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Mr. Blaine Calkins

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● (0845)

[*English*]

The Chair (Mr. Blaine Calkins (Red Deer—Lacombe, CPC)): Good morning, everyone.

It's great to see everybody back after our constituency week. This is our first meeting. Before I get to our witnesses and our guests this morning I'll remind members who are new, which is all of us, that when we're doing video conferencing you'll find that there is a delay between here and whether it's Montreal, Toronto, or Alberta in this particular case this morning.

What I would ask that you do is that you hesitate for a couple of seconds if you're going to switch languages or if you're going to begin your questions after someone is done speaking. You'll find that it's like a cellphone conversation when two people try to start talking at the same time because of the delay. Sometimes these things happen. For the sake of our translators and to make the meeting go as effectively and efficiently as possible for those of you who haven't done a video conference before just note that delay.

Colleagues, when we last met we had plans to have certain witnesses here. We had talked about having privacy commissioners from other provinces and information commissioners from other provinces as well, and they were able to join us today.

I would like to welcome from the Commission d'accès à l'information du Québec, Diane Poitras and Jean-Sébastien Desmeules. From Toronto we have Mr. Brian Beamish, and from my home province of Alberta we have Ms. Jill Clayton.

Ms. Clayton, we are glad that you're up bright and early this morning. You have with you Kim Kreutzer Work and Sharon Ashmore.

You've been briefed on what the topic of our study is. The way we will proceed is I will give each of you an opportunity to provide some information to the committee and then we'll proceed to rounds of questioning.

We'll go for about an hour and a half. If each of our witnesses gives us up to 10 minutes that would give us about an hour or 50 minutes for questions and answers. We'll make sure everyone has an opportunity to ask questions and then we'll have about 20 to 30 minutes at the end of the meeting again to further refine the details of our study.

Without further ado I will start with Ms. Poitras.

You have the floor for 10 minutes.

[*Translation*]

Mrs. Diane Poitras (Vice-president, Commission d'accès à l'information du Québec): Thank you kindly, Mr. Chair.

My name is Diane Poitras and I am the vice-president of the Commission d'accès à l'information du Québec. I am stepping in today for our president, Jean Chartier, who is currently out of the country. Joining me is our secretary general and chief of legal services, Jean-Sébastien Desmeules.

I would like to thank you, Mr. Chair, as well as the committee members, for inviting us to appear before you today. We appreciate the opportunity to speak to you briefly about access to information and privacy laws applicable in Quebec and the role of the Commission d'accès à l'information du Québec.

In terms of Quebec's legislation, An Act respecting Access to Documents Held by Public Bodies and the Protection of Personal Information was passed in 1982 and applies to approximately 2,700 public bodies in Quebec. Essentially, that means the government, the National Assembly, government departments and agencies, municipal and school bodies, as well as health services and social services institutions. Under the act, every person has a right of access, on request, to the documents held by these public bodies. Like other access to information laws, Quebec's legislation also sets out situations where a public body can or must deny access to a document.

The act also provides that every person can make a request to examine personal information concerning them or to have it corrected. There again, a public body can, of course, deny the request for specified reasons. A public body must give the reasons for any refusal to disclose an administrative document or personal information. The person may then apply to the commission for review of the decision.

To promote transparency, the access to documents act and accompanying regulations provide for the proactive disclosure of some information and documents by government departments and agencies. For instance, any document made accessible further to an access request must be disclosed on the body's website for the overall public good. The same is true of studies and research reports in the public interest, as well as information relating to a public body's contracting or spending activities.

Finally, the access to documents act requires public bodies to protect the personal information they hold. To that end, they are subject to obligations throughout the lifecycle of the personal information, from the time it is collected or created until it is destroyed.

Next, An Act respecting the Protection of Personal Information in the Private Sector was passed in 1994 and applies to all enterprises doing business in Quebec. In fact, the province was the first government in Canada to pass legislation to protect personal information in the private sector.

The legislation requires private enterprises to protect the personal information they hold and disclose, even outside Quebec. This act also stipulates that a person can request access to, and the correction of, personal information concerning them being held in a file by an enterprise. If the enterprise refuses to grant the request, the person can submit an application to the commission for the examination of a disagreement.

Both of the acts I just described override all other applicable legislation in Quebec, attesting to the desire of lawmakers to underscore the paramount importance of the acts and the rights they give citizens.

I would like to point out one last thing about the legislation. Every five years, the commission must report, to the government, on the application of the acts. The commission makes recommendations designed to improve government transparency and privacy protection in Quebec. The report is submitted to the National Assembly and then studied by a parliamentary committee, so it can give rise to legislative amendments.

Now I'd like to say a few words about the role of the Commission d'accès à l'information du Québec.

The commission was established in 1982 and has approximately 50 employees, with 7 members appointed by the National Assembly. They serve for a renewable term of 5 years. Under the act, the commission's mandates are split between two divisions: an adjudication division and an oversight division.

I'll speak first to the adjudication division.

● (0850)

The adjudication division acts as an administrative tribunal and decides applications for review made by any person who has been denied access to administrative documentation or personal information. The adjudication division receives approximately 2,000 new files annually.

Members appointed to the adjudication division generally hold hearings during which representations are made by the parties concerned. When deemed appropriate by the member reviewing the file, representations may instead be made in writing.

After hearing the parties concerned, the commission can decide on every matter of fact or of law and make every order it considers appropriate to protect the rights of the parties. In particular, it can order the release of a document and fix such conditions as it may deem advisable to facilitate the exercise of a right conferred by the act.

The commission's decision is public. It is executory 30 days after its receipt by the parties, subject to the person's right to appeal the decision before the Court of Québec on a question of law or jurisdiction only. This right of appeal is tantamount to a judicial review.

From the time a decision becomes executory, it may be filed with the Superior Court, granting it the force and effect of a judgment of the Superior Court.

The commission makes a confidential mediation process available to the parties, on a free and voluntary basis, to encourage amicable settlements. Approximately 80% of the applications filed with the adjudication division are settled through mediation, and 30% of those are resolved within 90 days of the file being opened.

Ensuring that files are settled to the satisfaction of the parties in this way allows the commission to reduce hearing wait times for other files. Furthermore, even in cases where the parties are unable to reach an agreement, the information provided by the mediator can help them narrow the focus of the debate and better prepare for the hearing.

I will end with a few words on the commission's oversight division.

In its oversight role, the commission is responsible for promoting the principles of access to documents and the protection of personal information. Clearly, it must also ensure compliance with relevant legislation. To that end, the commission investigates potentially problematic situations brought to its attention, thus ensuring that public bodies and private enterprises adhere to the provisions in the legislation.

The commission can make executory recommendations and orders further to its investigations. If an order is not implemented, the commission can notify the government, describe the situation in its annual report, submit a special report to the National Assembly or, in the case of a private enterprise, release a public notice. Penal proceedings may also be instituted.

The commission recently introduced a preliminary complaint-handling process, which has allowed it to resolve 60% of cases. This is a quick and effective way of changing the practices of public bodies and enterprises.

In conclusion, I would point out that the Government of Quebec announced its intention to modernize its access to documents act, by implementing a number of the commission's recommendations. These were set out in reports produced by the commission every five years. The government and several stakeholders nevertheless believe that one of the current model's strengths lies in the commission's power to make executory orders. The commission agrees, reiterating, as part of its modernization efforts, the importance of providing citizens with an effective remedy that allows for an executory decision at the initial recourse level.

Thank you, Mr. Chair.

I would be pleased to answer any questions you or the committee members have.

● (0855)

[*English*]

The Chair: Thank you very much, Madame Poitras, for that very informative briefing. I'm sure we'll get to some very good questions once we're through the list.

Now we move to Mr. Beamish for up to 10 minutes.

Mr. Brian Beamish (Commissioner, Office of the Information and Privacy Commissioner of Ontario): Thank you very much.

Good morning, everybody.

My name is Brian Beamish. I'm the information and privacy commissioner for the Province of Ontario. I appreciate the opportunity to speak to you while you continue to review the federal Access to Information Act.

I'm really pleased to be able to speak to you about Ontario's experience with access to information, or freedom of information, as we call it. In my 10 minutes, I am going to concentrate on the issue of oversight powers and particularly on our experience with having order-making power here in Ontario as compared to the ombudsman-style regime that is set out in the federal act.

Before I do that, let me just give you some context on the work we do here. My office oversees three laws: the provincial Freedom of Information and Protection of Privacy Act, the municipal counterpart to that, and Ontario's health privacy law, the Personal Health Information Protection Act.

In terms of exercising powers under those acts, when it comes to access to information, we have full order-making power, which means that ultimately we resolve issues by making an order that can range from situations where institutions have not made a decision, to fees, to requiring additional searches to be performed for records, or at the end of the day, to the refusal to disclose records. Under the health privacy law, we have, again, full order-making power so that when we conduct an investigation, we can order a health information professional or organization to take particular steps to comply with the law. On the public sector privacy side, we have very limited order-making power. We can only order an institution that is collecting information; otherwise, we have a review and recommendation function.

Again, it's context. I think it's important to understand that, even though on the access to information side we have full order-making power, we only issue orders in a relatively small percentage of cases. In May 2015, provincial and municipal institutions in Ontario received approximately 58,000 access to information requests. Those are the initial requests coming into government bodies. Of those, our office received 1,400 appeals, which represents about 3% of all of those initial access to information requests, and we were able to resolve about 77% of those appeals without issuing an order, which meant that we ultimately issued only 243 orders. So you can see that there's a real winnowing effect from 58,000 requests to 1,400 appeals to 243 orders, and I think a lot of that can be attributed to the fact that we do have order-making power.

Let me turn then to our experience with that power. I can say that it has been overwhelmingly positive. Before becoming commissioner, I was the assistant commissioner with responsibility for our tribunal services, so I did have direct experience with this, and I'm a very strong supporter of the order-making model. I think the bottom line is that it presents a benefit not only to requesters but also to the institutions that are covered by our act, and it promotes an expeditious, cost-effective, efficient access to information regime that has a real element of finality to it.

Let me turn to the specific benefits that we see. The first is that I think the order-making model does help to enforce the right of access in an efficient and effective manner. There is a clear incentive for institutions at the initial request stage to maximize the amount information that they are disclosing and to reduce the administrative burden both on themselves and on the requester.

I think it's important to remember as well that there can be a real power imbalance in the access to information system. The majority of our requesters are individuals who don't necessarily have the resources to engage in a prolonged battle with a government institution that may end up in the courts, and our system is designed to give them greater access to the information system and the review of the initial government decisions.

● (0900)

We are able, because we have order-making powers, to put systems in place to ensure that the review process of an institution's initial decision does not drag on. If it does, we are able to bring it to closure by issuing an order.

I know that one of the criticisms of the ombudsman style, particularly at the federal level, has been a low compliance level. The federal Information Commissioner makes recommendations, but they're not complied with by institutions. Binding orders don't have that difficulty. Our orders are final. They are not appealable to the courts.

Institutions or unsatisfied parties can seek judicial review, but that's a very narrow review process. In fact, last year, of the 243 orders we issued, there were only six cases where they were judicially reviewed. For the most part, our orders are final and binding on the parties and bring finality to the system.

The second benefit we see is that by our ability to issue orders we create a body of jurisprudence that can be relied on by requesters, the public, government institutions, and our staff themselves. Over the years, we have issued thousands of orders that have interpreted the act and how it should be applied. I believe that gives guidance to all the parties, makes for better and full decisions regarding disclosure by institutions, and also provides guidance, should there be an appeal, to the parties on how our organization will resolve those appeals.

The third benefit I see is that order-making power helps to facilitate settlements. Our order-making [*Technical difficulty—Editor*] not work to the exclusion of mediation. In fact, I believe it helps facilitate the mediation process. Parties, when they come to us on an appeal, have a very strong incentive to mediate and to find common ground, rather than have an issue move on to adjudication and a potential order.

Commissioner Legault noted last week in her comments that one of the benefits of order-making power is that there's a clear distinction between the mediation process and the adjudication process. In our system, if a file does not mediate, it moves on to adjudication, at the end of which an order can be issued. The mediation process is confidential. The parties can engage in mediation in a frank and open discussion, and they don't have the worry that anything they say during mediation might prejudice their case at adjudication. I think that's another way in which mediation is facilitated.

In 2015 we were able to fully mediate 63% of our appeals. I think that demonstrates that order-making power not only can operate in conjunction with a mediation style but in fact enhances it.

The fourth benefit we've experienced is the ability to deal with what we would term “administrative” or “procedural” appeals. Again, I note that Commissioner Legault last week suggested that up to 40% of the caseload she carries are cases that are administrative in nature, preliminary procedural issues that don't get to whether or not an individual has a right to information.

Our stats show that we [*Technical difficulty—Editor*] less than 10% of our caseload on administrative appeals. Last year it was around 8%. Generally, these are cases where an institution, having a duty to provide a response within 30 days, has not done so, and the requester has come to us to say that they're not getting any action out of the institution. We're able to deal with those directly, because the parties know that we can and will issue an order to require a decision out of an institution. We go to the parties. We go to the institution that hasn't provided a response. We try to renegotiate a deadline for a response. If we don't get that, we will issue an order requiring them to provide a response. We do have cases where months go by and an institution has not complied with their duty to give a response to a requester.

Again, looking at last year's stats, we did not have to issue an order in a deemed refusal situation. We were able to negotiate all of those, and we were able to do that in an average of 40 days. I think it's a very quick and efficient manner of getting responses out of institutions.

● (0905)

Finally, the last benefit I want to point out, and I mentioned this already, is some finality that's brought to the access to information process. There is no right of appeal to the courts. There's only that very rarely exercised ability to seek judicial review. Requesters are not dependent on the courts to exercise their access to information rights. I really believe that making the average requester, the average citizen, go to the courts to exercise their rights is, in many cases, really access denied, and it is not the type of remedy that is suitable for an open and transparent government.

I will wrap up my comments with that. I'm happy to take questions. I note that we understand that having order-making power presents an enormous duty on us to exercise it judiciously—not capriciously and not arbitrarily. We take that duty very seriously. I believe that it really is a fundamental element of a sound access to information regime.

Thank you very much.

The Chair: Thank you very much, Mr. Beamish.

Now we will move to our last presentation this morning before we get to our questions. I'll go to Ms. Clayton, who is the commissioner for Alberta.

Ms. Clayton, if you could introduce your guests, you have 10 minutes, please.

● (0910)

Ms. Jill Clayton (Commissioner, Office of the Information and Privacy Commissioner of Alberta): Thank you very much, Mr. Chair.

I appreciate the invitation to be here to talk to you a bit about the work of my office. I'm joined by Kim Kreutzer Work, who is the director of knowledge management in my office, and Sharon Ashmore who is general counsel and director of legal services.

As the information and privacy commissioner of Alberta, I am an independent officer of the legislature responsible to provide oversight for free access to information and protection of privacy laws. The first is the Freedom of Information and Protection of Privacy Act, which applies in our public sector, the second is the Health Information Act, which applies in our health sector, and the third is the Personal Information Protection Act, or PIPA, which applies to provincially regulated private sector organizations.

I have broad powers under all three of these statutes, including the power to conduct investigations both in response to complaints and on my own motion, and also to review responses to requests for access to information. I also provide general advice and recommendations, inform the public about the administration of the acts, comment on access and privacy implications of proposed legislative schemes or programs, review privacy impact assessments, and as a quasi-judicial administrative tribunal I have the power to hold inquiries and issue binding orders.

For the most part I will focus my comments today on our public sector legislation, the Freedom of Information and Protection of Privacy Act, otherwise known as the FOIP Act. In Alberta the FOIP Act is both access to information legislation and protection of privacy legislation. It applies to public bodies, which includes provincial government departments, boards and agencies, and schools and chartered schools, as well as local government bodies, municipalities, police services, housing management bodies, universities, and those types of institutions. At its core the FOIP Act provides applicants with a right to access any information in the custody or control of the public body subject only to specific and limited exceptions set out in the legislation.

In the over 20 years since the act came into force the FOIP Act has been reviewed three times by all-party special committees of the legislative assembly. Two of those reviews, the first in 1998-99 and the second in 2001-02, resulted in amendments to the legislation. There was a third review in 2010 that resulted in a number of recommendations to amend the legislation that did not go forward. In 2013 the Government of Alberta announced its own review of the legislation. There was a consultation process, but that has not led to any report or recommendations for amendment.

I made two submissions to the government's 2013 review, both of which are available on my website. One of those submissions was focused primarily on technical amendments to the legislation. The other provided ideas, suggestions, and recommendations for modernizing and strengthening the FOIP Act.

Some of the key recommendations from that second submission included reviewing the scope of the act to ensure that publicly funded entities that should be subject to the legislation are, and confirming the need for existing exclusions. Another recommendation was to review the exceptions to access set out in the FOIP Act to ensure they are appropriate, require public bodies to identify categories of records that should be made publicly available without requiring formal access requests, and ensure there is an appropriate statutory and policy framework in place for records and information management practices that support transparency, accountability, and compliance with the FOIP Act. This includes requiring that public bodies create such records as are reasonably necessary to document decisions, actions, advice, recommendations, and deliberations.

Both of the recommendations I've just referred to are similar to or consistent with those found in the Information Commissioner of Canada's report "Striking the Right Balance for Transparency", which sets out recommendations for modernizing the federal Access to Information Act.

In addition the Information Commissioner's report also recommends strengthening oversight of the right of access by adopting an order-making model similar to what is already in place in Alberta and in other provincial jurisdictions. I understand our experience in Alberta with order-making powers is of particular interest to this committee, and I will use my remaining time to describe how that works in our office.

● (0915)

Similar to the federal Access to Information Act, our FOIP Act provides a right of access to records in the custody or control of a public body subject to limited and specific exceptions. If an applicant is not satisfied with the response that he or she receives from a public body, the applicant may ask me to review any decision after a failure to act by the public body. For example, a government department may disclose some records to an applicant but withhold others, citing an exception to access. Perhaps the disclosure would be an unreasonable invasion of a third party's personal privacy or could reasonably be expected to harm a law enforcement matter or the economic interests of a public body.

If the applicant asks, I can review the public body's claim that these exceptions to access apply. We call this a request for review in my office. When an applicant requests a review of a public body's decision to deny access, typically I authorize someone on my staff to investigate and attempt to mediate or settle the matter. This is our informal process, which results in non-binding recommendations and resolves approximately 80 to 85% of cases in our office.

If the matter is not resolved through this informal process, I can authorize an inquiry process, which decides all matters of fact and law. Inquiries are a quasi-judicial administrative tribunal process where the burden of proof generally lies with the public body to prove that the applicant has no right of access to the record or part of the record.

On completing an inquiry I, or the adjudicator I have delegated to hear the inquiry, will issue an order. Examples of orders include requiring a public body to give an applicant access to all or part of the record, confirming a public body's decision to deny access, confirming or reducing a fee for access, or requiring that a duty imposed by the legislation be performed.

A commissioner's order made under the FOIP Act is final and may be filed with the clerk of the Court of Queen's Bench. After filing, the order is enforceable as a judgment or order of that court. Since the FOIP Act came into force in 1995, we have issued more than 675 orders under that legislation and we have had 100% compliance with those orders. All orders are made public on my office's website and through publicly available legal databases. They not only provide finality in resolving a particular matter but also set precedents that can be helpful to other public bodies and lead to improved information management practices.

Orders issued by my office and other jurisdictions as well constitute a body of jurisprudence that educates and guides public bodies on interpreting and applying the law. Publicly issued orders may also help to reduce duplication of effort in mediating, investigating, or adjudicating similar matters over and over again.

There are also significant benefits to individuals in the finality that goes along with a binding order that resolves a matter. My office's processes do not require that the parties have legal presentation, for example, and there is no cost. This is not to say that matters heard in an inquiry never make their way to court. Although orders are final, they are subject to judicial review, and since the FOIP Act came into force we've seen approximately 30 judicial review applications. In about half of those cases, the order was upheld as issued.

As I've just outlined, it is my view there are significant benefits to the order-making model in Alberta and our experience is that it provides clarity, enhances consistency of decision-making, and can be more timely, less expensive, and less adversarial than the courts while still providing finality for the parties involved.

Overall, in my view I think order-making power has been to the benefit of access rights in Alberta. I would be pleased to answer any questions that you may have.

Thank you.

The Chair: Thank you very much, Ms. Clayton.

Thank you very much to our witnesses today. Those were very insightful introductory remarks and I know we'll have many good questions for you.

I'll just remind everyone once again that in the course of a dialogue please wait for that delay or expect that the delay is happening. If you have a cellphone on you or near any of the equipment used in this, it may interfere with it, so I would ask you just to move your phones away from the equipment or turn them off.

We'll begin our first round of questions for seven minutes. We go to Mr. Massé from the Liberal Party.

[*Translation*]

Mr. Rémi Massé (Avignon—La Mitis—Matane—Matapédia, Lib.): Thank you, Mr. Chair.

Ms. Poitras and Mr. Desmeules, thank you for your presentation. It was great.

You said you were in the midst of a review to modernize Quebec's access to information legislation.

I'd like you to comment on the challenges you face and the solutions that would be available in modernizing the act.

Mrs. Diane Poitras: A number of considerations come into play.

The commission would like more organizations brought under the access to documents act. Currently, certain organizations that are entirely, or mostly, publicly funded, as well as those carrying out functions comparable to public functions, are not subject to the act.

The biggest challenge when it comes to modernizing the act has to do with the wording of the restrictions around access to documents. The act is more than 30 years old, and the restrictions are worded in very general terms that are quite open to interpretation. That can result in more remedies and more refusals by institutions, who have more discretion in denying access to information. I'll give you a specific example.

Under Quebec's legislation, a public body can refuse to disclose an opinion or recommendation that is less than 10 years old. The public body not wanting to disclose the opinion or recommendation is not under any obligation to show that the disclosure could have a negative impact. “Opinion” and “recommendation” are very broad concepts, and it was necessary for the commission to define how they should be interpreted.

There is something else I can tell you about that. In the provinces of my two counterparts who are joining us by videoconference, the acts contain a provision authorizing the refusal to disclose opinions and recommendations. But they also stipulate that the restriction cannot be applied to certain types of documents in specific situations. We don't have that in Quebec. As I see it, that's one of our biggest issues when it comes to access to information.

As far as the privacy component is concerned, without going into too much detail, I will tell you that the legislation was drafted at a time when most documents and records were on paper. There isn't enough flexibility in the act to adequately address issues arising from the use of new technologies, in terms of safeguarding privacy and protecting personal information.

Another principle that didn't exist in 1982 but is becoming more common nowadays is proactive disclosure, versus disclosure in response to an access request.

● (0920)

Mr. Rémi Massé: Thank you.

I'm going to stay on the same topic.

You said that the act applied to the legislative branch and contained safeguards to protect certain interests. I'd like a bit more information on the disclosure of documents involving the legislative branch. How does the act apply in that regard? What are the safeguards you mentioned?

Mrs. Diane Poitras: Quebec's access to information legislation applies to the government, the National Assembly, the lieutenant-governor, the Conseil exécutif—or executive council—and the Conseil du trésor—or treasury board. They can, however, invoke restrictions to protect certain kinds of information, for instance, involving parliamentary privilege. I know that's something that was discussed with Ms. Legault.

The act contains a provision protecting certain decisions made by the executive council or treasury board. It lists the documents that are protected, such as certain communications between ministers or between a minister and the executive council or treasury board, and the records of the deliberations of the executive council or a cabinet committee. If you'd like more detail on the information covered by the restrictions, you can consult sections 30 and 33 of the access to documents act.

As regards the office of a minister, section 34 of the act protects information for the exclusive use of a minister in the exercise of their political role, as opposed to their role as the head of a department. That's how I would summarize the safeguards in that respect and the way they are interpreted.

● (0925)

Mr. Rémi Massé: I have one last question for you.

You mentioned a more proactive approach to disclosure, at the department level, in particular. I'd like you to elaborate on how you see that working.

Mrs. Diane Poitras: The act was amended in 2006 to build in that obligation for government departments and agencies. Since 2009, regulations have set out the documents that must be made available on the Internet. The government recently amended the regulations governing distribution, increasing the number of documents subject to proactive disclosure. Further to that amendment, every public body must adopt a distribution plan.

It's important to keep in mind that the documents that interest a particular government department are not the same as those that interest a crown corporation like Hydro-Québec. It's hard to find a measure that suits all of them. The government's approach was to have a customized distribution plan for each public body.

Right now, only government departments and agencies are under that obligation. We would like to see the municipal and school sector, as well as the health services and social services network, subject to the proactive disclosure obligation. And that's what we recommended to the government.

Mr. Rémi Massé: Thank you.

[*English*]

The Chair: That takes up your time, Mr. Massé.

Next is Mr. Jeneroux from the Conservative Party, please.

Mr. Matt Jeneroux (Edmonton Riverbend, CPC): Perfect.

Thank you, everybody. Thank you for coming this morning, particularly Alberta. It's nice to see you all again.

My line of questioning is similar Mr. Massé's with regard to getting to the details about cabinet and cabinet minister and staff confidentiality. This question will come across as rather simple, but I know the answer definitely will not. In your expert opinion, when and where do you feel the line is for cabinet confidentiality and for what has to be made public?

If we could hear from all three provinces, that would be great. Thank you.

The Chair: We'll go in the same order as we did for the presentations. We'll start with Quebec, move to Ontario, and then Alberta, please.

[*Translation*]

Mrs. Diane Poitras: With the safeguards I mentioned already set out in the act, Quebec's experience has been rather positive. Since we have certain decisions pending before the courts, you'll appreciate that I can't say much more than that on the different interpretations of those provisions.

Nevertheless, generally speaking, I would say that the current provisions strike a balance between the need for those organizations to be transparent and the need to ensure their decisions and deliberations are protected, under what is commonly known as parliamentary privilege.

[*English*]

The Chair: Mr. Beamish.

Mr. Brian Beamish: In Ontario we do have an exemption for cabinet documents. It's not one we deal with a lot, but I agree with Diane, I think for the most part it strikes the right balance. I think it's reasonable that cabinet can have deliberations that have confidentiality attached.

Our cabinet exemption has a 20-year time limit. I think it's appropriate that there is a time limit put in place for cabinet documents. I suppose there could be a discussion about whether 20 years is the proper time limit, and whether it should be shorter or longer, but I think it's correct that at a certain point cabinet documents should be made public.

I think the question that we [*Technical difficulty—Editor*] more, and it's a different exemption, is advice and recommendation to government. That's a separate exemption and perhaps a separate discussion.

The Chair: We'll now move to Ms. Clayton, please.

● (0930)

Ms. Jill Clayton: In Alberta, cabinet and Treasury Board confidences are a "must refuse to disclose", so it's a mandatory refusal to disclose that information to an applicant. But there are some qualifications on that. This includes advice, recommendations, policy considerations, and that sort of thing. It does not apply to information in a record that has been in existence for 15 years or more, and information in a record that is about presenting background facts to the executive council or committees. The exception doesn't apply if the decision has been made public or has been implemented or if five years or more have passed since the decision was made or considered.

It is a mandatory exception. There are some qualifications on it. For the most part I think that does achieve the right balance.

One thing that I think is very important is that in my office we have the ability to review those records to ensure that the exception to access has been properly claimed. I believe there is a handful of orders that we've issued where we have reviewed the records and explained the purpose of that exception and why it matters—because exceptions to access are important—but where we've been able to issue binding orders to confirm, for example, the decision to withhold the records because they're cabinet confidences.

Mr. Matt Jeneroux: Thank you very much.

Shifting slightly to delays and extensions for delays, in Ms. Legault's report she speaks a lot about experiencing a large number of complaints and delays.

From your perspective, in the provinces, are you experiencing higher delays, and do you have any comments on her request for the extension piece?

The Chair: Anyone who would like to start, go ahead.

Mr. Beamish.

Mr. Brian Beamish: I did mention in my comments that delay is not as significant a problem in our jurisdiction as it is federally. I put that down to our ability to bring some finality and conclusion to a refusal to issue a decision or an overly broad time extension by issuing an order.

What would generally happen in Ontario is that if a decision has not been made by a ministry, for example, within 30 days, and an appeal comes to us, we will go directly to the ministry and basically say to them, "Either tell us when you will make a decision, within a reasonable time, or we will order you to make a decision within that time frame."

I don't believe it's as significant an issue with us as it may be at the federal level.

The Chair: Is there anyone else?

Madam Poitras.

[*Translation*]

Mrs. Diane Poitras: Just a quick clarification.

The problem we have in Quebec is different. Under the act, when an agency hasn't responded within the prescribed time frame, the assumption is that the organization is refusing to disclose. So the citizen immediately turns to us, and we treat the file as a refusal to grant access. Further to that process, the body must give reasons for the refusal.

What that means in Quebec, then, is that it's not necessary to negotiate time extensions with public bodies.

[*English*]

The Chair: Ms. Clayton, do you have anything to add to that?

Ms. Jill Clayton: Yes. I wouldn't say that delay is a systemic problem across all public bodies subject to the legislation, but there certainly are delays in pockets and on certain issues. We've put in place processes, certainly through our order-making process, to try to address some of those issues.

For example, I know we issued a number of orders just recently against a public body for a situation similar to what Commissioner Beamish was describing, where the public body had not provided a response to a request for access. That matter came to our office. We bypassed the mediation and investigation process in the interest of getting a timely decision out there, a binding order requiring the public body to provide a response to the applicant in that case.

As I said, there may be certain public bodies where a delay is a problem, or there may be certain issues where delay is a problem—maybe not intentionally, but in some cases because there is a matter that needs to be resolved and sometimes the way to resolve the matter is through an inquiry process or a judicial review of the matter.

But overall, similar to the comments that Commissioner Beamish made, I don't think we have quite the same problem of delay that perhaps is seen at the federal level.

● (0935)

The Chair: Thank you very much. It seems to be the case that there are different powers that you have in all your respective jurisdictions that I think we need to seriously look at, and I'm sure we'll get to more in the questions.

We now move to Mr. Blaikie from the NDP for seven minutes.

Mr. Daniel Blaikie (Elmwood—Transcona, NDP): Thank you very much.

Thank you to all of you for spending time with us today, and for your presentations.

I don't want to delay you too long but I do just want to quickly serve notice of a motion before moving on to questions. The motion is that the committee request all briefing materials and memos prepared by the Treasury Board Secretariat for the President of the Treasury Board with regard to possible changes to the Access to Information Act, and that the committee invite the President of the Treasury Board to appear before it to elaborate on the aforesaid information at his earliest convenience following receipt of this information by the committee.

The Chair: Thank you, Mr. Blaikie. This is not normally when we do these things, but that's fine.

Mr. Daniel Blaikie: I understand, but I think it does frame.... One of the things that I'm hoping we might be able to speak to is the difference between the public having access to information on what kinds of options government is considering that are out there and that they're looking at, versus having access to the actual deliberations of cabinet. Mr. Beamish has touched on this already, as have some of the other commissioners.

I just wondered if in the experience of any of the commissioners here, you could help better define what that difference would be, and the usefulness of having those cabinet confidences protected by specific exemptions rather than blanket exclusions.

Mr. Brian Beamish: I can start again. I did mention that the exemption for advice and recommendations has been an issue. Generally, in terms of the advice and recommendations provided by a public servant to either senior public servants or to the political level, I think all of our legislation has an exemption for advice and recommendations, and there are good reasons for that. Traditionally, in Ontario we had interpreted that very narrowly, and generally it would only be the chosen course that was protected, and also the advice and recommendations had to be given to the decision-maker. In other words, if civil servants were having a discussion and mulling over different choices, but it didn't go any further, then they couldn't rely on that.

The Supreme Court of Canada recently struck down our interpretation and broadened out what represents advice and recommendations, so now we can include things like pros and cons and various options. It's a much broader direction from the court in terms of how we would interpret that. I guess any review of legislation is an opportunity to see whether the Supreme Court of Canada's interpretation is right or whether other wording would be appropriate.

The Chair: Anyone else...?

Madame Poitras.

[*Translation*]

Mrs. Diane Poitras: I can give you details on the examples I mentioned regarding the exemptions in Quebec's legislation.

Recommendations made by a cabinet committee or a member of the executive council are generally protected by a specific provision. The same is true of studies made within the executive council department, so cabinet, or the office of the secretary of the treasury board regarding a recommendation or request made by a minister, a cabinet committee or a public body.

In addition to the general provision protecting opinions and recommendations provided by public servants, section 33 of the access to documents act deals more specifically with recommendations made by cabinet members, for instance.

[*English*]

The Chair: Ms. Clayton, do you have anything to add?

Ms. Jill Clayton: I'd only say that as in the other jurisdictions, we do have an exception to access for advice and recommendations. That's a discretionary exception to access in Alberta, and again there are some qualifications on that in terms of timelines. We have issued a number of orders interpreting that section of the legislation. The language in our section is a little bit different from other jurisdictions, but as Commissioner Beamish has pointed out, that interpretation has gone to the Supreme Court and I think that where there were perhaps conflicting interpretations, we're now starting to see some consistency from the court in that. The issues are around things like whether or not the advice has to be given, and whether it is just the course of action that is taken versus the other options.

● (0940)

Mr. Daniel Blaikie: To what extent do you think it's important that there be some kind of third party oversight when these exemptions or exclusions are applied, and that someone like you be able to look at it and then affirm whether or not it makes sense to apply that exemption or exclusion?

Ms. Jill Clayton: I will speak first on that, if that's all right.

The Chair: Go ahead.

Ms. Jill Clayton: I think it's tremendously important. I think this is what gives citizens the reassurance that information is not being hidden from them. What is of tremendous challenge is when there are exceptions to access that may be applied, but if, as the oversight body, you're not able to see those records or to obtain information to verify that the exception applies, then it's very difficult to do that job and to provide that reassurance to a citizen who's applied for access.

In effect there can be a large black hole, either intentionally, because a public body might not want to release information, or in some cases because a public body doesn't understand how the exceptions apply. That goes back to consistency of interpreting and applying the legislation as well. Over time, as an oversight body, particularly through the inquiry and order-issuing function, as I said in my opening comments, a body of jurisprudence is established that helps public bodies understand how to apply these things and what the test is associated with a particular exception to access.

Nonetheless, we still see matters that come to us where that test is not applied the way it has been applied previously, so I think we provide not only that reassurance to citizens—the independent oversight I think is tremendously important—but also the consistency in interpreting and applying the legislation.

The Chair: Thank you very much.

That does use up your time, Mr. Blaikie. I know that not everyone was able to answer that question, but I'm sure an opportunity will present itself as we move along.

We go now to the last of the seven-minute sets of questions, and Mr. Erskine-Smith from the Liberal Party, please.

Mr. Nathaniel Erskine-Smith (Beaches—East York, Lib.): Perfect. Thanks very much.

I would like to start with the legal duty to document. Because there are three of you and because time is limited, I'll keep the question fairly straightforward.

Is there a legal duty to document in your respective jurisdictions, and do you agree with Commissioner Legault that we should implement one at the federal level?

The Chair: We'll go Quebec, Ontario, Alberta again, if that's okay.

[*Translation*]

Mrs. Diane Poitras: Thank you for your question.

The answer to your first question is no. Quebec currently has no legal duty to document.

As for your second question, the answer is yes. Quebec agrees with the need for such an obligation. That's why we signed a joint statement to that effect, along with all of our counterparts.

[*English*]

The Chair: Mr. Beamish.

Mr. Brian Beamish: Ontario similarly does not have a duty to document in its legislation. We did a very significant investigation a number of years ago into deleted emails. One of the main recommendations coming out of that is that there should be a duty to document.

At a minimum, I believe the decisions made and the reasons behind those decisions should be documented in some fashion so that they are available.

The Chair: Ms. Clayton.

Ms. Jill Clayton: No, there is no legal duty to document in Alberta's legislation, and yes, I believe there should be. That was part of the recommendations made to the government's review of the FOIP Act in 2013. Like the others, we did sign on to the joint resolution, issued by all information commissioners across Canada, calling for a duty to document. This issue has arisen in Alberta, more recently in January of this year. We issued an investigation that had to do with the destruction of records following last year's provincial election.

There is no oversight of the records management program. There are no penalties for destroying records. If there are no penalties and there's no duty to actually have records, then there are no consequences, and I don't think that's appropriate.

● (0945)

Mr. Nathaniel Erskine-Smith: On the question of costs and fees, Commissioner Legault has recommended the elimination of all fees. I wonder if you could briefly let us know whether the fees in your jurisdictions have been eliminated or are nominal, and if you would support Commissioner Legault's suggestion that they be eliminated or, in the alternative, that they be nominal.

[*Translation*]

Mrs. Diane Poitras: Under Quebec's legislation, access to a document is free of charge for citizens. But, under the regulations, a public body may charge a fee for the reproduction of the document, after the first 20 pages or so. And, obviously, there is no charge to consult the document on site. The regulations provide for a few other considerations, but those are the only fees that may be charged in Quebec. There is no charge for the information search or the time a public servant spends responding to an access request. And the commission does not charge a fee to citizens seeking a remedy.

[*English*]

The Chair: Thank you.

Mr. Beamish.

Mr. Brian Beamish: In Ontario fees are applicable in two circumstances. One is the initial fee for submitting a FOI request. In Ontario it's nominal. I think it could easily be eliminated. It strikes me as being more of an administrative burden than anything else. Institutions can also charge a fee for responding to the request itself. If the request is for a person's own personal information, generally that's a fairly nominal charge, if there is any charge at all. If you're looking for general records, there are occasions where that fee can be substantial. We have the ability to review a decision and strike down a fee if we feel it's too large.

I think fees, if they're not eliminated, at least could present an opportunity to leverage the system. In other words, if an institution or a ministry does not respond in time, or if there are delays, you could construct the legislation so that they forgo the right to charge a fee.

The Chair: Ms. Clayton.

Ms. Jill Clayton: In Alberta there's a $25 fee for general access, or access to general records. There are no fees for access to personal information. There's a fee schedule that sets out a maximum charge for processing certain parts of requests for access. An applicant who is charged a fee can come to the office and ask us to review that fee, and in some cases we have the power to order a public body to reduce the fee. Fees can also be waived in the public interest and we can review those requests.

Mr. Nathaniel Erskine-Smith: I have a final question. Commissioner Legault suggested that where a body is publicly funded in whole or in part it should be subject to access to information. I wonder in your jurisdictions whether there's a *de minimis* amount. Is it in whole or in part, and what's the scope of the application of the act in jurisdictions?

The Chair: We'll start with Quebec, and then go to Ontario, and finally to Alberta.

[*Translation*]

Mrs. Diane Poitras: A number of criteria currently apply in terms of the government agencies subject to the access to documents act. With respect to an organization's funding, the act stipulates that bodies whose capital stock forms part of the public domain are subject to the act. As interpreted by the courts, that means a corporation whose shares are owned entirely by the government or a public body.

Clearly, we don't think that's adequate. It's quite a feat to find the right legal wording to describe agencies that are publicly funded and that carry out public functions, while excluding certain types of not-for-profit agencies already subject to reporting requirements because they receive funding from a government department.

Knowing where to draw the line is extremely complex, and I don't think Quebec's current legislation is adequate in that regard.

● (0950)

[*English*]

The Chair: Mr. Beamish.

Mr. Brian Beamish: In Ontario, there is no formula for how much funding makes you a public body or covered by the act. That is generally left up to regulation. The government bodies are covered by the act by regulation.

Ontario has done a pretty good job of filling some gaps over the last few years. Universities have been brought under coverage and hospitals have been brought under coverage. I would prefer, I think, to [*Technical difficulty—Editor*] Commissioner Suzanne Legault's fundamental principle, which is that if you're funded by the government, you are covered.

I think one of the areas that we are dealing with and trying to grapple with is that some of the regulatory functions that have been traditionally performed by government are now being outsourced, sometimes to industry bodies. They're not-for-profit but they look like a government function in performing something that government used to do. Our feeling is that some of those should, at a minimum, be covered by privacy regulation, and we think they also should be covered by access regulation in terms of how they are administering their dollars.

The Chair: Thank you very much.

Ms. Clayton, I know you mentioned this in your opening remarks, but if you could give us the list of exclusions and inclusions, that would be great.

Ms. Jill Clayton: In addition to what I mentioned in my opening remarks, in Alberta the phasing in of the FOIP act was a staged process, eventually covering what we'll call, in order to summarize, the MUSH sector, which is municipalities, universities, schools, and hospitals, and also provincial government departments. It covers all those groups.

There are public bodies that are named in legislation itself, but there are also criteria set out in regulations that provide some idea of how other public bodies may be added to the legislation, as follows:

> The Lieutenant Governor...may designate an agency, board, commission, corporation, office or other body as a public body...
>
> (a) where the Government of Alberta
>
> (i) appoints a majority of the members of that body or of the governing board of that body,
>
> (ii) provides the majority of that body's continuing funding, or
>
> (iii) holds a controlling interest in the share capital of that body,

There is a regular review of this schedule to add additional public bodies.

In regard to my submission to the Government of Alberta's review of the FOIP act, they did recommend that we take a fulsome, comprehensive look at various institutions to make sure that the exclusions are appropriate, that the criteria are appropriate, and that there are not additional agencies, boards, commissions, and institutions that should be covered by the legislation but perhaps are not yet covered.

The Chair: Thank you very much.

We now move to the five-minute round.

We'll start with Mr. Kelly.

Mr. Pat Kelly (Calgary Rocky Ridge, CPC): Thank you.

I want to return to and get some comments about the cabinet decision-making, advice, and recommendations, the exemptions, and the various exemptions around cabinet information that have come up already in some of the questions.

I was particularly struck by one of the responses that Commissioner Clayton gave about having access to ensure that an exemption is proper. In the House of Commons, we've had questions raised about pecuniary interests of senior staff or spouses of ministers. We've been assured in the House that the Ethics Commissioner is setting out proper walls and proper barriers and that proper recusals will take place to avoid an actual conflict of interest, rather than just the appearance of conflict of interest.

In Alberta, you have access to items to see whether an exemption is proper. Is this perhaps one of the tools that could be used to ensure that proper walls or barriers around conflict of interest could be monitored?

● (0955)

The Chair: That's an interesting question.

Ms. Clayton, I think you mentioned earlier that you had access to cabinet information.

Ms. Jill Clayton: Yes.

The Chair: Whether that was publicly disclosed or not is different, but you yourself had access to that. I think that's the nature and source of Mr. Kelly's question.

Ms. Jill Clayton: Yes. I will also just mention that one of the exclusions under our legislation applies to officers of legislation when they're engaged in performing their operational functions. With respect to the member's question concerning the Ethics Commissioner, in Alberta, for example, the operational records that are associated with the ethics commissioner's investigation are not subject to the FOIP Act. They are excluded from the FOIP Act. However, with respect to other types of records such as cabinet and treasury board confidences, we have issued orders. We have had the ability to review those records to be able to reassure the applicant and the public that the exception to access has been properly claimed.

That is not across the board. We have a matter that it is currently in front of the office and, in fact, in front of the Supreme Court coming up on April 1, which has to do with records for which solicitor-client privilege has been claimed. Solicitor-client privilege is an exception to access under our legislation. Certainly, in the last couple of years we've not only had difficulty obtaining the records to review claims where that exception applies, but also sufficient information. We have developed a separate protocol so that we don't necessarily need to see the records but can in fact obtain sufficient information to be able to confirm that a claimed privilege applies. When we are neither able to see the records to verify the exception has been claimed nor obtain enough information to be able to verify that claim, it's very difficult to provide the service to fulfill our mandate, which is to either order that the records be released or confirm that the records don't need to be released.

Mr. Pat Kelly: Okay. So if I understand that correctly, when you're seeking whether an exemption has been correctly applied, the issue of a conflict of interest, or something like that, would not be part of the decision on whether the exemption is correctly applied.

Ms. Jill Clayton: No. If I understand your question correctly, our job is to review the records to see whether or not the exception under the legislation has been applied correctly. We're not making a determination of whether there is a conflict of interest or not. That would be the purview of the ethics commissioner in one of her investigations, and records related to her investigation are excluded from our legislation.

The Chair: You have 15 seconds left, Mr. Kelly.

Mr. Pat Kelly: I don't know if I can get another question in and have a variety of you can comment on or answer, but I would have asked about the the extent to which.... We spoke about the fees. There was a question about fees and about how processes might enable the commissioners to avoid or deal with vexatious, frivolous, or abusive types of requests for information.

The Chair: That's a pretty good question. That was actually a question I was going to ask at the end, Mr. Kelly, and now I don't have to ask it.

I'd like a quick response from all three of you. We'll start with Madame Poitras and go to Mr. Beamish after that. Have you examined whether or not the presence or absence of fees condones or prevents frivolous requests or requests that simply are put in place to burden the system?

[*Translation*]

Mrs. Diane Poitras: Quebec's legislation contains a provision on those types of situations, specifically. It authorizes the commission to cease to examine a matter if the application is considered to be vexatious or frivolous, or made in bad faith.

The act contains another provision to address what you mentioned. When a public body, which has just 20 days to respond, receives an access request for several thousand documents, it can ask the commission for permission to disregard the request. Those mechanisms help keep the system in balance and address the issues you referred to. In Quebec, we don't do that through fees but, rather, through specific provisions of the act.

● (1000)

[*English*]

The Chair: Thank you very much.

Mr. Beamish, do you have some quick comments on that question?

Mr. Brian Beamish: Yes, I can speak from Ontario's experience. I think there are two instances at play here. One is an instance where an individual puts in a request that's overly broad, and I think these bring some [*Technical difficulty—Editor*] ability of an institution or government to charge a fee gives our mediators an opportunity to try to get the requester to scope the request down.

That's quite distinct from frivolous and vexatious requests. Similar to Quebec, Ontario does have a specific provision dealing with frivolous and vexatious requesters. An institution can declare a requester to be frivolous and vexatious, and we can either confirm that or not. Generally that [*Technical difficulty—Editor*] who puts in a large number of requests for the same information.

There are thankfully very rare circumstances where it's a matter of a requester who is not just abusing the system but abusing the staff who are operating the system. We have the ability to order and fashion a resolution or a solution for the institution and that may be limiting the person to one request a year or one open file or that they can only communicate by way of email, what have you. But I think it's a very valuable tool for us to have in those really rare circumstances where somebody may be abusing the system.

The Chair: Okay.

Last but not least, we have Ms. Clayton.

Ms. Jill Clayton: We have a similar provision in our legislation. A public body can apply to me for authorization to disregard an access request if it is repetitious or systematic and would unreasonably interfere with the operations of the public body, or if it's frivolous or vexatious. The onus is on the public body to come with the argument and persuade me that the test has been met. It's not something that I do lightly because it does involve taking away a statutory right of access, but there certainly are those cases where an individual is trying to—I think we've used this expression—grind down the public body and interfere with the operations, and the purpose of the request for access is not about obtaining access, it's something else altogether.

So the legislation does provide a mechanism whereby a public body can seek someone with—

The Chair: Okay, thank you very much.

Ms. Jill Clayton: I was just going to say that we had seven of those requests last year from public bodies, which was a significant increase. Usually there's one or two a year.

The Chair: Okay.

We continue with Mr. Saini.

Mr. Raj Saini (Kitchener Centre, Lib.): Thank you all for being here. I appreciate your comments. You spoke very eloquently about the advantages of each one of your systems and also the challenges that you're facing.

As you are well aware, the Office of the Information Commissioner of Canada has produced a document called "Striking the Right Balance" that has made 85 recommendations.

Do you disagree with any recommendations in that report, and do you feel for purposes of uniformity across the country whether it would be ideal to have some of those recommendations applicable to every province? I know each province has a certain nuance, but they'd be applicable to each province so they're uniform within the system.

The Chair: Ms. Poitras.

[*Translation*]

Mrs. Diane Poitras: That's a broad question.

Some of the recommendations in Ms. Legault's report aren't relevant because Quebec's legislation is different. In fact, you pointed that out, Mr. Saini. On the whole, I'm not opposed to any of the recommendations. In our efforts to modernize Quebec's legislation, the commission actually made a number of the same recommendations Ms. Legault did.

As for whether it would be a good idea to have the same laws applicable across the country, I would say that's quite a broad question. I must confess that it's not something I've looked into, so I wouldn't want to venture an opinion without having given it some thought first.

● (1005)

[*English*]

The Chair: Okay, very well.

Mr. Beamish.

Mr. Brian Beamish: I'll be honest with you. I can't say that I have taken a position on all of her 83 recommendations. I think there is a commonality to the recommendations that I definitely support.

I've spoken about the order-making authority that the commissioner should have. Broadening the scope of the act is something I would definitely support, as well as her recommendations around a duty to document, absolutely. I think all of those are issues that we deal with as commissioners across Canada. I'm confident that in Ontario I have a good enough relationship with our government that I can go to them and enter into a discussion about any particular changes that I feel are required.

I'm not sure that there's a necessity to have a pan-Canadian approach on these issues, if I could put it that way.

The Chair: Ms. Clayton.

Ms. Jill Clayton: Similar to the comments we've already heard from Quebec and Ontario, certainly some of the recommendations made in the "Striking the Right Balance" report don't apply in our context. For example, regarding recommendations for order-making power, we already have that. I think it is important to remember some of the jurisdictional differences.

Having said that, as I mentioned in my opening comments, many of the recommendations that I made to the Government of Alberta back in 2013 are consistent with or very similar to recommendations that appear in the "Striking the Right Balance" report, notably around open government. I firmly believe in publication schemes and identifying certain categories of records that should be made public, as well as a duty to document.

I do recall—I think it would have been two years ago—that commissioners from across the country did actually issue a joint resolution on modernizing access to information and privacy legislation and agreed on a number of principles. Duty to document was part of that, as was looking at the scope of legislation to ensure that the entities that should be covered are covered. I think there's a lot that is consistent between the positions that I've taken with respect to Alberta's legislation and the recommendations in the federal report.

Mr. Raj Saini: You mentioned during your remarks that you felt that certain public institutions should be automatically disclosing information regarding public access. I'm just wondering if you could give us some examples of what types of information should be allowed to be given to the public and what types of institutions you feel that's applicable to.

Ms. Jill Clayton: Certainly we've seen open government movements internationally, across Canada, and at various levels of government within provinces. I think there's generally a desire and a trend to make more government information available to the citizenry. An informed citizenry is able to participate better in democratic processes and hold government to account, so I am in favour of putting information out there.

I also hear often that the formal request for access process, under the FOIP legislation is onerous. It can be time consuming and it can be expensive. There are possibly ways around that by identifying the kinds of records that individuals or other entities or persons request access to and making that information proactively available. That could vary depending on which public body we're talking about. For example, there are certain kinds of records that are commonly requested from the department of the environment here, and those records have been identified. There has been a lot of work to make that information proactively available to the public so applicants don't have to make formal requests for access. It's just pushed out there. We've seen open government efforts across the country to identify datasets that the public wants to have access to or may be able to use to add value to, so identify those datasets and push them out.

Other than that, things like policies, certain kinds of minutes, those kinds of records that individual applicants request access to, identify them for each public body and push that out there to make it available in a transparent way.

● (1010)

The Chair: Thank you very much. We've gone over on time a few times now. We have to tighten this up a little bit.

Mr. Kelly for five minutes only. Thank you.

Mr. Pat Kelly: Thank you. I'll keep it short.

I note that in both Ontario and Alberta there is a dual mandate dealing with both privacy and access to information—areas that are covered by two different commissioners at the federal level and, if I understand correctly, in Quebec as well.

I'd like perhaps each of you to comment on the nature of the dual mandate to be a commissioner for information and privacy at the same time, as in the case of both Ontario and B.C. It's a different model from what we have at the federal level.

The Chair: That's an interesting question.

Madame Poitras, we'll start with you. Then we'll move to Mr. Beamish and then Ms. Clayton, please.

[*Translation*]

Mrs. Diane Poitras: Perhaps I wasn't clear.

The Commission d'accès à l'information du Québec has the dual mandate you mentioned, in other words, ensuring access to documents and protecting privacy. But we have two separate divisions, an adjudication division and an oversight division. As an institution, the commission has that dual mandate.

The report that led to the legislation in Quebec mentioned the importance of having a single organization overseeing both of those elements. I'll give you a concrete example that I think illustrates the importance of having one institution fulfill both of those mandates. I'm talking about consistency in the decisions that are made. In the case of an access request for documents containing personal information, the commission must determine what information is deemed personal before it can decide whether the documents should be made public or not.

In its oversight role, the commission must also determine what constitutes personal information within the context of an investigation, to identify how much jurisdiction it has and whether it can investigate a particular matter. Having two separate institutions each interpreting what personal information means could lead to conflicting definitions.

[*English*]

The Chair: Mr. Beamish.

Mr. Brian Beamish: I agree completely with those comments. We oversee the public sector privacy legislation as well as access to information legislation. I think it works very effectively having those combined in one agency. That at least has been our experience. I think there are times when there's a need to balance the right to privacy with a public interest or need for transparency and openness. I think if the function is combined in one office, that can be done effectively.

For example, when I first started in business, things like expense accounts of public servants, in Ontario anyway, were considered for the most part to be private. That was their personal information. That's no longer the case. I think there's an understanding that even though there may be information with a name attached to it, an openness and transparency and accountability function overrides that. Employment contracts are similar in Ontario. We now treat employment contracts as something that, despite the fact that they are personal to an individual, should be in the public domain.

The Chair: Last but not least, go ahead, Ms. Clayton.

● (1015)

Ms. Jill Clayton: I think in the interest of time, I'll just say that I agree with my colleagues. In particular, Commissioner Beamish has given some good examples of where you need to do that balancing. It's worked well for us.

Mr. Pat Kelly: I know we have to keep moving along. I find it interesting, though, that at the federal level we have two different commissioners.

The Chair: We'll move to Mr. Badawey, who is a guest today.

Welcome to our committee, sir.

Mr. Vance Badawey (Niagara Centre, Lib.): Thank you, Mr. Chairman. It's a pleasure to be here.

I do thank the participants. This issue has been a long-standing pet project of mine for many years. Therefore, I have a question with respect to privacy.

To the participants, this morning we talked a lot about one side of the fence with respect to releasing and being transparent with information from all levels of government. In your jurisdictions, what implications are actually built in or put in place if in fact information is released that should not have been released?

The Chair: Who would like to start?

Madame.

[*Translation*]

Mrs. Diane Poitras: It depends on the context.

If a public body or enterprise disclosed personal information, the commission would deal with it through an investigation. People can file complaints with the commission, but the commission can also investigate on its own initiative to determine whether the disclosure was in compliance with the act or not. If it wasn't, the commission has the authority to order that the disclosure cease if it is ongoing. The commission also has the authority to order that the enterprise or public body put practices or mechanisms in place to prevent similar situations in the future.

If I understood your question correctly, that's how we would deal with the situation you described.

[*English*]

The Chair: Thank you very much.

Mr. Beamish, I know that you are now staying beyond the time that you have allocated, sir. If you need to go, please feel free to go, but if you can stay until the end of the questions, we would certainly welcome you.

Mr. Brian Beamish: Perhaps I could just provide a quick answer to this question, and then I'm afraid I am going to have to leave. I apologize for that.

Similarly to Quebec, in Ontario, if information was disclosed improperly, we would have the ability to conduct an investigation, either because we received a complaint or on our own initiative, and having conducted that investigation, we could issue a report commenting on its inappropriateness.

I think the more common scenario for us, though, is cases where institutions may have collected information for one purpose and then are repurposing that information for a secondary purpose that is not permitted by law.

The Chair: Okay.

Ms. Clayton, go ahead.

Ms. Jill Clayton: It's a very similar scenario in Alberta.

I can initiate an investigation on my own motion, if I am made aware of something that looks like, for example, there might be personal information that has been disclosed in contravention of the legislation. In many cases, of course, we respond to complaints made by individuals to the office. The majority of those case are resolved, as I said, through our informal mediation investigation process. We would make recommendations to modify an information system, to stop disclosing the information, or to train staff, those kinds of recommendations. However, if necessary, the matter might go to an inquiry, and we could issue a binding order, for example, to require a public body to stop collecting, using, or disclosing information.

Mr. Vance Badawey: Thank you, Mr. Chairman, and those who commented on this.

I just want to take it a step further and dig a bit deeper. I understand and appreciate the fact that you would comment on the inappropriateness and send an order to stop releasing information. What I am trying to drill down on, however, is what the repercussions are. Whether it be an elected official or a person from administration, what are in fact the repercussions of releasing this kind of information?

As we can all appreciate, when inappropriate information is released, it can have some serious implications for those it's being released about, whether it be legal or solicitor-client privilege, etc. My question is specific to the repercussions. What repercussions are in place for those who release that information, whether it's an elected official or administration?

● (1020)

The Chair: Madame Poitras, go ahead.

[*Translation*]

Mrs. Diane Poitras: My answer is twofold.

If the disclosure is done and not ongoing, efforts will be made to prevent it from happening again. The Commission d'accès à l'information du Québec, however, does not have the authority to order any compensation for damages or injury suffered by a person as a result of the disclosure.

But if we have to manage a security breach, we will do everything in our power to stop the disclosure and we will ask the enterprise or public body to make every effort to limit the negative consequences arising from the disclosure. For instance, if the disclosure involves information about someone's credit or financial standing, the person can ask credit agencies to issue an alert or check whether their identity was improperly used.

The commission does not have the authority to order a body to make reparation for a disclosure that is no longer going on.

[*English*]

The Chair: Okay.

Ms. Clayton.

Ms. Jill Clayton: In Alberta, under all three of the statutes that I have oversight for, there are offences and penalties.

Under the FOIP Act the offences tend to be wilful contraventions of the legislation and not just a negligent human error type of incident—which is the sort of thing we mediate and make recommendations around—but wilfully not complying with the legislation, or for example destroying records that are subject to the act, or directing someone else to do that with the intent of evading an access request.

The penalties under the legislation include for individuals a fine of not less than $2,000 and not more than $10,000, and in the case of other persons a fine of not less than $200,000 and not more than $500,000.

I should note we have not had any successful prosecutions under the FOIP Act. On the other hand under our health legislation, which has similar offences and slightly different penalties, we have conducted a number of offence investigations that have resulted in successful prosecutions in court. We do the investigation, we turn our evidence over to the crown, and the crown conducts the prosecution. I believe we've had four successful prosecutions in Alberta, and this year under the Health Information Act we've had charges laid in four other offences.

Under the Health Information Act these tend to be wilfully snooping in other people's health information. I think one of the reasons we see more of that in the health sector than we do in the public sector has to do with the fact that in the public sector most of the cases in front of our office have to do with access to information. Complaints around snooping don't make up the majority of the cases in front of the office. We're far more likely to be looking at a response to a request for access and whether the information was improperly withheld. It's not always an easy thing to find evidence that somebody has wilfully destroyed records to evade a request.

I think it's the nature of the types of files that have led to prosecutions under the Health Information Act and not so much under the access to information act.

The Chair: Okay, thank you very much.

We have our last question of the day, and that's Mr. Blaikie for about three minutes, please, sir.

Mr. Daniel Blaikie: Thank you very much.

There are a number of government services that get contracted out to private companies and that's something that happens more and more. I think one of our witnesses today talked briefly about solicitor-client privilege, but I'm wondering if either of you have experience in terms of people wanting access to information about the provision of services, and because they're being offered by a private contractor instead of the civil service, how the exemptions around commercial interests play, and your thoughts on that. How can an access to information regime deal with those reasonably?

● (1025)

The Chair: Madam Poitras.

[*Translation*]

Mrs. Diane Poitras: Quebec's access to information legislation does indeed set out restrictions protecting the information provided by third parties and private enterprises under certain conditions. If the disclosure is likely to reduce the enterprise's competitive margin or result in profit for a competitor or third party, a person can request access to the document provided that it is held by a public body that entered into a contract with a private enterprise. But the public body can check with the enterprise to see if it consents to the disclosure in question. If not, the public body can invoke those restrictions, and it will be up to the third party or private enterprise to show that it can refuse to grant access to the document under the restriction conditions. The enterprise must demonstrate that to the commission.

[*English*]

The Chair: Okay.

Ms. Clayton.

Ms. Jill Clayton: We do have a similar exception to access in Alberta's legislation, but I think I will use my opportunity to respond to just say this. The sharing of information across public sector, private sector, health sector is something that has been of particular interest to me in the last couple of years. In fact we commissioned a research paper, available on our website, that looked at information-sharing initiatives around the world and nationally. It tried to draw some learnings from those case studies. There are potentially very significant implications for both privacy and access.

I don't want to suggest that this information-sharing should not take place, because I understand that this is vital to providing programs and services that citizens want, but it's certainly important to be aware of the access and privacy implications and risks, and to implement controls to mitigate those risks.

I'll just refer you also to a joint resolution that all commissioners signed off on and made public in January of this year. We issued the duty to document statement, but we also issued a resolution on information-sharing recognizing that there are great benefits to information-sharing, but it has to be done in a thoughtful, considered way with due regard to access and privacy for patients. We made some recommendations to governments to look at how that affects access to information, because it is something we're starting to see quite a bit of.

The Chair: Commissioners, we thank you very much. We certainly appreciate your taking the time this morning.

A shout-out to our friends in Alberta; even though this meeting is over, you're still early for work. At least you got to miss the rush hour on your way into the office this morning. As an Albertan, I know well the differences in time zones. I know how early you have to get up in the morning to be here.

I would also remind both of you, and Mr. Beamish, who had to leave, that this committee will also be studying the privacy legislation. We'll start with our Privacy Commissioner this Thursday, and then outline the scope of study, so we may very well be inviting you back to discuss the other side of your jurisdiction and responsibility, which is the privacy legislation that you administer on behalf of your respective provinces. If we should happen to make that request, we hope you will make yourselves available.

On behalf of the committee, I want to thank you very much for your considerations in our deliberations. I think it will be most helpful as we move forward in hopefully modernizing the access to information legislation that we have at the federal level. I want to thank you kindly for your time.

We will now move in camera to discuss future committee business.

[*Proceedings continue in camera*]