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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. Colleagues, if I can have your attention, please, we have a quorum at the table. We're expecting one more of our colleagues to arrive shortly.

We have our witnesses here today. This is our ninth meeting on this particular issue, and we're pleased today to have with us from the Canadian Association of Journalists, Mr. Sean Holman; and from the Canadian Taxpayers Federation, Mr. Aaron Wudrick. Joining us on video conference is Mr. Edward Ring from the Office of the Information and Privacy Commissioner of Newfoundland and Labrador, and with him is Sean Murray, director of special projects.

Thank you all, gentlemen, for being with us here this morning.

The way we're going to start is that I'll go in the order in which I introduced you, allow you to have up to 10 minutes, give or take, in your opening remarks, and then we'll proceed with rounds of questioning.

We have about two hours today that we can allocate to this. I would appreciate everyone's co-operation. For those of you who haven't been here before, there is simultaneous translation. Hopefully we have some amazing wizards working in our technology area here that will keep us all on track.

With that I'll turn it over to Mr. Holman for up to 10 minutes, please, sir.

Mr. Sean Holman (Vice-President, Canadian Association of Journalists): I'd like to begin by thanking the committee for inviting the Canadian Association of Journalists to comment on what we feel is one of the most fundamental challenges facing our democracy, namely, a lack of good information about what our public officials in public institutions are doing.

As was mentioned, I'm vice-president of the association, but I'm also an assistant professor of journalism at Mount Royal University, where my research has focused on the early history of the Access to Information Act, as I was mentioning to Mr. Long. I'd like to begin my presentation by talking about the past, because I think it will help inform our present discussion about the future of open government in Canada.

The history of freedom of information in Canada began in 1965, more than 50 years ago. That's when NDP MP Barry Mather introduced the country's first administrative disclosure bill. It's also when Carleton University political science professor, Don Rowat, presented an academic paper about the need for such a law. Back then, powerful societal forces including the consumer, environmental, and participatory democracy movements of the 1960s and 1970s were demanding more and more information from the state. In Canada, these demands were heightened by the increased availability of information in the United States, where freedom of information legislation had been signed into law in 1966.

Pierre Trudeau's government, which was in power during much of this time, wasn't completely unsympathetic to providing more information to the public. In so doing, it saw a solution to the problems of public ignorance and mistrust, the latter of which increased following the Watergate scandal. But the idea of introducing a freedom of information law in Canada was resisted by a political culture and system that has always favoured secrecy over openness.

For example, a 1974 Privy Council Office study recommended against such a law because the existence of cabinet necessitated a degree of built-in confidentiality in government decision-making. Three years later, a green paper on public access to government documents also stated that such confidentiality was necessary to ensure the civil service's advice was frank, not fearful; full, not partial; disinterested, not partisan.

When it was introduced in 1980, the Access to Information Act conformed to the contours of these twin concerns rather than challenging them. As a result, Rowat predicted that the sweeping mandatory exemptions for cabinet and related documents, and the broad permissive ones for deliberations, advice, or plans, would keep the public ignorant of anything that was happening at the summit or even the foothills of government in this country.

Indeed, within just two months of the law coming into force, that prediction had become both a prophecy and a punch line. In the *Toronto Star*, one writer quipped that the Access to Information Act's loopholes—you have to remember this was within two months of the act coming to force—were so wide that the Goodyear blimp could float through them without touching on either side. However, for the electorate, it was also a tragedy.

In the 1984 study testing the spirit of that law, public interest researcher Ken Rubin found the Canadian Government was still not willing to share much of the information it had collected at taxpayers' expense. In fact, Rubin wrote, “I have been able to detect that less information, not more may now be released”.

This history challenges the established narrative that Canada has gone from being a global leader in freedom of information to a laggard. Instead, we have always been and continue to be a laggard. That's because, in many ways, the Access to Information Act legally fortified the secrecy that is an inherent part of Canada's political system and culture.

● (0850)

Over the past 30 years, those fortifications have been buttressed by practices that allow public officials and institutions to thwart even the limited transparency the legislation provides. For example, in 1983, former Tory MP Gerald Baldwin, the father and grandfather of the Access to Information Act, wrote, “It will be a very sorry day when those obliged to make important decisions are so fearful of having their motives and their assumptions challenged that they will make such decisions on facts given orally.”

However, that sorry day is already upon us. Earlier this year, the country's information commissioners warned about an emerging culture of oral decision-making, where the activities of public institutions go undocumented.

At the same time, the government has constricted other means of accessing such information. For example, in 1979, then prime minister Joe Clark directed public officials to frankly discuss information within their areas of responsibility with the media, but today even the most routine requests for information usually have to be filtered through communications departments.

When taken together, such measures don't just thwart the public's right to know, they also threaten our democracy.

As such, the Canadian Association of Journalists recommends the government take five priority actions that address this threat.

First and foremost, the CAJ recommends the government close or shrink the 75 loopholes in the Access to Information Act, which public institutions use to censor records before they are released to the public. Of particular concern to the CAJ are the exemptions and exclusions that create an expansive zone of secrecy surrounding the government's decision-making processes. Section 21 of the Access to Information Act permits the government to refuse access to any advice or recommendations developed for public officials, as well as accounts of their consultations or deliberations for a 20-year period. In addition, section 69 prohibits access to any records related to cabinet, government's principal decision-making body. Together, these sections mean that Canadians often only know what the government lets them know about the reasoning behind the decisions and actions it takes.

The Canadian Association of Journalists recommends replacing those loopholes with a single discretionary exemption for policy advice or accounts of policy deliberations by public officials. This exemption would only apply to records that have been in existence for fewer than five years, or which relate to a decision or action that has not yet been made, whichever happens sooner. In addition, to apply this exemption, the disclosure of those records would have to substantially inhibit the free and frank provision of advice or exchange of views in government.

The CAJ further recommends that ministers' offices, and by extension the records they hold, be brought within the scope of the Access to Information Act.

Secondly, the Canadian Association of Journalists recommends public officials be required to document their decision-making, with penalties for those who don't. After all, an access to information act is useless if there is no information to access.

Thirdly, the Canadian Association of Journalists recommends public institutions be required to regularly, promptly, and proactively release broad categories of records in a machine-readable format. Neither the public nor the media should have to go on fishing expeditions to find out what their government is doing, by filing access to information requests for records that may or may not exist. Instead the government should simply publish records such as briefing notes, ministerial calendars, audits, and studies as a matter of course.

Fourthly, the Canadian Association of Journalist recommends the government permit and encourage federal employees to freely communicate with the media and the public, without the involvement of political or media relations officials. The government has already issued such a directive to its scientists, but we see no reason why this policy should not be clearly applied to all public officials.

Finally, the Canadian Association of Journalists is in agreement with those who have recommended the Information Commissioner of Canada be given order-making power. While the association feels it is more important to reform the loopholes in the Access to Information Act, we also feel it is important the commissioner be given greater authority to ensure the government does not abuse the remaining exemptions in that legislation.

● (0855)

But more important than any of these recommendations is the need for government and members of this committee to be willing to challenge the assumption that secrecy is necessary for decision-making. That happened in the 1960s and 1970s, when Canadians questioned the necessity of conventions and traditions such as cabinet and civil service confidentiality. If we want a government that is truly open in this country, you need to start asking those questions again.

Thank you for your time.

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

We now move to Mr. Wudrick, for up to 10 minutes, please.

Mr. Aaron Wudrick (Federal Director, Canadian Taxpayers Federation): Thank you, Mr. Chair.

Good morning, my name is Aaron Wudrick. I'm the federal director of the Canadian Taxpayers Federation. I'm very pleased to appear today, and I thank the committee for its invitation to speak about prospective reforms of the Access to Information Act.

The Canadian Taxpayers Federation is a federally incorporated, not-for-profit citizens group founded in 1990, with more than 89,000 supporters nationwide. We are dedicated to three key principles in which we focus all our advocacy, those being lower taxes, less waste, and accountable government. It is, of course, on the third point of accountable government that I make my comments today.

My remarks are largely built around the recommendations made by the Information Commissioner, the large majority of which the Canadian Taxpayers Federation supports, and which of course serve as an excellent basis for any discussion of reform. If anything, our main critique of the commissioner's report is that, with 85 separate recommendations, there are simply so many that it is unlikely that each one will receive sufficiently thorough individual examination. I do want to take the opportunity, too, to echo the remarks of Mr. Holman. We're certainly in support of everything he said today.

In our view, most recommendations for ATI reform fall into one of two broad categories, those being the scope of the application of the act and the administration of access to information requests. We propose some key principles to guide any reform of the Access to Information Act.

With respect to the scope of the act's application, as a general principle the federal Access to Information Act should cover all of the federal government, including both government-controlled and government-funded areas. The principle here is quite simple—where taxpayers' money is being spent, the public deserves accountability and transparency. Many government entities, including the House of Commons and the Senate, are currently not covered by the act. There are others, which are relatively obscure to everyday Canadians, such as the commissioner for federal judicial affairs, which is probably unknown to 99% of Canadians even though its budget is over $500 million a year. Other little-known entities that are partly arm's length from the government, such as the Canada Health Infoway, which has received more than $2 billion in federal government funding since 2001, are also not currently covered by the act.

Additionally, proactive disclosure should include all information that is in the public interest. This can be achieved by way of a public interest override applicable to all exemptions, of which we also believe there are too many. Of particular interest to the CTF, in our role as a spending watchdog, is the proposal that third-party exemptions may not be applied to information about grants, loans, and contributions given by government institutions to third parties.

Now, many of these principles are encapsulated in several of the commissioner's recommendations, including recommendation 1.1, which would extend coverage of the act to entities funded or controlled in full or in part by government, entities that serve a public function, and institutions established by statute; and recommendation 1.4, which would extend it to the Board of Internal Economy, the Library of Parliament, and other entities that support Parliament.

Recommendation 4.1 proposes that a general public interest override be applicable to all exemptions to replace some of the other narrower overrides, and recommendation 4.19 proposes that, as I mentioned, third-party exemptions may not be applied to information about grants and loans.

Another recommendation of interest to us is recommendation 4.25, which proposes that “the solicitor-client exemption may not be applied to aggregate total amounts of legal fees”. That is to say, if you make a request about the cost to government of pursuing a particular legal case, the itemized information about that case is still confidential, but the global cost, the total cost, would be publicly available.

Turning to the second area, the administration of access to information requests, there's been considerable attention focused on the five-dollar access fee. Our view is that a five-dollar fee is an affordable, reasonable fee that does make sense insofar as it can prevent frivolous request-filing. However, the additional fees for research and production of documents should be eliminated or steeply curtailed, as they can be prohibitive.

Delays are also a concern for us. We are a group that files a lot of ATI requests. We have discovered that delays are the norm rather than the exception. We find that there are delays simply because the departments choose not to have the resources in place to complete the requests within 30 days. Given that there are no consequences for failing to meet the 30-day limit, it's not surprising that compliance with that limit is fairly lax.

With respect to the data, as mentioned by Mr. Holman also, they are often not provided, and in our experience, never provided in a digital-friendly format, like Excel files or CSV files. Information is, in fact, often very hard to read. It seems to have been printed and photocopied multiple times, so you can barely read it.

● (0900)

On this front some of the key recommendations by the Information Commissioner include recommendation 2.7, which proposes that institutions be required by default to provide the information in a digital, open, reusable, accessible format; and recommendation 3.1, which proposes that the extensions be limited “to the extent strictly necessary, to a maximum of 60 days”, so twice the 30-day limit. As well as recommendation 3.10, which would require specific reasons be provided as to why an extension is required.

In summary, it's fair to say that in our view the act is simply too narrow and littered with too many exemptions. We very much welcome the new government's promises with respect to increased accessibility and openness, and look forward to seeing it matched with concrete legislative action.

Thank you very much, and I'm happy to take questions.

The Chair: Thank you very much. That was very brief.

We now go to Mr. Edward Ring, the Information and Privacy Commissioner of Newfoundland and Labrador.

Mr. Ring, please introduce your colleague and start your presentation.

Mr. Edward Ring (Information and Privacy Commissioner, Office of the Information and Privacy Commissioner of Newfoundland and Labrador): Thank you very much.

First of all, I'm the commissioner for Newfoundland and Labrador. I've been in that position for almost eight and a half years. Mr. Sean Murray is the director of special projects. Sean has been in the office a bit longer than I have been and has excellent knowledge of the act and its development over the years.

We're going to break our presentation down into two pieces. I'm going to give a little bit of a history lesson on the evolution of access and privacy in Newfoundland, because it's fairly new, and I'll end by handing over to Mr. Murray, who will give some of the highlights and the major changes that have resulted from our latest new legislation.

In 2002, the access and privacy law was passed through the House of Assembly in Newfoundland and Labrador. In 2005, the access provisions only were proclaimed into force. It wasn't until three years later, in January 2008, that the privacy provisions were proclaimed as well.

I arrived in the office only weeks before the privacy provisions were brought into force. I will say that the following three to five years were a period of great turbulence and instability with this particular act. Soon after the privacy provisions came in and we were dealing with applicants and complaints and requests for information and so on, there arose a trend of more challenges to our office, which became problematic and troublesome. It got progressively more difficult as time went on. In 2009 we had major challenges to the jurisdiction of the office, particularly as it related to section 21 of the old act, which was the commissioner's authority to view solicitor and client privilege records.

Shortly after that, in 2010, the first statutory five-year review was scheduled. Again my office saw significant flaws with the process that was adopted by the government. Legislation called for a committee to review the act. In fact, there was a sole commissioner appointed. The entire process was very secretive. There were no public presentations. None of the presentations was televised. There wasn't a website set up so that any of the submissions could be viewed by others. It was a very secretive and difficult process, particularly for one that dealt with a law that was basically espousing openness.

The aftermath was Bill 29. After it was debated in the House, many of the recommendations made by that commissioner were accepted. There was a filibuster in the House of Assembly for a full week based on the outcry and resistance by the opposition party and the third party. Eventually, the bill was passed, Bill 29.

It was a regressive piece of legislation that stripped away many of the powers and much of the jurisdiction of the commissioner's office. Basically, it was more difficult for the general public to access information held by the government and public bodies.

There was a significant outcry by the general public. It continued for several years, it was relentless, and it resulted in the second statutory review being convened. This review was supposed to be a five-year mandatory review, but it occurred two years early. That was a direct reaction to the outcry of the general public against what was viewed to be a very secretive government that had stripped away individuals' right of accessing government information.

The next review occurred late in 2012. There was a blue ribbon committee convened, as per the legislation, to conduct this review. The former chief justice and former premier of Newfoundland and Labrador, Clyde Wells, was the chair of the committee. Former privacy commissioner for Canada, Ms. Jennifer Stoddart, was a committee member, and the third member of that committee was Mr. Doug Letto, an investigative journalist and eventually an executive with the CBC.

● (0905)

That process, in vast contrast to the first one, was very open and very transparent. All of the presentations were live-streamed. Every submission was published. It gave organizations, such as the commissioner's office, an opportunity to comment as required on any of the commissions that were provided.

It took about a year, or just over a year, for the committee to do its work. In early March in 2015 the report was provided to the government. It was a very comprehensive report, 600 pages and two volumes, and it included draft legislation. The report was provided to the media and made public shortly after it was provided to the government. The reaction was very positive.

There were 90 recommendations made by the Wells committee, if I could refer to it in that way. All of these recommendations were accepted by the government as was the draft new legislation that was provided by the committee, as well. Again, that was adopted, without change, by the government. The new act was proclaimed in force on June 1, 2015, so it's relatively young as far as legislation goes. We are dealing now with the transition from the old act to the new act.

What I'd like to do now is ask Mr. Murray to comment on some of the highlights of the new act that will contrast very much with the way it was prior to this new legislation.

Thank you.

● (0910)

Mr. Sean Murray (Director of Special Projects, Office of the Information and Privacy Commissioner of Newfoundland and Labrador): Thank you, Commissioner Ring.

First of all, I'll just begin by saying that—as the commissioner referenced—government, with this latest review, explicitly stated they wanted to have the best access to information legislation in Canada when they were finished. The Centre for Law and Democracy, once it was enacted, called our new legislation “a strong...law by international standards” and “head and shoulders above other Canadian jurisdictions”. I think the Newfoundland and Labrador law, ATIPPA, 2015, is well worth examining in close detail by any jurisdiction in Canada that's looking at reviewing its access to information provisions.

As the commissioner mentioned, there were 90 recommendations accepted by government in relation to this new act. Obviously I'm not going to go into all 90 of them this morning, but I want to hit some of the high points I think might be helpful to you.

One of the things that changed in the new act was that the commissioner's oversight of certain provisions of the act was enhanced or restored. In the previous version of the act, the commissioner was not able to review certain types of cabinet records and was not able to review claims of solicitor-client privilege. Under the new act this was restored to the commissioner.

Furthermore the scope of coverage of the act was also broadened. In fact, one of the things we've had all along in our jurisdiction is that the legislature has been covered by the act for a number of years now, but in the new act even entities at the municipal level were added.

In terms of the oversight role, we have a unique model in Newfoundland and Labrador. Primarily, across Canada, you have either order-making power or the ombudsman type of model that we had in the past where the commissioner only makes recommendations. Our hybrid model now involves the commissioner continuing to operate as if it's an ombudsman model in terms of how it's set up. When the commissioner issues a report making a recommendation, and if a public body does not wish to follow the recommendation, they have to go to court to ask a judge for permission to not follow the recommendation. They would have to argue in court that our recommendation is not valid. If they fail to go to court to do that, the commissioner has the ability to file the recommendation as an order of the court. That model works for us. We've had it for less than a year, and so far so good. We have not yet had a situation, since the new act came into force, where a public body has refused to follow our recommendations. That's been helpful.

I know that timelines is one of the issues that has plagued the federal level. Public bodies have 20 business days to respond to access to information requests in our jurisdiction. If they feel they cannot meet that, they don't have the ability to extend the timeline on their own beyond 20 business days. If public bodies feel they need additional time, they have to request an extension from the commissioner's office. We've been fielding extension requests from public bodies since the act came in last June. It has not been overly onerous for us to handle these. We've been looking for strong arguments from public bodies and evidence as to why they need time extensions, and that process has worked well.

There is no fee to make an access to information, no five-dollar fee, and the fees are reduced overall. You don't get charged fees until either 10 hours of search time or 15 hours of search time, depending on the category of public body you are.

In terms of the time frame for the review process at the commissioner's office, our office has to complete our reviews within 65 business days. Now this only works if your oversight office has either order-making power or you have the hybrid model that we have. I don't think it's feasible if you have ombudsman power to limit the commissioner's time frame in that regard, because informal resolution becomes more important if you don't have some sort of order power, or some basis to ensure the public bodies will follow your recommendations.

● (0915)

We also have a public interest override provision, which applies to most of our discretionary exceptions. The clerk of the executive council can exercise a type of public interest override in relation to cabinet records as well.

With regard to the third-party business interest exception, we previously had the three-part test, which is the best standard in Canada up to now. Some jurisdictions in Canada have the three-part test. Under the previous legislation the commissioner referenced, which was overturned, it had reverted to a one-part test. We are now back to the three-part test, which is where we need to be.

The committee that reviewed our legislation recommended that government bring in a duty to document, which I know Commissioner Legault has spoken about extensively.

When the report was presented, the government of the day agreed with that recommendation. The current government, as far as I know, is working to make that happen. That is going to require a legislative amendment to Newfoundland and Labrador's Management of Information Act. The commissioner, according to the recommendations at least, will have oversight of the duty to document and be able to audit how the duty to document is being implemented.

In the advice and recommendations section of our legislation, we have a long list of types of records that are not covered by that exception. There is the advice and recommendations exception, but there are also a number of examples of types of records, such as factual material, which cannot be withheld under the advice and recommendation provision. I think that is a good way to go and I would recommend for you to have a look at it.

Our cabinet confidences exception was revised. We don't have a full substance of deliberations test. Substance of deliberations is applied to cabinet confidences material that might be found in records that are not cabinet records per se, but it's more of a categorical exception. That one probably could be better. I'm sure Commissioner Legault has put forward arguments as to what she believes it should be. I would recommend you have a look at those closely.

Some other acts, of course, are set out as taking precedence over access to information provisions in each jurisdiction in Canada. We have those in our jurisdiction as well. However, the committee that looked at our act ensured that they were kept to a minimum. Further, they recommended that these provisions be looked at in greater detail in the next review. Some of them were removed from the list, so that we have fewer now than we had before.

It's important, I think, to have a provision that requires that the act be reviewed every five years. Basically, the federal act has been perennially criticized from all quarters, because there has been no requirement to review the federal act on a regular basis. Probably one of the most important recommendations that anyone could make is to ensure that the act be reviewed regularly, as is the case in our jurisdiction and in some others as well.

Some other powers of the commissioner that we now have include the ability to audit compliance with the act. We have the ability to commission research. We have the mandate to educate the public about the act, as well as to educate public bodies about how to comply with the act. We have the ability to initiate own-motion investigations.

It is also mandatory for the government to consult with the commissioner's office on any proposed bill that could have implications for access or privacy. That's been excellent. Previous to that, government consulted with us on an ad hoc basis, but this makes it a requirement and ensures that it's consistent. I like to think, and certainly the reaction we've gotten to our input on legislation, is that the government has been happy to get our suggestions and has acted on them on several occasions.

The offence provision in our legislation has been updated so that it is practical to enforce. Our office has actually conducted two investigations under our Personal Health Information Act, and offence provisions and successful prosecutions ensued, so we think that's important.

● (0920)

Broadly speaking, in Newfoundland and Labrador we are satisfied that the act grants appropriate rights to citizens and that the commissioner has the necessary tools to achieve effective oversight. I would think that's where you'd want to go. You want to have an act that ensures that citizens have appropriate rights, and you want to ensure that the commissioner has all the powers and mandate to ensure that those rights are protected and upheld.

Thank you very much for the opportunity, and we're glad to answer any questions you may have.

The Chair: Thank you very much. That was very thorough.

On a humourous note, Mr. Ring, I have eight brand new MPs joining me at this committee table, and when you talk about one-week filibusters, it makes the chair very nervous.

With that being said, we'll pursue our rounds of questions.

We're going to start with seven minutes with Mr. Erskine-Smith.

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

I'd like to begin with a straightforward question about the 75 loopholes. Do you have a list of those loopholes for us?

Mr. Sean Holman: Yes. I mean, they are in the act, and there are 75 of them. Compared to the United States, that's voluminous. The United States has only about 14 loopholes that can be applied to requests for information. I think it would be fair to say that we have gone overboard when it comes to exemptions and exclusions to freedom of information requests.

Mr. Nathaniel Erskine-Smith: I see.

In terms of expanding the application of the act to other bodies, the first recommendation of the commissioner was extending the act to ministers' offices, the Prime Minister's office, and also to bodies that perform a public function and bodies that receive public funding. I asked the commissioner about whether there's a de minimis requirement here. I mean, does any amount of funding qualify? The commissioner came back and said that a $5 million threshold or 50% of the institution's total funding would be sufficient to trigger the act. I would be interested in your comments on the expansion, whether that's reasonable or whether you would go further.

Mr. Aaron Wudrick: I think there's a strong argument to be made that obviously the nexus is stronger. The greater the funding, the greater the contribution, the greater the input from taxpayers, from citizens. Obviously, I think the demand for accountability, the threshold, should also be lower. The onus should be on them to be more transparent.

We can quibble over whether or not a body that receives a tiny amount of funding should have the same rules applied to it. But clearly where the contribution is greater, I think they should be treated more and more like a regular government body.

Mr. Nathaniel Erskine-Smith: My request to you then would be, if you differ with the commissioner's view as to the threshold—50% of total funding received from the federal government or the $5 million threshold—I'd be interested if you would submit to this committee your recommendations as to what the threshold ought to be.

Here's a question for Mr. Murray and Mr. Ring. In terms of the expansion of the act to public bodies in your jurisdiction, has it been expanded to bodies that perform a public function or bodies that receive public funding?

Mr. Sean Murray: It's been expanded for municipal entitles. If a municipality creates a corporation to carry out its role in some way, then that corporation would be subject to the act.

For example, in the city of St. John's, the bus service is operated by a separate corporation, which up until now was not covered by our act. It was created by the city to operate the service, and now it is covered by our act.

Mr. Nathaniel Erskine-Smith: Thanks very much.

Does anyone attending today disagree with any of the 85 recommendations of the commissioner?

Mr. Aaron Wudrick: Certainly there are some, and really it's a question of priority. I know there was a question, for example, about whether or not the right should be extended to non-Canadians, because the argument was that they already go through a Canadian agent. We think Canadians, being the ones that are paying the bills, deserve priority, so we don't know that this is a high priority.

Also, on the issue with recommending the elimination of all fees, again, we think a small upfront fee that is enough to weed out frivolous requests is reasonable. It's that we don't want the fees to become an obstacle to people who genuinely want the information but simply can't afford to pay. Those are two that we identified.

Mr. Nathaniel Erskine-Smith: Go ahead, Mr. Holman.

Mr. Sean Holman: While we agree with the report in its broad strokes, I would encourage the government and the members of this committee to think about access to information, to think about freedom of information in a more expansive way. The Information Commissioner has made recommendations that relate to the Access to Information Act itself. The Canadian Association of Journalists believes that there are further actions that need to be taken outside the scope of the act to increase open government in this country.

We have a cultural problem when it comes to secrecy. We have a structural problem when it comes to secrecy. Fixing the Access to Information Act is only one part of addressing those problems. In fact, I would argue that the problem with the Access to Information Act when it was introduced was that it was grafted onto a secretive political system. We did not deal with the actual problem; we instead introduced legislation that conformed to the system as it currently existed.

● (0925)

Mr. Nathaniel Erskine-Smith: Thank you very much for that.

Here is another question for Mr. Ring and Mr. Murray. When the fees were eliminated, was there a significant increase in requests? Was there any increase?

Mr. Edward Ring: No, there was not a significant increase at all. In fact I don't think there was any increase at all, but I know that during the presentation to our review committee, it was viewed and supported by Commissioner Legault that the nominal fee that was being charged was probably more expensive to administer than the worth of the fee. It was only five dollars. It didn't prohibit anybody. It wasn't something that would stop even someone who was prepared to submit multiple requests. The five dollars did not have an effect.

Mr. Sean Murray: Let me add that we have a provision in our act now that relates to frivolous and vexatious and overly broad requests. A public body that's facing a request of that nature can come to the commissioner's office and ask that the request be disregarded. You don't need a fee, then, to deal with that situation.

Mr. Nathaniel Erskine-Smith: Thanks very much.

Here is a further question for you both with respect to coordinators. The report that I read noted that coordinators must be seen by colleagues as having organizational clout to challenge senior officials, in order to presumably make a decision to ensure that there is proper disclosure. What rules are in place in your jurisdiction to ensure that coordinators are so empowered?

Mr. Edward Ring: That's a very good question. This is one of the recommendations that I think large public bodies are struggling with. We have a number of large public bodies in Newfoundland and Labrador that have not just dedicated ATIP coordinators, but offices with two or three people. In most other large public bodies, such as government departments, we have individuals. In some cases they're double-hatted, in some cases triple-hatted.

We knew that this one was going to be somewhat problematic to implement because, if I can use an old military term, there is a chain of command involved, and the ATIP coordinator is carrying the ball but has to work up the chain. I think that in an ideal world, if you had somebody at a director's level or more senior who could make decisions on behalf of the organization, that would be ideal, but what we live with and what we experience is minimum resources and a bureaucracy that is involved, which I think in the days of shortened timelines makes things more problematic for the public bodies.

The Chair: Thank you very much for your answers. That stretched this out a way.

We now move to Mr. Kelly, for up to seven minutes, please.

Mr. Pat Kelly (Calgary Rocky Ridge, CPC): Thank you, Mr. Chair, and thank you to our witnesses this morning.

I would like to start by pointing out one of the challenges that we have with this process today. We had excellent presentations from all of our witnesses, and each of our witnesses has touched on several issues as recommendations to our committee on what we may recommend to the government.

However, yet again the budget that has been tabled already deals with this, and it would appear that they have already made some decisions about what we do. Page 208 of the budget discusses what appears to be the government's decision already on certain items, such as moving to an order-making model. We're talking about debating the merits of an order-making model, yet it would appear that we have an order-making model already decided. Notwithstanding that, it has been very good to hear from more experts in these areas.

I would like to have some comments on certain items and maybe touch on some areas about which we've heard from other witnesses.

We had a very compelling presentation last week—or I thought it was compelling—from Professor Drapeau who in his presentation shared many of the concerns that Mr. Wudrick and Mr. Holman raised about the shortcomings and difficulties. In fact, Professor Drapeau said that the access to information system was thoroughly broken and was in a state of crisis, yet his recommendation—made very powerfully to us and stated in very strong terms—was that an order-making model was not necessary and that what really was necessary, among other things, was a change of culture within government.

I thank Mr. Holman for his bit of history on the culture of secrecy. I'd maybe like comments from both Mr. Wudrick and Mr. Holman on what the real problem is. Is it that the commissioner cannot make orders, or is the problem simply that you can't get the information you're asking for? Could this be addressed in other ways, and how do you change a culture?

● (0930)

Mr. Sean Holman: I think that giving the commissioner order-making power would be a good idea. However, to use a sports analogy, it's great to give the referee more authority to clamp down on cheaters, but when the rules of the game are unfair, it is more important to change the rules of the game. By that I mean the exemptions and exclusions in the Access to Information Act. That is the principle problem. The Information Commissioner can have all the power you want to give her, but at the end of the day it won't matter if the commissioner is making rulings based on unfair rules. That, to our way of thinking, is the real problem.

I would also, as I had earlier stated, encourage the committee to think about the culture of secrecy in government and the structural issues that create secrecy in government. It's hard sometimes to do that because there is an assumption in this country that privacy is necessary for decision-making, and I think we need to challenge that assumption. I think the public is mature enough to understand the differences in government, and differences of opinion do not necessarily equate with dissent. We constantly infantilise the public in our handling of access to information.

Mr. Aaron Wudrick: I think one of the merits of an order-making system is maybe not even the exercise of the power itself, but the threat of being able to use it. Bodies that are now taking their sweet time, and perhaps withholding information they shouldn't, if they knew there was an order-making power standing over them that would order them to do it anyway, perhaps they wouldn't be so reluctant to do it. We're not dead set on the order-making model, but I think the reason it's come up for discussion is that the ombudsman model has seemed powerless to do anything about some of the problems we face.

To go back to one of your earlier points, we believe there are too many exemptions and we believe there's a cultural problem, but some of it is just that it's taking so long. We file requests and there are incidents where we'll get them back a year later. It's not a question of a few weeks too long. I started this job 18 months ago, and I just got something filed by one of my predecessors last month. This is from before I showed up on the job. If we were getting this information in a timely manner, I think there would be less angst about what we need to do about it.

Mr. Pat Kelly: Yes, many witnesses have commented on this, but I was quite struck by Professor Drapeau's assertion. He felt strongly that it wasn't a question of resources; it wasn't a question of power. It was really a question of culture, and he questioned the utilization of the resources available to the commissioner. He recommended the Auditor General be brought in to investigate the expenditure of the existing budget of the commissioner. Do you have any comments on the current functioning of that office?

● (0935)

Mr. Sean Holman: I would question our overall spending on access to information. If we had fewer exemptions and exclusions in the act, then it would cost less to have government documents released to the public. That simply makes logical sense. As an example, in fiscal year 2014-15, in Canada, the cost per closed request was about $1,000. In the United States it was $623.76 U.S. That is less than we are paying in Canada to administer the access to information system.

In addition to resulting in greater openness, fixing the exclusions and exemptions in the act will also reduce the amount of time and the cost associated with the access to information system.

The Chair: That does it for that particular round.

Mr. Dusseault for up to seven minutes, please.

[*Translation*]

Mr. Pierre-Luc Dusseault (Sherbrooke, NDP): Thank you, Mr. Chair.

My thanks to the witnesses for sharing some of their time with us today.

I will first make a comment about the reviews carried out every five years. I paid close attention to what you said about the requirement in Newfoundland and Labrador to review the legislation every five years. The absence of a requirement to do so at the federal level is perhaps the reason why the Canadian legislation hasn't been significantly amended in 30 years. However, this requirement applies to many other pieces of legislation. I am pleased that the committee is looking at this issue today to perhaps recommend changes to the government.

Mr. Holman, something has piqued my curiosity. You are saying that some access to information requests sometimes go all the way to the communication services of ministerial offices. Have you seen that happen on some occasions? Have you actually felt obstruction from ministerial offices and perhaps from directors of communications? They may have tried to withhold information and to delay the response so much that, when the information is finally released, it is no longer very useful.

[*English*]

Mr. Sean Holman: To be clear, I was actually referring to just simple requests for information from media and the public. We would phone up a communications officer, or we would have to go through a communications officer, in order to get information from the government. But to your point, yes, there certainly have been well-documented circumstances where there has been political interference or communications involvement in the access to information system, both at the provincial level and at the federal level.

That was actually highlighted by a colleague of mine, Ann Rees, whom I would commend to the committee as a potential witness. She's a professor at Kwantlen Polytechnic University in Vancouver.

But yes, it is a significant problem. I'm not exactly sure how you fix that problem. There's always going to be, I think, the potential for improper involvement by political staff and communications staff in these kinds of processes.

To go back to your first point, I'm actually not certain that having a regular review process would assist this situation. As everyone in this room knows, as a result of party discipline within our political system, if the government does not want to do something, it will not do something. Yes, a regular review would provide an opportunity for this kind of forum for a review of the legislation, but changes are not going to be made unless government actually wants to make those changes. By the way, the lack of power that individual MPs experience under our system of government was one of the reasons why the Access to Information Act was put in place. Gerald Baldwin ran something called the "League to Restore Parliamentary Control", and one of its mandates was actually to bring forward freedom of information legislation.

● (0940)

[*Translation*]

Mr. Pierre-Luc Dusseault: I would like to continue along the same lines.

Would the solution be to have tighter deadlines, not only tighter but also mandatory deadlines?

I often use the example of the Department of National Defence to show the importance of deadlines. That department asked for a delay of 1,110 days to respond to a request without necessarily explaining why it had done so. The department actually told the requesting party that it needed 1,110 days to respond to the request. It provided no explanations. Unfortunately, Canadians have no choice but to accept such delays.

What do you think about a process that would require shorter deadlines, but that would also include a requirement to provide a logical, well-founded reason for having to extend a deadline? Ultimately, the commissioner is the one deciding whether the delay is truly warranted.

Mr. Wudrick and Mr. Holman, can you answer that question?

[*English*]

Mr. Aaron Wudrick: No, we would agree. One of our concerns is that there's no point in having a prescribed timeline if there's no consequence for not meeting it. For any rule that is broken, if there's no punishment and if there's no consequence, then there's no incentive to respect the rule.

We understand there's going to be instances where there's a lot of information being requested. It may take a great deal of time to get that information, but it should be explained to the requester then, at least the broad outlines of it. Otherwise there is a big feeling of powerlessness on the requesters part, in that you've been given an answer that it's going to take months or years to do something, you have no idea why, and you don't have much recourse other than to complain to the commissioner.

We definitely think these timelines should be enforced, one way or another, and that reasons should be given when they can't be met.

Mr. Sean Holman: We would concur with the view that's been expressed by the CTF. Again if there were fewer exemptions and exclusions in the act, then less time would be required to release information to the requester.

This is a major problem. I joined Mount Royal University four years ago, after a career as an investigative journalist that lasted 10 years in B.C. At the provincial level I still have a freedom of information request that is outstanding and that has been in process for more than four years.

Information delayed is information denied, especially in a political, democratic environment.

[*Translation*]

Mr. Pierre-Luc Dusseault: You have said that, in Newfoundland and Labrador, it is possible to issue penalties to organizations that are subject to the Access to Information Act. Could you elaborate on that?

[*English*]

Mr. Sean Murray: Yes, that would be the offence provisions. The offence provisions are oriented toward non-co-operation with the commissioner's office, wilful destruction of records, wilfully evading an access to information request, and things of that nature.

In terms of penalties for delay and something like that, there's no penalty under the offence provision for delay, but there is a maximum time period. There is a 20 business-day time period for our response to an access to information request. A public body that finds they cannot meet that time frame must make their case to the commissioner's office for a time extension. We can grant them a time extension or not.

If a public body fails to meet either the 20 days or an extended time period that we may grant them, they are deemed to have refused the request and the applicant has a right to come to our office.

We have to deal with our complaints within 65 business days. At the end of that period of time, if the applicant has not received a response, we could potentially recommend the release of that record, and the public body would have to go to court to try to convince a judge why they shouldn't get it.

There are no circumstances in Newfoundland where a request would carry on for years anymore.

● (0945)

The Chair: Thank you very much, Mr. Dusseault and Mr. Murray.

We now move to the last seven-minute slot in our first round.

[*Translation*]

Mr. Massé, you have the floor for seven minutes.

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

I would like to follow on the same topic as Mr. Kelly, the issue of culture raised by Professor Drapeau. I personally had the opportunity to ask Mr. Drapeau whether it was only a question of culture, or also a question of management of information.

Mr. Ring and Mr. Murray, could you comment on the management of information issue? By amending the legislation in Newfoundland and Labrador, have the government and the ministries adapted their policies, their tools and their processes to ensure a better transition in terms of access to information? We know that information is now provided in many formats and is accessible on various platforms.

Could you talk about the management of information?

[*English*]

Mr. Edward Ring: Thank you very much. That's an excellent question.

As I said earlier, the new law came into force on June 1, 2015, so it's relatively young. Even though there was 100% buy-in, 100% acceptance by the government of the new act, certain things had to be done to ensure that the results that the act envisages come to fruition. One of these was to make the amendments that had to be brought to the Management of Information Act.

We said a little earlier that this is a work-in-progress. My office has been in consultation with the Office of the Chief Information Officer, and we understand that the work is moving forward. Once the draft is complete, it will contribute significantly to the open government concept that has been recently adopted by the Government of Newfoundland and Labrador and hopefully will facilitate the release of more information, a lot of it proactively rather than as the result of an access to information request.

Of course, things are moving a bit slower than we'd anticipated, because as you may or may not know, the act came into force on June 1, 2015, and a number of months after that there was political interest in getting ready for an election, which occurred on November 30, 2015, which led into Christmas. The new government was sworn in, I think, around the middle of December.

Another aspect of what is going on in this province is that the priority for this government has been preparing for the budget process, which was announced last week. I will say that it has not been the most popular budget that this province has ever seen.

All of this has been a preoccupation of the government. I think we're a little bit behind where we'd like to be in terms of the Office of the Chief Information Officer's moving that duty-to-document situation forward. There will be more on this in the near future, we hope.

Sean, do you have any comments?

Mr. Sean Murray: The previous government also initiated an open government process that the current government is carrying on. More and more information is being made available proactively, and in formats that are easily usable by recipients. We have, then, seen some progress in that direction.

For example, in all access to information responses, the documents that are provided to the applicants are, a number of days later, put on a government website. That's one change that has also been made recently.

[*Translation*]

Mr. Rémi Massé: That's great, thank you.

You have also answered the second question I wanted to ask about the preliminary transition issues that you have observed.

If you don't mind, I will ask Mr. Saini to use the rest of my speaking time.

[*English*]

The Chair: Mr. Saini.

Mr. Raj Saini (Kitchener Centre, Lib.): Thank you very much, everybody, for coming here today. It's been a very thoughtful discussion.

The question I have is to either Mr. Ring or Mr. Murray.

I notice on your website that you publish your completed access to information requests, that you make them public. You also appear to have a broader definition of the public interest override than, let's say for example, Ontario or British Columbia.

Can you elaborate on how your office interprets that override and how that interpretation affects the way you process your requests?

● (0950)

Mr. Edward Ring: Thank you very much for that question.

It's been the practice of our office to publish our reports, straight from the first report that was written. The public interest override is something that is new to our province. It didn't exist in the old act; it's only since the most recent review that we have it.

One of the first things we did in our office was develop a set of criteria that we thought would be helpful to ATIP coordinators at public bodies. These dealt with what conditions would have to exist, and how you would.... There will be a significant issue, if you have a mandatory discretion or exception that you basically won't follow. The reason for the exception has to be overridden by the importance of the public interest.

We've developed a good set of guidelines. In fact, we did some of the work in conjunction with the clerk of the executive council, who has, as Mr. Murray mentioned, the ability to override, in light of the public interest, cabinet documents.

We've not had any experience in dealing with that specifically—

A voice: We had one case.

Mr. Edward Ring: —except that we have an applicant who made a request through a particular public body and is not satisfied with the response. As recently as yesterday—actually, it was a bit earlier than that—we were notified that she has taken the issue to the courts, hopeful to get a decision from the court based on the public interest override that's in our act.

We think it's a very good provision. As the legislation matures, we will see how it unfolds and how it results for the general public.

Mr. Sean Murray: We have a guidance document available on our website about how to interpret the public interest override. It is certainly available. If anyone wishes to contact us, we can direct you to it.

Our assessment of how the public interest override should work was based partially on research about the application of that provision in the U.K. There has been a lot available, I believe, on the U.K. information commissioner's website about the public interest override and how it should be applied.

As the commissioner mentioned, there will be a case going to court soon in this jurisdiction relating to the public interest override, so we may have a court decision interpreting that provision soon.

The Chair: Thank you very much. We're well over eight minutes in that seven-minute round. That ends the very first round, and we'll have lots of time for questions as the day goes on.

We'll move to the five-minute round, with Mr. Jeneroux, please.

Mr. Matt Jeneroux (Edmonton Riverbend, CPC): Thank you, Mr. Chair, and to everybody here also. Thank you, Mr. Wudrick and Mr. Holman, for being here. To both Mr. Murray and Mr. Ring, thank you for being here via teleconference.

It was very interesting to hear, Mr. Murray and Mr. Ring, your presentation, particularly the part that outlines the hybrid model that you've chosen. I'd love to learn more. Obviously, today is just a short presentation, but I think there's some benefit from it.

Again highlighting an issue that my colleague brought up, it's unfortunate that the budget indicated that we're moving to an order-making model without hearing presentations such as yours first. It would have been excellent to hear them, particularly since the budget indicated that they're informed by consultations with the Information Commissioner, stakeholders, and parliamentarians. We on this committee haven't put forward a report yet. We were looking forward to doing so. I guess we've been scooped by the budget.

Again, I appreciate your taking the time to be here.

My questions in particular go to something Mr. Wudrick brought up. I think everybody in this room may be curious to know a bit more detail.

One of the recommendations from the Information Commissioner is to invite non-Canadians into the process of requesting ATIPs. A question was posed to a previous witness—Professor Drapeau, who has been mentioned before—about having a priority for Canadians first. This is something that makes sense to me. I'm not saying quite yet whether I'm for or against opening it up to non-Canadians—there's obviously the financial side of it, which worries me a little—but I've been thinking a lot outside of committee meetings about how we would give the priority to Canadians first.

Are there any suggestions, thoughts that you guys might be able to elaborate upon from your end? How could we pose a recommendation back to the Information Commissioner on that very opportunity, to give Canadians a first priority?

● (0955)

Mr. Aaron Wudrick: I think perhaps we are overestimating the demand amongst foreigners for filing Canadian ATIPs, but the principle is simply that Canadians are the ones who are taxpayers. Accountability and transparency are triggered by the fact that they are the ones paying for it, so it would seem logical to us that they would have first priority. As mentioned by the commissioner, if a foreigner wants to file a request, they can get a Canadian agent to file it for them. That is fine, but if there's an additional cost involved, I think it's reasonable that they pay it since they are not also contributing through the tax system.

With respect to the sensitivity of the information, I think we probably have less concern there, because if it's information that could be released to a Canadian, it would obviously be released publicly anyway. It would be hard to envision information that would be sensitive if released to a foreigner but not to a Canadian citizen, so I don't think that's our biggest concern. It's just a question of priority, in terms of who gets to move up the line faster.

Mr. Matt Jeneroux: I should have put this in a bit more context for you both before posing the question. We had the immigration department in and their comments, when posed a similar question were that it could be huge and that they would have to rethink how they do this because it simply wouldn't be possible to hire enough people, and it wouldn't be a good way of dealing with business. They also said they would have to think of a completely different approach to make sure that everything was out there.

I'm just putting that on the record before perhaps you answer the question, Mr. Holman.

Mr. Sean Holman: I guess I would ask you why people who are not Canadians should have less of a right to information that may impact them. It's interesting that one of the reasons we ended up getting freedom of information legislation in this country was because Canadians were able to use the United States Freedom of Information Act to request information that related to Canada from the American government. It seems somewhat unfair that we have a law that does not allow Americans to do the same thing. In fact, I get requests from American journalists who are looking to file freedom of information requests in Canada, because they cannot do so, even for an issue that relates to their jurisdiction. I would just ask us to think about the fairness of not opening up the access to information system.

The Chair: Okay, that's five minutes, Mr. Jeneroux.

We now move to Mr. Lightbound, please, for five minutes.

Mr. Joël Lightbound (Louis-Hébert, Lib.): Before I begin, I would like clarify for Mr. Jeneroux that the budget was not a scoop. If he goes back to our platform, which he's quoted plenty of times, it's there fair and square. That's not a scoop to me, but I think the work of this committee can inform the government as it moves forward.

One of the things that really struck me last week, when we had Professor Drapeau here—and I'd like to have your take on it—is that he mentioned the role of ATIP coordinators within each department. In his remarks to this committee he said:

> At present, they are subservient to the wishes and dictates of the mandarins, not the public or the ATI users which they are mandated to serve. These ATI Coordinators need the status, independence and authority which flow from a [Governor-in-Council] appointment in order to properly perform their [functions]....

I'd like to have, from the three of you, your take on an increased role and that specific recommendation by Mr. Drapeau to have them appointed by the Governor in Council.

● (1000)

Mr. Sean Holman: I listened to Professor Drapeau's testimony with interest and this particular recommendation that he made to the committee. For my own part, I would say we would disagree with the idea of turning access to information coordinators into political appointees. I understand Professor Drapeau's point that access to information coordinators need more power and authority. I would also say they need more independence from the system, but I do not think that his cause is served by essentially making them political appointees.

Mr. Aaron Wudrick: I think my sentiments are similar to Mr. Holman's. The sentiment is clear. The problem is that these coordinators do not have sufficient independence. I think that the professor's recommendation is an attempt to find an alternative solution to that. The question, then, turns on whether you think a coordinator is more independent when they report to a mandarin or when they depend on an appointment, which, at the end of the day, could be traced to political motives.

Mr. Sean Holman: Would it be possible, for example, that access to information coordinators be put under the jurisdiction of another independent body? For example, would the Auditor General be a possibility?

I haven't given a lot of thought to what the solution might be, but I think the solution that has been proposed by Professor Drapeau is not the right one, although he has identified correctly a problem within the system.

The Chair: Mr. Ring, I remember that in your testimony you said that some people were double- or triple-hatted who had this mandate. I think this is relevant to Mr. Lightbound's question.

Mr. Edward Ring: Yes, that's correct. We have several very large bodies, such as the university and so on, that have a small office with dedicated staff, and other large-bodied bodies, such as government departments, that are double- and sometimes triple-hatted. That filters down to the smaller groups as well, in which you may have someone there just part time, such as in a municipality.

But I think something that has to be stressed here is that it's not the ATIP coordinator who has the authority to release or authorize the release of the information. It's the head of the public body. I would strongly support the ATIP coordinators being in the position of authority—at the director, executive director, even the assistant deputy minister level—at which they can have the ear of the head and be able to speak, I suppose, more frankly. When you have to work through the bureaucracy, there is only so much that the ATIP coordinators can do.

We've seen over the years a significant amount of frustration when the recommendation is made, but it's up to the head to make the decision.

Sean, is there anything you can add to that?

Mr. Sean Murray: No, I think....

The Chair: Mr. Lightbound.

Mr. Joël Lightbound: I'd like you, Mr. Holman, to elaborate on your single exemption, which you mentioned earlier, and how it squares with the commissioner's recommendation.

Mr. Sean Holman: What I'm trying to do with the single recommendation is to rationalize the system and provide greater openness.

The commissioner has made various recommendations regarding the exemptions and exclusions within the act. I think the Canadian Association of Journalists' position would be that we need to go further than that. We believe that these two sections of the act, as well as established practices and traditions and structures within government, create an unacceptable zone of secrecy for government decision-making. Canadians cannot easily, if at all, access information about why their government has made the decisions it has made.

I would ask the committee members to ask themselves why that is. Why is that kind of secrecy really important? Do we want a government that is scared of the public? Do we want a government that hides from the public? Or do we want a government that is open to the public and treats the citizenry as participants in this thing we call democracy? Do we want an informed public? I would hope that the members of the committee will agree that we want citizens to have a better understanding of why government made the decisions it did.

Senator Daniel Patrick Moynihan—

● (1005)

The Chair: I have to cut you off, Mr. Holman. We're well into what should have been Mr. Kelly's time, but I think you'll have an opportunity to come back and elaborate.

Mr. Kelly.

Mr. Pat Kelly: Thank you, Mr. Chair.

Although I was enjoying Mr. Holman's answers, I'm sure we'll have more time as we go on.

I'd like to start by bringing in Mr. Murray regarding the dual mandate of being a commissioner for both privacy and access to information. Notwithstanding my colleague's comments on what the governing party's platform was, we have indeed in the budget, seemingly, a conclusion already drawn as to how we are going to proceed, so I hope that this time is productive.

I'm very interested in the idea of the dual mandates. We've heard from three different provincial commissioners who are commissioners for both access to information and privacy, as is the case in Newfoundland and Labrador. We've heard from many witnesses who uphold the Newfoundland and Labrador model as being the example and the standard in Canada. We also had Mr. Drapeau's recommendation that the two are intertwined and ought to be under one roof for a variety of reasons, including the efficiency of staff resources.

Please comment on the relative merits of having two different commissioners for privacy and access to information versus conferring a dual mandate.

Mr. Edward Ring: Yes, thank you very much for another excellent question.

I would start by saying that it's a question of proportionality. I understand that in some cases, when you consider all the factors involved, you have conflicting factors when looking at the individual's right to information and the protection of individual privacy. In my view, the size and magnitude of the work involved in the federal bureaucracy requires two offices. Even in our own small jurisdiction—that's about half a million people—we find that there is sometimes a huge balancing of what should be released and what should not be released. I think it's an order-of-magnitude question and that the size of the jurisdiction will make a huge difference.

Mr. Sean Murray: I like having the separate federal offices. I think it makes sense for the provincial and smaller jurisdictions to have the combined oversight, but at the federal level it has been nice that some of the spokespersons who have represented those offices on the national and international stage have represented Canada very well in talking about privacy rights and access to information rights. You can get into very fundamental issues of society and democracy.

I like the idea of having them separate at the federal level. Whether there are efficiencies to be achieved I'll leave it to those commissioners to comment on.

Mr. Pat Kelly: I had certainly thought of the sheer proportions and numbers and about Newfoundland and Labrador being a small province, but we had heard from joint commissioners who were representing both Ontario and Quebec.

I'd like, if I have time, to invite both Mr. Wudrick and Mr. Holman to comment as well on the dual mandate.

Mr. Aaron Wudrick: I think Mr. Ring and Mr. Murray's comments are germane here. The bigger the jurisdiction, the harder it is for one office to do two things. We think keeping these offices separate just in terms of resources might be a wise idea.

Mr. Sean Holman: The Canadian Association of Journalists would also be opposed to the idea of a commissioner who wears both hats. When he was justice minister, John Turner delivered a speech entitled “Twin Freedoms”. He was referring to both the freedom to privacy and also the freedom of information. I think that in this country we sometimes give greater priority to privacy than we do to freedom of information. We can even see this in the reporting of the actions of provincial information and privacy commissioners, who are repeatedly referred to as privacy commissioners even though they are talking about information issues. I think it would be a mistake to combine the two offices.

● (1010)

The Chair: Thank you very much. Your time is up. I left momentarily and everything went well, and I'm so relieved.

Mr. Saini, take up to five minutes, please.

Mr. Raj Saini: The one question I have to Mr. Murray and Mr. Ring is about what Mr. Wudrick highlighted, the fact that there's a five-dollar fee for access to information. I think part of the reason for that was to minimize any kind of frivolous or vexatious information request that might have come forward. You also highlighted the fact that the five dollars did not really serve any purpose because the cost to administer it was higher.

You've also come up with a very intriguing system whereby you bank requests. I want to ask you a question on that. When you get multiple requests from certain people—and in some cases they may be vexatious or may be follow-up to other requests—how does your banking system work? Have you found it to be helpful in making sure that the requests are more targeted rather than just a splatter or disarray of requests coming through that are going to plug up the system?

Mr. Sean Murray: Let me explain that the banking provision is in relation to the review or appeal function at our office as opposed to being at the request level. There is no banking system in terms of public bodies banking requests from applicants when they first receive an access to information request. The banking provision only applies to our office.

I think it's important to have, because our office now has the tight time frame of 65 business days to complete a complaint investigation and issue a report. If we were inundated with complaints or appeals about access to information requests from a single individual, however, we would have the ability to bank those.

That has not occurred recently. It's something that, over the 11 years that our office has been in existence, we have had issues with. We have not encountered it and have not had to use the banking provision since it came in.

In terms of a public body that might receive a lot of requests, however, the public body has the ability to come to our office and request a time extension, and one of the reasons they can present is that they've received an inordinate number of requests, whether from the same individual or not. We will look at what their capacity is, at how in-depth the request is, and we will question in detail what resources will be required to respond to the requests and may or may not grant their request for an extension.

As well, they have the ability to ask us to disregard a request, if it's overly broad. If someone comes to a public body and says, I want every record produced from this year to this year, it's something that will be unreasonable for them to respond to. It would require all of their resources and detract from their ultimate mission, whatever their organization is. The public body has the ability to come to our office and ask that we grant them the permission to disregard the requests, which we have done on a couple of occasions.

Mr. Raj Saini: The second question I have is something a little bit different. It concerns privacy breaches. Your ATIPPA says that every public body must report a privacy breach.

My question is two-fold. What is the onus on them to do that, and what enforcement do you have to make sure that they comply with that part of the legislation?

Mr. Edward Ring: Thank you very much.

I will say that prior to ATIPPA, 2015, our office could only undertake a privacy investigation if we received a complaint. Under the new act we can undertake own-motion investigations.

In fact, in terms of the public bodies reporting, it's a work-in-progress. As I said, the legislation is very new. One of the things the former government did, however, was initiate a couple of early actions. The legislation wasn't proclaimed in force until the first of June, but I think by the middle of March there had been some early actions taken, such as getting rid of the fees and mandatory reporting of all privacy breaches through the commissioner's office.

We thought that we would be inundated, because there are a lot of privacy breaches, many of them internal, many of them minor. For example, inside a large public body you could have faxes that are going to the wrong fax machine, but it's still within that same organization.

We set up a protocol, we have a reporting document, and we've had hundreds of public bodies report privacy breaches to us since March past. One of the tools we have in our tool box now that didn't exist before is our ability to conduct audits into access and privacy with the public bodies. We're just starting that process—we're involved in our first audit now—but during subsequent audits we'll be able to look at those kinds of issues.

We have no tool that is a blunt instrument at this point in time, but we have to develop ways to ensure, beyond just trying to encourage public bodies, that it's not bad to report a privacy breach to the privacy commissioner, because what we will hopefully do at the end of the day is make recommendations to that public body that can be used by others and will help make their system more solid, and the risk of breaches will be minimized, if not eliminated.

● (1015)

Mr. Sean Murray: There are no penalties for failing to report a privacy breach. However, as the commissioner pointed out, we certainly would have the ability to conduct an audit of the privacy practices of a public body, and their breach reporting practices are certainly something we could audit or investigate.

The Chair: Thank you very much. We went well over time, but we're going to have lots of time at the end.

To finish up the formal questioning, we have Mr. Dusseault, for three minutes. Then I have Mr. Bratina and Mr. Long as potential folks who haven't gone on the record yet. Then time permitting, colleagues, if you have any other outstanding questions, we should have enough time to get them all dealt with.

Mr. Dusseault, please.

[*Translation*]

Mr. Pierre-Luc Dusseault: Thank you, Mr. Chair.

I would like to talk about the fees and costs. We should give that more thought. However, I think that one of the potential risks is to place the organizations that are subject to the Access to Information Act in a difficult position.

Let me give you an example of that. CBC, which is a crown corporation, is clearly limited in terms of the information that it can provide because it operates in a very competitive field with private companies. In 2011, Quebecor, its main competitor, flooded CBC with access to information requests. In the span of one year, 80% of CBC's access to information requests came from one and the same requester. I think the number of requests was more than 1,000. That is a potential risk. The cost per request is $5. So that amounted to at least $5,000. So there is some deterrent effect, but it is not desirable for a private company to be able to flood the public entities that are subject to the Access to Information Act with access to information requests.

In Newfoundland and Labrador, has a competitor ever deliberately flooded a public agency with access to information requests with a view to harming it, to the point that it was not able to respond by the deadline?

[*English*]

Mr. Sean Murray: The only situations like that we've really encountered are situations of disgruntled former employees who have filed a large number of requests over a long period of time.

That's not something we're currently experiencing. That's something of a historical experience we've had. Even with the Quebecor example, I would question whether $5,000 is significant to a large enough organization like that, which has a purpose in mind. If it's something that's being experienced at the federal level, there may be some other means of addressing it, if it's considered to be an abuse of the act in some way.

● (1020)

[*Translation*]

Mr. Pierre-Luc Dusseault: I will let Mr. Holman add to what he was saying before.

My understanding is that we could at least be allowed to know the decision-making process that helps cabinet make a decision, although it is completely legitimate for its deliberations to remain secret. In this way, the public would at least have access to everything that cabinet ministers had in their hands when they made their decision and the final decision, which is in the public domain. As a result, people would be able to know the information that the decision-makers had at their disposal and determine whether or not the decision is appropriate. The process should be as open as possible, with the exception of cabinet's deliberations.

[*English*]

Mr. Sean Holman: I would concur, and I would even question whether or not it is necessary to have those deliberations protected. What are we really protecting here? Are we protecting cabinet ministers from embarrassment? Are we protecting a fiction that more than a dozen people in a room will always agree with one another?

What are we really protecting when we talk about cabinet confidences, when we talk about cabinet confidentiality? Is that something that is deserving of legitimate protection, or is it something that is an archaic part of our political system that is contrary to the wishes of the public?

I do an interesting exercise with my students when I talk about access to information. I get them to write on a board all of the information they want, which they would expect to have from the government. Then I take a piece of chalk, and I begin to cross out all of the pieces of information they are not allowed to access under our Access to Information Act and under our political system.

It seems passingly odd to me that the principle decision-making body in government is entirely secret. I wonder whether or not it seems odd to anyone else in this room.

The Chair: I'm going to have to leave it at that, because we went well over five minutes on a three-minute round, but I'm sure we'll have opportunities to ask questions.

Colleagues, I'll move to Mr. Bratina and Mr. Long for up to five minutes each, and then we'll see where it goes from there.

Mr. Bob Bratina (Hamilton East—Stoney Creek, Lib.): Thank you.

Thanks, everyone, for participating today.

When I became the mayor of Hamilton, I was asked on my first day on the job what my first priority was. My first priority was the live-streaming of all committee meetings. The reason for that was that the public required the reporters to tell them what was going on, whereas now they could just figure it out for themselves.

There is a tension here, obviously, that we're trying to correct through these meetings, but what responsibility do journalists have with regard to the use of this data? There is always a concern, ethically speaking. For instance, I've read the CAJ code of ethics, and it says that you do not give out all of the information that's brought together to form a story. Sources and other data are not divulged. On the other hand, the issue is that we should be divulging.

I'd like to hear your comment on this ethical imbalance, if you will.

Mr. Sean Holman: I appreciate the question and I appreciate the research that the member has conducted prior to this meeting.

I would say that elected officials are in a role different from journalists'. Elected officials were elected by the public to serve the public. Journalists serve the public in another way, but we are not directly, for the most part, paid for by the public; nor are we chosen by the public to do the job that we do.

I would say that there is a greater onus on transparency for public officials than there would be for journalists, although I take your point. We make decisions on a fairly regular basis, especially if one is functioning in an investigative capacity, about what information should be publicized and what information should not be.

The criteria that we use are far narrower than the criteria that are currently in the Access to Information Act. For example, we wouldn't necessarily publish something that is simply of a private interest as opposed to a public interest. That would be a big one. Is it necessary for the public, for their decision-making, to understand that something happened? In cases in which it isn't, we decide not to publish. That is very different, however, from what we're talking about when it comes to, for example, cabinet. I would argue that the vast bulk of what goes on in cabinet and in government is in the public interest.

● (1025)

Mr. Bob Bratina: The issue, though, then becomes what information is kept and how it would be accessed. In view of what's being created here, one might say, “Let's go play golf this afternoon”, and nothing is passed, nothing is written down. We want to do the right thing as government, as officials sitting around this table, but I'm not sure how you can ensure that every last thought we had that led to a policy outcome was specified.

Mr. Sean Holman: I suppose it is the principle that is more important. Yes, no system is ever going to be perfect. Every system we create is a human system and human systems are not perfect, but you mentioned for example the idea of whether the public should know you are going to golf with someone. I would argue that it depends upon who that person is. In my former career as a journalist in British Columbia, there were certainly instances when it would be important for me, as a journalist, to know whether you were golfing with a particular individual, as it would be in the public interest if that person were, for example, a lobbyist.

Mr. Bob Bratina: Thanks.

The Chair: Thank you.

Mr. Long.

Mr. Wayne Long (Saint John—Rothesay, Lib.): Thank you, Mr. Chair. Thank you to the presenters this morning. This is very interesting.

One of the problems with going last is that most of the good questions have been asked, so I'll have to bump myself up in the batting order, I think.

I'm going to start with Mr. Ring. Your presentation was very interesting. I have many good friends over in St. John's, Newfoundland.

I want to talk more about Bill 29—in 2012, when it happened—and about what was surrounding it. In 2012 you went with Bill 29, which had a culture of cabinet secrecy, and ministers' briefings were off limits, and so on, and in 2015 to a total overhaul of ATIPPA and a much more progressive style. I want to get your comments and input as to how you went from such a dark era in 2012 to a new era in 2015 and the change in culture that you've seen between the two periods.

Mr. Edward Ring: Thank you very much for that question. I'll sum it up by saying that it's coming from the darkness into the light, and I'm not talking about the sunshine list that's currently being debated in St. John's.

I'm not going to take long with this question. I know we're short on time.

The initial act that we had in this province was probably biting on the heels of B.C. It was a very good piece of legislation, but it tended to be eroded and there was a trend that government wanted to give out less information. Steps were taken to.... For example, we went to court on the commissioner's ability to review solicitor-client claim records, and we won in the Court of Appeal. That was almost immediately overturned by government, whereby we couldn't review those again.

Things became very rough politically for the government. The general public were outraged, and it was that groundswell and that current that led to.... In fact I'll say it: one of the previous premiers said to me that Bill 29 was the worst thing that government had ever done, and I said, “I agree, man.”

When Premier Marshall, at the time, came out wanting to move forward with the review, it was like again coming out into the sunshine, and we've been very happy ever since. A lot more work was generated for our office, and we're hoping to get the appropriate level of resourcing to deal with it, but we have an excellent act, an excellent piece of legislation that the people now enjoy.

● (1030)

Mr. Wayne Long: Right back at you. Obviously Commissioner Legault had her 85 recommendations. To what extent did you influence the process in Newfoundland? Did you also submit recommendations? Were you active in the process?

Mr. Edward Ring: I'll quickly give an answer and then I'll hand over to Mr. Murray.

We were extremely active in this. We met with the review committee before the hearings even commenced. We were the first group to present to the committee. We provided a 95-page submission with numerous recommendations made in it, a large number of which were accepted by the committee. We had the opportunity to interact with the committee in reaction to other submissions that were made by public bodies and other interest groups. We were also the last ones. We summed up on the very last day of the hearings. We were given outstanding opportunity to make our points and we took full advantage.

Mr. Sean Murray: Commissioner Ring and I spent eight hours in total in front of the review committee, reviewing every aspect of the legislation and discussing all of our recommendations. We had ample opportunity to debate and discuss back and forth, while it was carried on the parliamentary TV channel in Newfoundland. It was carried online as well and hundreds of people could tune in. It was a great process and very effective.

Mr. Wayne Long: Mr. Holman, thanks for coming in. Again, it was a great presentation. I appreciate your passion.

When we spoke before the meeting, you made a comment that you're writing a book about the history of ATIP.

Mr. Sean Holman: That's right.

Mr. Wayne Long: What you said to me was that we tend to forget our past and that there are a lot of answers in our past. Could you elaborate about that and your comments?

Mr. Sean Holman: Yes. As I mentioned earlier, there is an established narrative when it comes to the history of access to information that we have gone from a global leader to a laggard. It's this idea that, over time, freedom of information has eroded in Canada.

While there certainly have been practices that have been adopted since the Access to Information Act took effect that make access more difficult, it is important to understand that the legislation itself was built to be broken and was fundamentally flawed, and it was recognized as being fundamentally flawed when it was introduced.

I think we create the mythology that somehow there was a golden time when we had more freedom of information under the current legislation, but that is not correct. On this point, I think I differ with Professor Drapeau who, if I understand his testimony correctly, seems to be of the opinion that the problem is not with the act but with the culture.

I agree that it's with the culture, but it's also with the act and it's also with the very structure of our political system.

The Chair: Great.

Colleagues, if it's okay with you and I have nobody else on the list, may I ask a few questions. Is that okay?

First of all, I want to thank the witnesses for coming today and providing what I deem to be excellent testimony in regard to this particular issue.

I do have one concern about the technical aspect of it. I think the notions and the commentary are all laudable. I really do. I think it's absolutely fantastic, and I'm hoping that this committee will have an opportunity to invite you folks back again as we review legislation line by line that deals with this. I'm not sure where that's going to go, but that's my hope.

I have a few concerns which may be technical. Mr. Holman started off by saying that moving from a 20-year to a five-year window of keeping things confident, and the cultural change of having the default setting being open information, and having very restrictive exclusions on why government shouldn't release the information, is a complete flip from how it's currently implemented. I would agree with that assessment.

Mr. Wudrick, you're very concerned on behalf of taxpayers. Making sure that the tax dollars are followed and that you have, as your organization puts it, the ability to fulfill your mandate to follow the money and make sure that it's spent in the most accountable way to taxpayers, is laudable to be sure. But there might be times, and I'll give you some examples, where too much information, or information being released at the wrong time, might not be beneficial. It might not be beneficial to taxpayers. It might not be beneficial to Canadians.

I'll give you a couple of examples and then I would like all of your feedback. If our colleagues in Newfoundland and Labrador, in their role as commissioner, could give us any examples of where the Province of Newfoundland and Labrador found itself in this situation, that would be helpful as well. I'm going to talk about negotiations.

Every once in a while the Government of Canada engages in negotiations. The negotiations might be with other countries in the form of trade agreements. The negotiations might be with public sector unions when it comes to wages and collective bargaining agreements. It might be in negotiations with companies around the world when it comes to procurement of large military contracts and so on.

Given the fact that we want to shine a light on these things, is there the potential risk to make things...because I would argue procurements take abysmally long. I would suggest that sometimes these trade negotiations take a long time as well, and even the union negotiations or contract negotiations can sometimes take a long time.

If we were to take your recommendations and put them into a policy and into action, in your opinion, would we be getting a better or a worse result on those fronts?

● (1035)

Mr. Aaron Wudrick: Thank you, Mr. Chair.

I think those are fair concerns. We don't take the position that every single piece of information inside the government needs to be disclosed. I think Mr. Bratina touched on this. There's a natural tension between privacy and accountability. I think the nature of public officials and of government is such that it has to be tilted more towards accountability than privacy, for the simple reason that government has power that no private citizen has.

At the end of the day, Mr. Holman and I can come here and make recommendations all day long, but those around the table are the ones with the power. Therefore, I think the onus for transparency and accountability is higher on government.

That said, I think there are reasonable cases, such as the ones you have cited, in which the information should either not be released, or not be released for a certain period of time after which point the information becomes less sensitive. I don't know that we go as far as Mr. Holman in saying that there should be no exemptions. There should be fewer exemptions and they should be justified.

I certainly take your point that it's not a simple, blanket “throw open the doors”. There are going to be situations in which the information is sensitive, and certainly not just with trade deals. You can envision military situations, intelligence information situations, in which that would also apply. I certainly take your point.

Mr. Sean Holman: To be clear, the Canadian Association of Journalists and I are not recommending entirely doing away with exemptions and exclusions. I think what the Canadian Taxpayers Federation just mentioned about, for example, national security issues, privacy issues, etc.... These are legitimate areas in which there may be some reason that we need to keep the information secret.

Going to the point you just mentioned, however, and the examples you brought out—trade negotiations, for example—once a trade negotiation is concluded, would it not be reasonable for the public to understand the grounds under which the deal was made? That seems to me to be a reasonable thing that the public should have access to.

Senator Daniel Patrick Moynihan in the United States once wrote that “secrecy is for losers”. By that, I would say he means that secrecy is for those people who cannot rightly explain the decisions and actions they are taking to the public. There should be no reason for secrecy in the examples you mentioned, if government is able to actually defend making the decision it made, if it made a good decision.

● (1040)

The Chair: Mr. Ring or Mr. Murray, do you have any examples?

Mr. Sean Murray: Yes, I have a couple of examples. First of all, concerning the examples that you reference, I think that as long as you have harms-based exceptions incorporated into your statute so that you are not necessarily excluding entire classes of documents but are saying, if the disclosure of certain information could reasonably be expected to lead to well-defined harms, then I think you can ensure that your statute is designed to protect against those harms occurring, if the disclosure happens. I think there is a way to deal with the concerns you're referencing.

I would address one example you mentioned, procurement. I think in all of the access to information legislation across Canada, if someone requests, for example, a copy of a contract to provide goods or services—a contract between a private sector entity and the government or a public body—there is a process whereby notification must be given to a third party, and the government can either refuse access or can decide to give access, but the third party can then object and attempt to refuse access.

What we're trying to pursue in this jurisdiction is something called open contracting. I don't know whether you've heard much about it yet in your process, but open contracting basically is a concept whereby, if an entity has a contract to provide goods or services with a public body, by and large that information should be available to the public. Sometimes there may be proprietary information that is associated with it or that had been provided along with it, and that can be withheld. But what the government is paying to a private sector contractor and what they're purchasing in terms of goods and services for that money can be made proactively available.

That's one way that I think we can in fact avoid some of the processes and the delays that are associated with access to information, by designing your process in that way, for proactive disclosure.

The Chair: Thank you very much. That's basically the only question I had.

We only have about five minutes left, but in that time, seeing that we don't have a whole lot of time to re-engage in a conversation, I'll take this opportunity to thank you all very much for making yourselves available to the committee today.

I want to thank my colleagues at the committee table. This was an excellent meeting.

I remind my committee colleagues that we will be meeting again on Thursday, as we've changed our schedule now. We will be resuming on this particular topic, on this legislation. I'm just working with the clerk now to secure the witnesses whom we have, but we will have a meeting. We have enough witnesses already, I think, going forward, so we'll continue on with our study. Please check your mailboxes for an update on what location we'll be at and who the witnesses will be.

With that, I would like to adjourn the meeting and thank everyone for their patience with the chair today.