stated as part of general law by the Parliament of Canada Act. At all levels, we have the sense that it's definitely part of our legal fabric.

Do you have any advice for us, from just public law principles, on whether a government institution might have latitude outside of the specific terms of the act, or by reading into the act the powers that are not explicitly there? Is there any basis for saying that everything being done here is clearly a breach of the act, or is there some room for creating compatibility so that government institutions can do what they've done?

**The Chair:** Thank you very much.

I'm going to move on to Mr. Casey. I know he wants to hear the answer to that question.

**Mr. Sean Casey (Charlottetown, Lib.):** You're absolutely right, Mr. Chair. I thought that question was very well put and I'm looking forward to the answer. Please go ahead.

**Col Michel W. Drapeau:** At the moment, the breach is that all of a sudden, there is a sensitivity by some access to information coordinators in some departments that some information under their control has originated from Parliament, at whichever source, and in some cases they have a sensitivity to the point that they have sought advice and given notice, and probably acted on such advice, not to disclose.

My point is if that had come to the knowledge or suspicion of the requester, the requester could complain. His complaint probably would have been withheld and it would have gone to court, and so on.

The status quo is that if you have enjoyed some formal notice, this is going to disappear very quickly because you have no right to it, as matters now stand. You can stop the flow so there's no longer any information shared with government institutions, knowing that if it is shared, then it comes under their control. That’s one way you may want to go; it would probably be unlikely, because there is communication that takes place, and if it does, how do you protect that?

You can also go against the grain, against the grain the purpose of the act itself, which as a quasi-constitutional statute is to enlarge—I'm citing—the “access to information under the control of government”. You can exclude it and say that not unlike the client-solicitor privilege, not unlike other privilege that applies, we will simply not release anything that bears a stamp, or is identified, or is authored by Parliament. It's excluded. If it is, then the decision is simple: we simply don't release it. It doesn't come under the ambit of the act.

Another way is that you could exempt it. An exemption could be discretionary, as Mrs. Legault said, or mandatory, as I say. You try to reduce the debates that would take place each time such information comes to be reviewed for disclosure, but unless you go through an exclusion or an exemption, the problem will remain.

● (1235)

**Mr. Sean Casey:** Mr. Drapeau, you said a couple of times that if the decision had been challenged, it would likely have been upheld on judicial review in court.

I'd like to refer you to the Quebec Court of Appeal decision in 1991, National Assembly v. Bayle. I hope that you're familiar with that, because I would be interested in your comment on it, given what you said about a potential challenge here.

In Bayle, as you know, the court upheld the rights of the National Assembly to their claim of privilege to withhold it. Is it that distinguishable? Is the legislation that distinguishable? Have you any comment with respect to that case and what application it has, even the reasoning, to the matters that gave rise to this inquiry?

**Col Michel W. Drapeau:** You're giving me too much credit for remembering the details of that particular case. I don't. I would answer to you with that the famous lawyer's phrase that “it depends”. It depends on the situation, depends how it is framed, and I would have to go back and see whether there is an analogy to the current circumstances.

**Ms. Suzanne Legault:** In the case of the Bayle situation, it was done under the Quebec access to information act, and under that act, the National Assembly is actually covered by the legislation. It is considered to be a public body under their legislation; therefore, it is subject to the act. There is a specific section in that legislation that addresses the discretion of parliamentarians to refuse disclosure.

This is what the court said in that case, as far as I understand it. First of all, the request in that case was made to someone at the National Assembly who was their access to information coordinator for the assembly, so it was a direct request to the National Assembly. The court stated that the *Commission d'accès*, because the National Assembly is covered by the act, had the right to review that decision —which I think would be challenged by the law clerk if I were to review a decision on parliamentary privilege, but we'll see when we come to that—but once there is a determination that something is parliamentary privilege, the *Commission* did not have the right to basically go under that claim and determine whether or not that claim is appropriate. That's how that case is different.

Here, the situation we have is that Parliament, in its omniscient capacity, has decided to give government institutions a scheme, and a completely controlled scheme, to determine how they're supposed to disclose information under their control. They really don't have this discretion. The parliamentary privilege belongs to the House of Commons and the Senate. It belongs to Parliament. The institutions that are covered by the act are functioning under a clear, determined, defined statutory scheme that determines their decisions on disclosure. That's the issue. Parliamentary privilege belongs to Parliament.

As a result, if Parliament does not want disclosure on the basis of parliamentary privilege, it certainly puts this entire self-contained scheme of disclosure under extraordinary pressure. What you will find, if you have a clear case where there's no other exemption in the act and there's an assertion of parliamentary privilege, is that there's going to be a complaint to my office. I'm going to review that, and I'm going to basically have to say that I think I have jurisdiction to take the matter to Federal Court if I think the claim is not appropriate. You would also have the House of Commons taking this matter to court to prevent disclosure. They would be different schemes under the federal Access to Information Act in terms of judicial review by the Federal Court: you would probably have the House of Commons going under section 18.1 of the Federal Courts Act.

It's a bit of a potential mess, frankly, and it could be fixed, and in my view it needs to be fixed.

● (1240)

**The Chair:** Thank you.

We've given an extra minute to everybody, so we may not get everybody in.

Let's go, Tom, for four minutes.

**Mr. Tom Lukiwski:** I know that there are probably many more questions than we have time to get answers to, but it strikes me that in most cases when we're trying to resolve a situation, we should go back to the basics and ask what the spirit of the act was to begin with. What was Parliament trying to do? What was our government attempting to do when we established your office?

It would appear to me the spirit is, if you had to balance the scale, to weigh in favour of transparency. That's what the intent is here: to allow individuals who want to find out more about the inner workings of government and have specific questions about particular cases to have the ability to do that through ATIs. I think that should be our guiding light in any considerations we have, and I hope you agree.

Honestly, the more I hear you both speak and the more I hear the interventions from my colleagues opposite, I can't see any other true resolution unless we do make amendments to the act. I share your views on that. I think the challenge for our committee, if we want to provide clarity to the highest degree possible, is to determine exactly how those amendments are brought forward. The precision of wording will obviously be a part of that, but what do we need to do in order to amend the act to satisfy both the requesters' rights and the rights of Parliament? That's a great premise to begin, but I haven't got an answer just yet. I was looking for a little guidance.

I'd like a couple of comments on whether you think we're perhaps going on the right track.

**Col Michel W. Drapeau:** You're very right. The aim of the act is transparency and accountability, and it has been said over and over again by the court. In some ways you're going against the principle of the act itself. You are also going against a trend. The British House of Commons is now subject to the act.

If you want to retrench from that and say we're going to be having an exclusion or an exemption, you want to do it with some measure of caution, because from a political standpoint, with respect to transparency, you want to make it a little less transparent than what it actually is at the moment.

Whether or not you use a more cautionary approach for documents that are being released to government institutions, with the knowledge that some but not all of those documents may be accessible without having to submit a request, if it does happen, then you no longer should be able to count on getting notice, because you really are not entitled to such notice. Once the access to information coordinators have these records, they will process them as they do with all other records and probably will make them available to the individuals who have requested them.

The final analysis is whether or not the risk to the parliamentary privilege—and really that's what it boils down to—is such that you cannot take any risk of having any of it being disclosed, and by so doing, then you have to go to an exclusion or an exception.

**The Chair:** We'll have Madame Legault on that topic.

**Ms. Suzanne Legault:** Essentially, if there were consideration for an amendment, I think one would have to determine the exemption of parliamentary privilege. I really am not supportive of exclusions. I'm not supportive of mandatory class exemptions. I think it should be discretionary.

Second, I think you have to deal with the process for institutions to consult Parliament and therefore the timelines and whether or not it's a mandatory consultation with Parliament.

Third, you have to provide for a process within Parliament to answer to the government institutions, as they have, I believe, in the U.K. or Australia, where they have a certification process within Parliament to determine whether it's a parliamentary privilege matter or not.

I think if you did that, you probably then get very close to the Bayle decision, wherein the court basically says once there's an assertion of parliamentary privilege, they're not going to lift the parliamentary veil, if you wish, if I was going to make a parallel with the corporate veil.

To me, those would be the components that the legislator would have to look to.

● (1245)

**The Chair:** Thank you.

Mr. Cullen is next.

**Mr. Nathan Cullen (Skeena—Bulkley Valley, NDP):** I have two quick questions following up on my friend's comment about Parliament maybe being exposed to losing a case in court around this particular topic.

With so many interested groups around the country engaged in access to information, do you have any ideas as to why this hasn't been tried if the act is so potentially in conflict?

Second, there was an assertion made that government departments would also be broadly covered, if I'm understanding this correctly, by this parliamentary privilege component. Have we seen evidence of that? I may have missed that in your testimony. Am I misreading what you said earlier?

**Ms. Suzanne Legault:** Perhaps I didn't express myself properly. I haven't had a case as a complaint in which this issue has arisen.

As I expressed before, my concern is that it may be occurring, but it's not being disclosed either to the requester or to my office through a complaints process that the real reason for not disclosing is that the House has asserted the parliamentary privilege. I haven't seen that. It is disquieting.

I'll give you an example within my own office of an issue that arises from time to time. When I prepare report cards, the report cards are always tabled in Parliament as a special report to Parliament under my legislation, which is very specific in terms of how I give special reports to Parliament.

Before the report cards are finalized, I send them to the institutions that are the subject of these report cards for them to review and to check for accuracy of facts and so on, and make some corrections of factual information if need be. It has occurred that someone, an institution, has said we have had a request for this information. I say that it's protected by parliamentary privilege, that it's a report I'm preparing for Parliament and I'm an agent of Parliament. However, it's very awkward, because there is no such thing.

Probably in the future I'll have to do these report cards under a formal investigative process to avoid this issue occurring. It shouldn't be. There should be a provision for that so that Parliament tells institutions, should you have information under your control, that the House or the Senate somehow has been certified to be protected by parliamentary privilege, and you have the right under this scheme to refuse disclosure. That's what we are looking at.

**Mr. Nathan Cullen:** I know that Mr. Drapeau has some answers. I also want to make some time available for Mr. Scott to ask a question at the end.

**Col Michel W. Drapeau:** About 4% of the requests lead to a complaint, so it's not surprising that even over the past 30 years, this hasn't surfaced yet. Perhaps, given the publicity this is given, it might, and sooner than we'd want it to. I'm not surprised by it.

**Mr. Craig Scott:** I just wanted to clarify one thing.

It's great that this discussion has led us to the point where we're thinking about an amendment to the act. I just wanted to be clear about one thing.

Some of the recommendations you referred to, Madame Legault, did not simply list parliamentary privilege so that a third-party process could tap into that exemption; they recommended listing Parliament in schedule 1, as is done in Quebec and in some other Westminster jurisdictions.

Do you have a view on that issue?

**Ms. Suzanne Legault:** I am of the view that public institutions that receive public funding and that spend public funding should be covered by the Access to Information Act—that is, requesters should have the right to make an access to information request.

I think that as far as the administration of Parliament is concerned, as far as its administration of public funds is concerned—I'm not talking about political information—it should be subject to the Access to Information Act. That's what they have in the U.K. That's what they did in Newfoundland. I think it is appropriate, and yes, that would be my recommendation as well.

● (1250)

**Col Michel W. Drapeau:** If I can echo that, I'm in fact on the record as having said that on a number of occasions, starting in the book you have before you. I would certainly have the House of Commons, the Senate, the Governor General, and the court administration subject to the act, with no exceptions. Make the act universal.

**The Chair:** I have no one else on my list.

Everything you've said brings another question to mind, but there is not going to be time today to answer all of them. I'll entertain a couple more one-off kinds of questions.

We'll go to Mr. Lukiwski for a minute or two.

**Mr. Tom Lukiwski:** Madame Legault, I assume, perhaps incorrectly, but I hope I'm correct in my assumption, that you have examined some of the provincial access to information acts and how they deal with privilege. You've cited Quebec, of course.

In your examination of the provincial legislation, is there anything that would be problematic if we tried to replicate some of the provincial legislation? Clearly there are differences between the federal and provincial legislatures on a number of different levels, but specifically on this point, do you see anything that would be problematic? I believe that if we're going to do any kind of examination, we're going to have to take a look at what the provinces do.

**Ms. Suzanne Legault:** Well, I have an issue with the Quebec legislation. Even though the National Assembly is covered, parliamentarians have full discretion without any parameters on how that discretion is exercised in terms of what can be disclosed. I certainly have an issue with that model.

I'd have to look at the different jurisdictions a lot more closely. I'd probably look at the Alberta one, because P.E.I. is essentially a model of Alberta.

I'd like to speak to my colleagues in Australia and the U.K., actually. That's where I would like to go. I do look at provincial legislation, but I like to look at national legislation because there are different considerations for nations as a whole versus provinces.

I would like to come back to the committee, should you wish to have a more in-depth study.

**The Chair:** All right. We will keep that in mind, and as you gather information, we'll find a way to transfer that back and forth.

Monsieur Drapeau, do you have something on that piece?

**Col Michel W. Drapeau:** Yes.

Mrs. Legault and I agree. I don't think Quebec would be the model I would go to, unless you wanted to have the House of Commons added to schedule 1. That is, it would be subject to the act. This is not what we're discussing here today. If it is to look at parliamentary privilege information being disclosed by federal institutions as we know them now, I would not use this as a model. I'd rather look at what the U.K. and Australia and perhaps some other provinces have done.

**The Chair:** Mr. Williamson, you can have a short question.

**Mr. John Williamson (New Brunswick Southwest, CPC):** Ms. Legault, I might have misunderstood, so I thought I should ask again.

You were saying, and I don't want to put words in your mouth, that when you prepare these report cards, if the raw documents were requested, they're protected by parliamentary....

**Ms. Suzanne Legault:** As Information Commissioner, as an agent of Parliament, if I prepare a special report to Parliament and it's disclosed when it's sent to an institution for comments, that would cause me personal embarrassment vis-à-vis Parliament, because this is something I'm preparing for parliamentarians. Since there's no such exemption in the act, I've reconsidered how I will conduct these report cards. If I do them under a formal investigation, then they're protected by the confidentiality provisions for investigations under the act. That would not be my preferred route, but it's another example of what people are now having to do in certain circumstances in order to ensure that matters you would expect to be protected by parliamentary privilege are actually protected.

In the meantime, given that this is the situation when information is shared between Parliament and institutions, perhaps before information is shared there should be a consideration in Parliament as to whether or not this could be an issue if it were disclosed by the federal institutions covered under the act. Once it leaks, there could be an argument for a presumption, akin to solicitor-client confidentiality, that there is a waiver of privilege at that time.

● (1255)

**The Chair:** Almost everything you say raises three more questions. I was almost at a level with you. Now you've added that. I'm thankful for the great talent I have around the table.

Monsieur Drapeau, do you want to add to that?

**Col Michel W. Drapeau:** No, I would agree that at the moment it is certainly implied consent. I haven't seen the documents in dispute, from Parliament to the Auditor General, but there is an implied consent. You ought to have known that this was under the control of a federal institution; it came under the act and this is what happens.

**The Chair:** Mr. Casey, have you a one-off?

**Mr. Sean Casey:** Yes, thank you.

I was interested in your comments that even the basis on which—

**The Chair:** I'm sorry, Mr. Casey, but apparently we have bells.

Go ahead and ask the question, and if that's the case, we will have to go.

**Mr. Sean Casey:** The basis on which this was even referred back to Parliament pursuant to section 20 may have opened a question. You mentioned a couple of times in your opening remarks that there is no process for government institutions to determine who has authority to invoke or waive parliamentary privilege. We're looking for advice on who should have the power to invoke or waive.

**Ms. Suzanne Legault:** When we look at other models, in the U. K. the provision is that there needs to be a certificate signed by the appropriate authority certifying that an exemption is required. My understanding is that the appropriate authority is the Speaker in the U.K., but this is something that I would have to check with my colleagues.

**The Chair:** Madame Legault, if we request it, would you put what you discover or the research you do back to us in writing, please?

Committee, we're going to have to adjourn.

Thank you so much, and thank you for living with what's going on with the bells and the votes today.

I thank the committee for great questions today.

Just before we stop, Tuesday...?

**An hon. member:** I'm against it.

**The Chair:** You're against Tuesday. Okay, then the meeting is adjourned.

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