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Chair

Mr. Bob Zimmer

Standing Committee on Access to Information, Privacy and Ethics

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● (1530)

[*English*]

The Chair (Mr. Bob Zimmer (Prince George—Peace River—Northern Rockies, CPC)): I call the meeting to order. Good afternoon, everybody.

This is meeting 73 of the Standing Committee on Access to Information, Privacy and Ethics. Pursuant to the order of reference of Wednesday, September 27, 2017, we are studying Bill C-58, An Act to amend the Access to Information Act and the Privacy Act and to make consequential amendments to other acts.

I've been told that MP Cullen would like to make a motion at this time.

Mr. Nathan Cullen (Skeena—Bulkley Valley, NDP): Thank you, Chair.

This committee has a mandate, and I'm sure everyone's familiar with it. It's under subparagraph 108(3)(h)(vi). I'm sure we could all quote it chapter and verse, but let me quote it just to remind my colleagues of the mandate of the standing committee:

> in cooperation with other committees, the review of and report on any federal legislation, regulation or Standing Order which impacts upon the access to information or privacy of Canadians or the ethical standards of public office holders;

That's what this committee is charged with, so this is the appropriate place to do that. As some will have noted, I asked the Prime Minister for his thoughts on this in question period, but perhaps question period isn't always the most deliberative place that we have in the House or in Parliament. This is, of course. It's a committee.

I move the following motion, and I'll be curious for colleagues' comments on it:

> That, pursuant to Standing Order 108(3)(h)(vi), the Committee undertake a study of the Conflict of Interest Act and how it relates to public office holders; that the Conflict of Interest and Ethics Commissioner be invited to discuss her 2013 recommendations—

—that have been so often quoted—

> —provided in the context of the five-year review of the Act; that the Finance Minister be invited to explain decisions he has made in accordance with the Conflict of Interest Act; and that this study begin as soon as possible.

That is the motion as moved. I want to be very cautious, and respectful of our witnesses today. I'm not expecting an extended debate on this, but I wanted to put it forward, hear comments from colleagues, and move this motion.

The Chair: I'm willing to hear all sides.

Mr. Kent is first.

Hon. Peter Kent (Thornhill, CPC): Thank you.

I certainly support the sentiment of Mr. Cullen's motion, but I'm also aware that while we operate under Standing Order 108(3), there was a proviso written into the mandate at the time of its creation by PROC, the procedure and House affairs committee, regarding the Conflict of Interest and Ethics Commissioner. If the conflict of interest relates to a member of the House of Commons, a specific member, as I think in this case it obviously does, it is to be studied by the House of Commons Standing Committee on Procedure and House Affairs.

I think we can certainly call the commissioner in terms of a general discussion, and we could certainly take a study of the act. However, I'm afraid that to get to some of the statements of the Prime Minister and finance minister quoting the commissioner—and we would certainly like to see if she agrees with the way they've characterized her advice, recommendations, and information—I think it would have to go before PROC.

● (1535)

Mr. Nathan Cullen: We did look at that aspect, Peter, just in terms of where the proper place for this was. The advice that we were given is that, while it could exist within PROC, as is sometimes legislated, Standing Order 108(3) allows us at the end, with “the ethical standards of public office holders” the purview to review.

What we're trying to do is, as my grandmother used to say, “Never waste a good crisis.” If something goes wrong, the worst thing you can do is not learn any lessons from what has happened. We see this use of the Ethics Commissioner.... She is in an awkward space sometimes, Chair, as you know, because the conversations that we as MPs have with her are by default private, in order to say things. I've had conversations with her privately, and I want to have them publicly. I think that would be helpful to everybody.

If we are not to learn from these things, the concern is that the message sent is that the act has contained within it provisions, for example, that if I own a company but I number the company, then it changes my ethical obligations on reporting. It changes my obligations with respect to conflict of interest, which is the code, a different thing. Yet this committee is charged under 108(3) to look at moments like this, and we have a moment like this right now, “the ethical standards of public officer holders”.

I hear the concern about whether it's best done at PROC or best here. We read 108(3) pretty clearly. It says, “the ethical standards of public office holders”, so here is where we can review. The Ethics Commissioner certainly would be the first witness we would want to call.

The Chair: Mr. Erskine-Smith.

Mr. Nathaniel Erskine-Smith (Beaches—East York, Lib.): I don't think anyone, on this side or otherwise, would take issue with having the Ethics Commissioner at some point before us. I am cognizant of the time of the witnesses today in particular.

Mr. Cullen, you mentioned that in the House this issue becomes politicized. If we're getting into the issue of a rule, that's one thing, but if we're getting into further politicizing the finance minister's personal situation, I think in, at times, an incredibly unfair way, I would worry that this becomes a forum for doing that in addition to the House in question period.

I think it's appropriate to call the Ethics Commissioner. I don't think it's necessarily appropriate now, given that we have to continue the debate, so I would move that we put this to a vote.

The Chair: Mr. Erskine-Smith, it's not up to me to decide to go to the vote if debate still exists. The debate is still ongoing. We'll let it continue. It will go to a vote when debate collapses.

Mr. Nathaniel Erskine-Smith: That's fair enough.

Mr. Nathan Cullen: Chair, as I said, I was conscious of having very good and important witnesses in front of us on Bill C-58. This is the mechanism that we have. As I said at the beginning, I don't wish to belabour this.

The frustration and question for many Canadians whom we hear from is what exactly the rules are and how the interpretation of the rules manifests in real life for us as public office holders.

We have a case in front of us that I think helps illustrate some of the problems with the act. We put a motion before Parliament. I'm not sure whether any colleagues here spoke to it, but when colleagues of mine spoke to it, all we got from the benches opposite was a speech about everything except ethics, everything except the ethical guidelines and the code.

We tried in Parliament in debate. We tried in question period to ask simple and straightforward questions about disclosure, about ownership, about conflicts of interest. I think it's a fair assessment to say that we haven't received answers. I watched the finance minister last night in front of the media on CBC. He was asked very straightforward questions—nothing scatological, nothing like “Have you sold your shares”, for example. Again, there was no answer.

If committees aren't the place to charge that, if Parliament is not the place to charge it, if speaking to the media is not the place to discharge this, then where is? At some point the government can't say in their mandate letters that ministers must “bear the fullest public scrutiny”—I think that is the call, the commitment for each of the ministers of the crown. The opposite has been true: we don't have full public disclosure; we can't know what ethical rules have been broken. We also can't know that simply saying “the Ethics Commissioner gave me this advice”, when we don't actually hear from the Ethics Commissioner as to what the process is when an MP goes before her and says, “This is my financial arrangement”....

I have pertinent questions, and I think all members likely have pertinent questions for her asking how she manages conflicts of interest. How does she manage, for example, when the conflict of interest shield is your own chief of staff, whom you hired? Is there not a dynamic and a tension there, that a person whom you hired is now responsible for telling you “no, no, and no” and not explaining it?

These things, for which we think there are legitimate places within the ethics act to guide us, and in the members' code, I would argue, which can be exploited simply by doing something quite common—well, not common for most middle-class people, but simply common in business, to set up a numbered account.... Then suddenly our ethics code no longer speaks to it. Well, that's no good.

I think that if the finance minister wants, and I think he is sincere in this, to focus on his job, which is to run and administer and regulate the financial sector—in which he has holdings, by the way, but regardless—the best way to do so, in my experience, is to clear the air, to come forward, to tell us everything. If he says there's no conflict of interest, then there should be no problem in clearing the air, in being transparent, which is also in his mandate letter.

We have found the opposite to be true, in debates in the House, in question period, and in his dealings with the media. We turn then to committee, because committee is a deliberative place, where we put people here in front of us and ask them questions.

I hear Nathaniel's concern about politicization, but to vote against this, to say that we're not interested in hearing from the Ethics Commissioner, that we're not interested in hearing from the finance minister, is in fact an act of politics. It's to say these things aren't important, when clearly they are for everybody watching.

If there is some amendment they seek to move on this, if there's some other way to crack this nut, we're very interested in the conversation. To simply reject efforts to fix the loopholes in the act, however.... It's hard to draw any other conclusion than that the government is not sincerely interested in getting to the bottom of this.

● (1540)

The Chair: Mr. Kent, go ahead.

Hon. Peter Kent: Well, notwithstanding the proviso that's on the books, I would certainly support a call to the commissioner and to begin a study on the flaws that she identified in 2013, which are obviously still there—many of them hadn't been exploited until now—and at least to begin the conversation before this committee, even though in the end the specific questions about specific individuals may end up before PROC.

Mr. Nathan Cullen: We can stand this motion if there is any interest in that conversation, if calling the finance minister before the committee is the concern, in terms of what Nathaniel talked about, politicization. If that is not of appetite—I hear that from Nathaniel; I don't know if his colleagues share it, but I'm going to take a wild guess that it's likely—then calling—

Mr. Nathaniel Erskine-Smith: They don't always agree with me.

Mr. Nathan Cullen: Is that right? I heard the opposite.

If simply beginning that study on what concerns have been raised about the code itself is of interest to the committee, then we'll certainly stand this motion for today and not require a vote on it. We can have a dialogue off channel about how we might actually get at this, if that's amenable to my colleagues.

The Chair: Are you withdrawing?

Mr. Nathan Cullen: Yes, I'll withdraw, because I am concerned about time, and if there is a willingness and openness to dialogue, then we'll certainly do that and find another way to get at this. We thought this was the clearest way.

Apologies to the witnesses.

The Chair: The clerk has just informed me that we have two options: either adjourn debate on it, which would just require 50% plus one, or withdraw the motion, for which you would need unanimous consent.

What would you prefer, Mr. Cullen?

Mr. Nathan Cullen: I would withdraw, with the provision and the understanding that there is agreement among us to talk about a way to get the Ethics Commissioner—

The Chair: So, is it to suspend debate?

Mr. Nathan Cullen: Yes. The only concern I have with withdrawal.... Does that eliminate the motion from future consideration?

The Clerk of the Committee (Mr. Hugues La Rue): You would have to move it again.

Mr. Nathan Cullen: To move it again is not a concern. We would just give notice.

The Chair: Are you willing to withdraw?

Mr. Nathan Cullen: Yes, that's okay.

The Chair: We have to have unanimous consent that he withdraw his motion. Do we have it?

Some hon. members: Agreed.

(Motion withdrawn)

Mr. Nathan Cullen: Thank you, Chair.

The Chair: Thank you.

Thank you, witnesses, for allowing us to do some business. Officially, we'll get going.

We have Drew McArthur, from the Office of the Information and Privacy Commissioner for British Columbia, and Nick Taylor-Vaisey, from the Canadian Association of Journalists. Is that correct?

Mr. Nick Taylor-Vaisey (President, Canadian Association of Journalists): That is correct.

● (1545)

The Chair: From Evidence for Democracy, we have Katie Gibbs, executive director, and Kathleen Walsh, director of policy.

We have a bit of a time issue. We are starting at 3:45, and we were supposed to start at 3:30.

Witnesses, are you okay to stay a little longer than we originally asked you to, until 4:30?

Ms. Kathleen Walsh (Director of Policy, Evidence for Democracy): Yes.

The Chair: Okay. We'll try to extend it by 10 minutes. That should cover us. It depends on where the debate goes.

Mr. Nathaniel Erskine-Smith: We have votes.

The Chair: Yes, and we do have a second panel, so that complicates it a bit.

We should be good. We are going to allow an extra five minutes, if that works for everybody, just because we do have witnesses.

Drew McArthur, I have you as speaking first. Go ahead, Drew.

Mr. Drew McArthur (Acting Commissioner, Office of the Information and Privacy Commissioner for British Columbia): Thank you very much.

I want to talk about the proposed reforms to the Access to Information Act from the B.C. perspective. I think I will start by characterizing the scope of the act, which is the ideal of openness and transparent access to information, so the public can be involved in the debate. However, we find most of the act is focused on exceptions to access, so I find it a bit ironic that the bulk of the act is about exceptions, as opposed to access, and openness, and transparency.

With that opening perspective, the same thing exists in British Columbia, but in terms of right of access and making requests for information, proposed Bill C-58 suggests to require the requester to specify the subject matter, the type of the record, and the period for which they are requesting.

The federal commissioner's position has been that she feels the current requirements in the act are sufficient. B.C.'s law requires an individual to request records in writing, to provide sufficient detail for an experienced employee to identify them, and to submit their requests to the public body the applicant believes has the information. In other words, there is a duty to assist in B.C. and that is enshrined in our legislation, so you can't just turn away an applicant. You must assist them in getting the records that they are looking for. In some cases, if a request goes to the wrong ministry, it can be transferred to the correct ministry, rather than saying there are no responsive records.

In order to refuse an access request, Bill C-58 will allow institutions to decline to act on a request if it does not include enough detail, if the person has already been given access or can access by other means, or in circumstances where the volume of pages could interfere with operations. The federal commissioner is also concerned about that because she believes it's overly broad.

In B.C., public bodies must apply to my office for an authorization to disregard a request and we will then review that. Public bodies have a duty to assist applicants and as part of that duty, they may ask the applicant for more information about what records they are requesting for the purpose of assisting that individual. However, they cannot ask why they are requesting it.

Public bodies can charge an applicant fees to respond to a request, except when that request is the applicant's own personal information. This increases the public body's duty to assist, as the fees assist in some level of cost recovery, but typically not entirely, for some requests that would otherwise appear disruptive to operations, but just because it might be disruptive to operations does not mean that the public body must not respond to the request. Quite often, our office does receive complaints around the fee structure that a public body proposes to charge and often those are at issue in terms of gaining access to the records.

As it relates to the coverage of the Prime Minister's Office, Parliament, and courts, the issue is that the Prime Minister's Office, Parliament, and the courts are not covered under Bill C-58. It does provide for mandate of proactive disclosure of certain records for those entities, but with timelines longer than the regular access requests. The commissioner has no oversight over the information that those entities would disclose proactively and an institution can decline to respond to someone, if they are requesting information that the institution has already disclosed.

In B.C., our law applies to the office of the premier, to the ministers, and to cabinet records, but not to court records. The access to records held by these government departments is not unfettered. Exceptions do exist and they are clearly in our act.

For example, our act prohibits a public body from disclosing information that would reveal the substance of deliberations of the executive council or any of its committees, including advice, recommendations, policy considerations, draft legislation, or regulations submitted or prepared for submission to the executive council or any of its committees.

The government receives many access requests for records held by those government departments each year and the records are fundamental to the accountability and to the object of access to information.

Bill C-58 proposes to insert the words “to enhance the accountability and transparency of federal institutions in order to promote an open and democratic society and to enable public debate on the conduct of those institutions”. That's proposed to be put in the purpose clause. If that's the purpose, then access should be extended to those offices where those decisions are made.

● (1550)

On order-making power, the proposal is that the courts would review the Information Commissioner's order *de novo*, allowing for submission of other information and other facts after the investigation by the Information Commissioner. In B.C. we have full order-making power and orders can be registered with a supreme court. These orders are produced by adjudicators after an investigation and mediation process. It's a separate process. The two do not overlap.

In most cases, parties do not apply for a judicial review of our orders or a decision of my office, although they can. In B.C., with limited exceptions, such as in cases where a public body is claiming solicitor-client privilege over records, the courts have determined that the appropriate standard of review of my decisions is reasonableness. They review all our decisions and our orders on that basis.

If Bill C-58 were to be implemented in B.C., it would not provide incentive for public bodies to be meaningfully engaged with our office in the investigation or mediation phase. We resolve probably 95% to 99% of our investigations at the investigation mediation phase and rarely have to go to orders. That's a much better process for the applicant and the public body.

In other areas of concern, there is the transition period. Parts of the bill that relate to complaints to the Office of the Information Commissioner and the commissioner's power to investigate would not take effect for a year. It would only be applicable to those complaints received after that effective date. In British Columbia, our act was amended in 2011, and it came into force immediately upon royal assent. That just removed any uncertainty between applicants and government about their requirement to respond under those new conditions.

I will make a little note on information management. The government is now telling my office that they get requests for access to information that may involve hundreds of thousands of pages. They're not allowed to ignore those requests because of the size. In fact, we've encouraged them to start to disclose on a staged basis. But I note that if the information systems designed by government ministries to manage their operations also included thoughtful consideration of the requirement for access to information and transparency of their work, the work taken to respond to requests would be much easier and simpler as the information systems would already be anticipating that the information might be having to be disclosed.

It doesn't help in today's world but as we're designing our information systems going forward it's as if we say privacy by design to protect personal information, but it's access by design to enable the transparency and the delivery of those records to people who have a valid reason to know them.

I'll end there.

Thank you.

The Chair: Thank you, Mr. McArthur.

We'll go next to Nick Taylor-Vaisey, again for 10 minutes.

Mr. Nick Taylor-Vaisey: Thank you, Chair.

Thank you to the committee for inviting the CAJ today.

I'm Nick Taylor-Vaisey. I'm the president of the Canadian Association of Journalists. I'm here today in that capacity and do not speak on behalf of my employer, which is Rogers Communications and *Maclean's* magazine.

Today I'm speaking to you from Toronto, but our national board represents almost every corner of Canada. The CAJ is a truly national association of working journalists with members all over the country and across all forms of media.

Before I offer you our thoughts on how this committee could proactively improve the access to information reform on the table in the form of Bill C-58, I'd like to spend just a few seconds telling you about the CAJ.

The CAJ was founded in 1978 as the Centre for Investigative Journalism, a non-profit organization that encouraged and supported investigative journalism. Over the years we broadened our mandate and now offer high-quality professional development, primarily at our annual national conference, and also outspoken advocacy on behalf of journalists.

Our members include some of the most dogged investigative reporters in the country, journalists who have read freedom of information laws back and forth and have actively used them to inform their stories. They serve the public interest by digging up information their readers require to be informed citizens.

As you know, because you see it every day, excellent journalism reshapes public policy and improves people's lives. An effective access to information law allows journalists, and by extension the broader public, to be better informed, and at an even more basic level a good law serves the public's right to know.

This committee is well aware of the need for access to information reform. You've studied this issue exhaustively and have made important and necessary recommendations to the government. You now have before you a bill that the government has called “the most comprehensive reform of access to information in a generation”.

Of course, the Information Commissioner's opinion is different. She has said that Bill C-58 “would result in a regression of existing rights”. Heather Scoffield from the Canadian Press told you earlier this week that her Ottawa bureau, one of the most active in Canada when it comes to using the law—journalists like me are usually pretty jealous of the CP bureau's work—is “alarmed” to “see more ways for the government to turn us down and deny us information”.

The CAJ hopes the committee will work to change several damaging aspects of Bill C-58.

The first is that the government promised to expand the number of offices, including ministers' offices, that were subject to the act. Instead, Bill C-58 subjects ministers' offices to increased proactive disclosure. You'd be hard pressed to find a journalist who doesn't celebrate increased proactive disclosure. The problem is that governments control what is proactively disclosed, and a strong access to information law actually shifts that balance of power to the public. The CAJ urges the government to keep its election promise and subject ministers' officers to the right of access.

The second point is that Bill C-58 would allow departments to decline to act on requests deemed “vexatious” or “made in bad faith”. Both the Information Commissioner and this committee recommended that the government add a “bad faith” clause to the law. The proposed clause, however, could kill requests that don't include narrowly defined criteria, including the specific subject matter of the request, the type of record being requested, or the period for which the record is being requested.

Now, as journalists go about their work—our work—they will not always have all that information at their disposal. To dismiss those requests that lack only certain details as vexatious or in bad faith is an unnecessary overreach. The CAJ, like the Information Commissioner, urges the committee to remove these amendments in clause 6 from Bill C-58.

The third point is that Bill C-58 doesn't give the Information Commissioner effective order-making powers. The bill does technically enshrine order-making power, but the Information Commissioner has criticized the toothlessness of that element of Bill C-58. She's also suggested a different approach that would enact real enforceability, and the CAJ supports those recommendations. Of course, Mr. McArthur just spoke in some detail about that particular element of the bill.

The last recommendation is that Bill C-58 is a step backwards on fees for access. Early on in its mandate this government made a decision to waive all fees except for the mandatory $5 application fee. Bill C-58 reintroduces those fees and only says that they “may be prescribed by regulation”. Fees act as a barrier to access, and the CAJ believes the government should follow its interim directive of 2016.

Ultimately, journalists are hoping for an access to information law that shifts the culture within government, including that of both political actors and the broader public service. Bill C-58 will not get there. It adds new restrictions to the right of access and, outside of more government-managed proactive disclosure, won't instill a culture of openness by default. Journalists will spend more time clarifying or appealing requests, often with no clear path to a resolution, and sometimes at a significant financial cost.

● (1555)

Access to information coordinators, who are often caught between journalists and citizens who want information and government officials who don't want to give it up, will continue to have one of the most unenviable jobs in the public service.

Thanks for your time. Once the witnesses have finished their statements, I'm of course happy to answer your questions.

● (1600)

The Chair: Thank you, Mr. Taylor-Vaisey.

Next up is Evidence for Democracy and witness Katie Gibbs, I believe—or is it Kathleen Walsh?

Kathleen, go ahead, for 10 minutes.

Ms. Kathleen Walsh: Thank you, Mr. Chair and members of the committee, for having Evidence for Democracy here today.

We're very pleased to be here to discuss Bill C-58 and we're happy to see that the Access to Information Act is being revitalized for the first time in a long time—and actually for the first time within my lifetime.

Evidence for Democracy is a non-partisan, not-for-profit organization promoting the transparent use of evidence in government decision-making. E for D works with parliamentarians, public servants, scientists, and the public to ensure that the best available evidence and science make it into policy, and in a method that is transparent and open.

Robust evidence and facts underpin our democratic process. When Canadians do not have access to the science and evidence created and used by government, we cannot effectively hold our governments to account and our democracy suffers. As many of you are aware, access to scientific information in government has not always been available. When scientists are muzzled, cannot speak to the media, or fear for their employment if they speak about their research, our democracy is greatly impacted.

This government and many other members have worked hard over the last two years to ensure that government science can be openly communicated to the media and to the public. We're pleased to see these positive steps forward; however, this is only one part of being able to access government information. The ambitious undertaking of revitalizing the Access to Information Act is certainly another part of it. The revitalization of this act was long overdue and is an opportunity to truly modernize it, improving accountability and trust between the government and the Canadian public.

It is our opinion that there are serious flaws with Bill C-58 as it stands now; however, we recognize the opportunity to change and strengthen it. Our recommendations are similar to those of the other witnesses today: to focus on proactive disclosure, the denial of requests, and the ability for the Information Commissioner to order records.

On proactive disclosure, the decision to make ministerial mandate letters open by default was a commendable step by this government. We're pleased to see it enshrined in Bill C-58 and look forward to the normalization of this practice. These mandate letters have helped us as advocates and researchers to understand government priorities and desired changes. This is a positive step; however, it does not go quite far enough.

Evidence for Democracy, like many, interpreted the access to information reform presented by the Liberal Party in its election platform as including the ability to ATIP ministers' offices and the PMO. We are disappointed that this is not part of Bill C-58 and are concerned that proactive disclosure, while laudable, in its current configuration does not reach far enough.

We're deeply concerned that proactive disclosure of information is not overseen by the Information Commissioner. We see the information commissioner role as an incredibly important one and do not want to see parts of access to information legislation removed from that office's oversight. It is imperative that proactive disclosure be under the purview of the Information Commissioner.

Additionally, there must be shorter timelines for disclosure specified in the act, and it should allow for individuals to still request access to information.

We agree with this committee's recommendations, particularly recommendation number 23, that purely factual or background information, information on, and a record of decision made by cabinet or by any of its committees on an appeal under the act also be disclosed.

Furthermore, the ministers' offices and Prime Minister's Office must be required to respond to access to information requests. Proactive disclosure on its own is not sufficient; right to access should be extended to these offices.

With that, I will hand it over to Katie Gibbs, my colleague.

Ms. Katie Gibbs (Executive Director, Evidence for Democracy): Thank you, Kathleen.

When it comes to the bill's amendments to section 6, as it stands now we are concerned about requests that may be deemed vexatious and turned down. We do not believe that government departments or agencies should be able to determine that a request is vexatious and deny it. We think that only the Information Commissioner should be able to make those calls.

We believe there should be some means for the Information Commissioner to say that something is vexatious, but we think there need to be very clear specifications added into the act around what exactly "vexatious" means. It's a very subjective term as it stands now.

Additionally, the bill requires requesters to specify very specific information, such as the topic, the type of record, and the time period. While this may sound simple, it can be very challenging for civil society groups. NGOs like ours, but certainly members of the public, often do not have that very specific information prior to submitting a request. These changes really make it harder and not easier for the public to access information. We feel that this provision dramatically weakens our access to information legislation and really provides governments with a mechanism to subvert the intent of the acts, if they choose to.

The last issue we're concerned about is around the authority of the Information Commissioner in section 36, which allows the Information Commissioner to order a government institution to either reconsider denying access or order that a record become available. In theory, we absolutely think this is a positive change, but we have concerns about the timeliness of this process as well as the resources required within the Information Commissioner's office to fulfill this mandate.

We would remind the committee here that the scientific community is still waiting on a report from the Information Commission on the muzzling of federal scientists. This investigation began in March 2013, and we are still waiting for the report. It has been four and a half years, and we still don't have answers. Obviously, I think, we can all agree that this is unacceptable.

In the scenario that we see with these changes, someone would submit a request to the relevant departments. It would consequentially be denied, which we assume would take a few weeks, if not the full 30 days. They would then have to take it to the Information Commissioner. We assume they would then need some time to review it. Say that they do compel the government to produce the record; it then has 30 days again to actually produce the records.

Really, then, we're looking, even under a best case scenario, at its taking potentially months to actually get the documents. Again, this is assuming that the Information Commissioner would actually be able to review the case immediately, but given that the office is under-resourced as it is, it seems likely that there could be a significant delay in the process and in their ability to review the case. We want to make the case that in order to fulfill any new mandate given to the Information Commissioner, the office will need a significant addition of resources to match any new mandate being put on them.

Additionally, again we support this new mandate for the Information Commissioner to order records, but we are concerned that the bill does not really provide any teeth for the office to do that job effectively. It's not currently clear what kind of recourse there would be if the institution just refused that order from the Information Commissioner.

It is thus our opinion that the bill needs some serious work and amendments, but we are very pleased to see that the act will be reviewed in one year and then again in five years. We think that regular renewal and revitalization of an act so vital to our democracy is imperative. As data practices and government evolve, so too should our access to information laws.

● (1605)

We look forward to seeing what the committee does with this bill, and the reviews.

Thank you for your time.

The Chair: Thank you.

I just want to bring this to committee that if we go to seven minutes, we're likely only going to get to three questioners before time. I'm suggesting that we go to five minutes each to get the first round in.

Is that fair? Are we in agreement on that?

Some hon. members: Agreed.

The Chair: Okay, we'll go to five-minute rounds, starting with MP Fortier.

Mrs. Mona Fortier (Ottawa—Vanier, Lib.): Thank you. I will ask my questions faster.

Good afternoon, everyone, and thank you so much for being here today. It's very important for this committee to hear you. There have been a variety of views over the last few meetings, and yours have all contributed to a fulsome discussion. Thank you.

I would like to start by getting a good idea of how out of date this legislation is. I think by understanding the lack of movement on this file over the past decade, especially with the digitization of records and the sheer amount of information, it will give us a better understanding of the legislation.

I would like to start with you, Mr. McArthur. As I have limited time, I'm going to ask a few short questions.

When was your legislation enacted in B.C.?

● (1610)

Mr. Drew McArthur: It was in 1996, I believe.

Mrs. Mona Fortier: When was it most recently reviewed and amended?

Mr. Drew McArthur: I believe the last time was in 2011.

Mrs. Mona Fortier: And before that?

Mr. Drew McArthur: I don't recall.

Mrs. Mona Fortier: Was that the first time it was reviewed, or is —

Mr. Drew McArthur: No, there have been ongoing revisions.

Mrs. Mona Fortier: Ongoing, so I suspect you would agree that these periodic updates have helped keep the legislation up to date and modern.

Mr. Drew McArthur: Yes.

I might submit, one of the areas where B.C. is a bit unique is that we have a data localization provision which created a lot of logistical problems and subsequent legislative updates to exceptions to that. However, in some other areas, there have also been changes to the act as well.

Mrs. Mona Fortier: Thank you for sharing that.

Now I'd like to turn to Evidence for Democracy.

I must commend you for the work you do and have done over the past number of years to advocate for evidence-based decision-making, something I am very supportive of.

My first question is pretty basic but not too long, so we'll start with that. How does access to information support your work in holding governments to account?

Ms. Katie Gibbs: I have a really concrete example.

We have touched on the muzzling of scientists that was an issue for a number of years. Around 2013, we wanted to do a study that looked at the communication policies for government scientists and compare the policies in different departments. We contacted a lot of people within government, tried to find these policies online. We were not able to get our hands on the policies through those means, so we ended up having to get them through filing many access to information requests.

We were able to get the policies through that mechanism, and this allowed us to do a very comprehensive report comparing the policies across departments and making a number of recommendations. This report was quite foundational in that issue, in dealing with it and providing solutions.

It also gave us a helpful baseline of the communication issues for scientists. Hopefully that will allow us to repeat similar studies down the line to see how things have changed.

Mrs. Mona Fortier: Did you wish to add something?

Ms. Kathleen Walsh: No.

Mrs. Mona Fortier: You mentioned a situation where a government wasn't releasing the information you were looking for or are still waiting for, or you believed that they are intentionally ignoring your request.

Do you believe that the commissioner's legal powers to compel documents would act as a deterrent to such malicious behaviour?

Ms. Kathleen Walsh: I think in its current form, no.

As mentioned by Mr. McArthur, I think it would be better if the Information Commissioner followed an order-making model. Further, I think that if the Office of the Information Commissioner were able to publicize her investigations, that would be an additional deterrent.

Mrs. Mona Fortier: Finally, as I understand in your statement, you would like to see vexatious and malicious more concretely defined.

How would you do that? That's what I'm trying to understand.

Ms. Katie Gibbs: It's a good question.

I think our colleague here would probably have a better idea. I think it is a very rare case that there are requests that shouldn't be acted on. It should be a very, very rare thing.

My concern with a term that subjective and broad is that it could be so easily used by governments. It's vexatious to whom? I do worry that, as it stands now, it could very easily be used by governments to not release information.

[*Translation*]

Mrs. Mona Fortier: Thank you very much.

[*English*]

The Chair: That's perfect time. Thank you, MP Fortier.

Next up is MP Kent, for five minutes.

Hon. Peter Kent: Thank you very much.

Thanks to you all for appearing today. It's obvious from each of your presentations that you've expressed very clearly your general agreement with the commissioner herself in terms of her characterization of Bill C-58 as regressive, and with any number of amendments required to develop the sort of fulsome legislation that you've all recommended.

I'd like to make a few comparisons. I'll start with you, Mr. Taylor-Vaisey. Let me just say that I remember fondly the original founding moments of the first incarnation of the CAJ back in the seventies. What has been the experience of your membership with the B.C. commissioner's office as opposed to the federal office?

● (1615)

Mr. Nick Taylor-Vaisey: I don't think I have a fulsome response to that question. We, as an organization, have not focused regionally on British Columbia. We've had concerns, now and again, with the flow of information in British Columbia, but as an organization, we have focused largely on the federal legislation.

Hon. Peter Kent: I see. Thank you.

I wonder if I could ask Ms. Walsh and Ms. Gibbs whether they've had experience with any provincial information commissioner.

Ms. Kathleen Walsh: My experience provincially has been limited, but we do have some experience with B.C. The only difference was the timeline. It was similar. There was a bit of backlog and delay, but it was comparable federally, I would say.

Hon. Peter Kent: Mr. McArthur, you were talking about the fee consideration. We've had witnesses who have said that sometimes the collection of fees is actually counterproductive or not terribly significant. What sort of revenues do you collect annually in terms of fees?

Mr. Drew McArthur: I don't collect any revenues. That goes to the government.

Some hon. members: Oh, oh!

Hon. Peter Kent: Of course.

Mr. Drew McArthur: There are no fees for access, but there are fees beyond a certain number of pages or a certain number of hours. Typically, if it's beyond a five-hour search, fees can be imposed. You can't deny based on fees, and the government has to confirm with the applicant that they want to proceed on a fee quote. That's the point in time when many people come to our office to say they think these fees may be excessive. We do get complaints on that. I don't have the number of complaints.

Hon. Peter Kent: You mentioned the benefits of mediation rather than the issuing of orders. I'm sure there isn't a strict average, but is there any sort of average time consumed in terms of the toing and froing through mediation? Is there a point where you would finally decide that an order must be issued?

Mr. Drew McArthur: No. It is not typically based on time, although if a public body does not respond to an access request within the amount of time specified in the legislation, we may get a complaint. We would then investigate that complaint to determine that they were not responsive in a particular period of time.

In our office, the processing of a complaint is going to depend on two things. It's going to depend on the parties to the complaint, but each one is given a certain amount of time to provide information in the mediation process. We ensure that both parties have an opportunity to review each other's submissions. From that point in time, an investigator will make a recommendation. Either party can then request a review. As I said, it's only maybe between 0% and 5% that actually go to the request for the review, and a separate adjudication process or an order is the result. The order will be to the public body to either disclose these records or not disclose them, if we are in agreement with what the public body says. It will be either one or the other.

Hon. Peter Kent: Is the appeal to you?

Mr. Drew McArthur: That is correct. The request for review comes to my office. There is a third and final level of appeal, and that is to the courts, if either party believes that they don't like our order. Our orders can be judicially reviewed.

Hon. Peter Kent: Does that happen on a frequent basis or only occasionally?

Mr. Drew McArthur: In the last 19 years, we've had 1,094 orders. I don't know the total number of judicial reviews on those, but I'm going to guess it's in the range of, say, 20%.

Hon. Peter Kent: Thank you.

The Chair: Thank you, MP Kent.

Next up is MP Cullen for five minutes.

Mr. Nathan Cullen: Thank you, Chair. I'll try to go quickly.

I was looking through, Mr. McArthur, your office's recent records. You had about 20,000 requests over a five-year stretch. Only 20 of those went to an appeal to the commissioner after the request had been made. There was a complaint by the public, and you folks got involved.

I was looking at a recent survey—I don't know if it was by Mr. Nick Taylor-Vaisey's organization or another—looking at grading all the provinces and the federal government. You got a B. You didn't get one of the As that four other provinces got, but four got Bs, and two Cs, and three unfortunately got Ds. The loser in this was the federal government, which got an F, and was the worst.

I'm wondering about this condition of duty to assist. I have an access to information request that was done by a Canadian into Finance Canada asking for information with respect to the divestment of the finance minister. They wrote back saying, "I must inform you that, after a thorough search, no records exist in the Department of Finance Canada concerning this request."

Is the duty to assist, then, at that point when the officer would then find out where the records do exist, then assist the applicant in finding out where they are? Because that's where it ends. That's the dead end federally.

Provincially if someone wrote to Finance, and the records weren't in Finance, but they were over in the ethics department or some other department, would the duty to assist require that officer to then assist the public to get to the place where the records are?

● (1620)

Mr. Drew McArthur: One of the advantages in the B.C. system, I will say, is that the processing of access requests is done through a central group. It happens to be located in the Ministry of Citizens' Services right now. It was in the Ministry of Finance. That group is typically very familiar with where the records are going to be held. They put out the call. They get the access request, and they put out the call to the appropriate ministries.

Mr. Nathan Cullen: Federally it goes right to the department. The department says, "All right, it's not here."

Mr. Drew McArthur: If that happens in B.C., and that department says there's no request, and the individual doesn't agree with that, they can come to my office. We will determine whether or not the government had done an adequate search.

Mr. Nathan Cullen: We all hope for good intentions by everybody in government and all folks working in politics.

I did an ATIP on the sinking of the *Nathan E. Stewart*. You'll remember the ship that went down near Bella Bella. This is what I got back. This is the unified command situation report, by the way, a publicly available document, but my ATIP looks likes this. What happened? When did it happen? Who was there? Who didn't show up? I can find these, but my ATIP proved this, hundreds of pages of this.

I have a question for Mr. Taylor-Vaisey.

Is it fair to say access delayed can be access denied? If a government simply doesn't want something to be revealed, be it embarrassing or costly in some way, is simply just running the process...? We heard about four years waiting on scientists being muzzled, and two years since this government took power....

Is that another form of accessibility delayed? Is transparency delayed transparency denied? Are those fair statements?

Does Bill C- 58 make things worse or better as it's written right now?

Mr. Nick Taylor-Vaisey: I think those are fair statements. I mean, as you know, if we put ourselves in the shoes of a journalist, they report stories all the time that reach back into history as long as that history is newsworthy and in the public interest. We're patient. We wait out these requests as long as it's feasible, given the resources of our newsrooms, which, as everyone around the table knows, are typically shrinking. There's a time limit on everything.

If a government loses power, and then another government gains power, and three years later there's an access to information request that comes back that has some pretty vital information in the public interest about the last government's actions, we might still report the story, but it sure would have been nice if we could have reported the story three years ago.

Mr. Nathan Cullen: While they're still in office.

I have a question for our friends here. I'm looking at this notion.... You identified flaws in the bill as it stands right now. First of all, I don't know if you've read the Information Commissioner's recommendations to the committee on ways to fix it...access to the PMO.... You've got it. Do you support what she's recommended to the committee broadly?

Okay, that was a nod yes.

You mentioned that one good thing is that the mandate letters are public. I'm reading the mandate letter for Mr. Brison, who sponsored this bill, one of the few witnesses we've had who fully likes it. In the end, his mandate letter says, "...the Information Commissioner is empowered to order government information to be released and that the Act applies appropriately to the Prime Minister's and Ministers' Offices...."

In his mandate letter that is now going to be by default publicly disclosed, and that is good. They're not following.... There's some irony here somewhere that the one thing that's going to be made public is an example of one thing that they're just not following in the design of their own Bill C-58.

My question is the same for you. Does Bill C-58 move us forward? Does it move us backwards as it is? What would be the one or two main amendments to give it some chance of improving access to information for Canadians?

● (1625)

The Chair: We're actually out of time, but I'll let you answer quickly.

Mr. Nathan Cullen: Oh, the preamble was too long.

Ms. Kathleen Walsh: You mentioned timelines. I think that certainly moves us backwards. The same thing applies from a journalist perspective to an advocacy perspective: timeliness is of the essence. That would be a major change that we would like to see.

Again, in terms of the clause 6 requirements on specifics in applying, we'd like to see that changed as well.

Mr. Nathan Cullen: Thank you very much.

Thank you, Chair, for the indulgence.

The Chair: Thank you, MP Cullen.

The last question goes to Mr. Erskine-Smith. You have five minutes.

Mr. Nathaniel Erskine-Smith: Thanks very much.

I'll start with you, Mr. McArthur.

Picking up on clause 6, the language that you indicated exists in B.C.'s legislation is more general in nature. It's not quite as possible to deny, based on a strict interpretation of the rule.

I take it from your submission that you might also agree with Ms. Walsh and Ms. Gibbs that we ought to remove clause 6.

Would that be fair?

Mr. Drew McArthur: That would be fair.

Mr. Nathaniel Erskine-Smith: In B.C.'s legislation, you mentioned the reasonableness review. It's a JR with reasonableness There are other judicial reviews that are *de novo*.

The Information Commissioner has indicated some concern about the ability to enforce the order-making powers that should be granted pursuant to Bill C-58. In your legislation, I think it's section 59.01, it explicitly says, "the commissioner may file a certified copy of an order".

Do you think that the federal commissioner ought to have the same power?

Mr. Drew McArthur: I do agree.

Having the ability to file that with the court makes it an enforceable order. There is always a point of review for a public body or an applicant, an opportunity for judicial review. However, having an enforceable order is a critical component to having order-making powers.

Mr. Nathaniel Erskine-Smith: Do you publish the orders?

Mr. Drew McArthur: We do.

Mr. Nathaniel Erskine-Smith: Is there legislative authority for doing so, or do you simply do it by virtue of practice?

Mr. Drew McArthur: I don't know the answer to that question. We've been doing it for as many years as I've been involved and as many years as I recall.

Mr. Nathaniel Erskine-Smith: Okay, I open this to Evidence for Democracy, as well, this notion of proactive disclosure and oversight. The Information Commissioner recommended that we delete proposed section 91. It would preclude the Information Commissioner's authority for having oversight with respect to proactive disclosure.

I'm wondering what that looks like. What does it look like for her to review proactive disclosure?

There are certain timelines. For mandate letters, there's no timeline, from what I can tell, but for other briefing materials, there are between 30-day and 120-day timelines, depending upon the content of the briefing materials.

Is it an enforcement of timelines? Is it if things are redacted? How would we give the Information Commissioner appropriate authority over proactive disclosure?

Ms. Kathleen Walsh: That's a great question.

I think that timelines are certainly part of it. However, without oversight, our concern is that there would be materials that would never be proactively disclosed. We wouldn't know, and we potentially couldn't find that.

What would oversight look like? I'd have to think on that and get back to you, but I think timelines are certainly part of it, and the content of what is actually released.

Mr. Nathaniel Erskine-Smith: Which timelines would you recommend changing? Would it be imposing a timeline, perhaps on —

Ms. Kathleen Walsh: On mandate letters. That would be helpful.

It seems right now that it's quite immediate. A timeline on mandate letters would be quite helpful. Also, shortening the 120 days, obviously depending on the content, if possible, would be great.

Mr. Nathaniel Erskine-Smith: On vexatious and bad faith, in B.C., you indicated that departments have to apply to the commissioner's office in order for requests to be disregarded, so you don't have a vexatious rule.

Mr. Drew McArthur: Yes, we do.

Mr. Nathaniel Erskine-Smith: What other factors are considered in agreeing that a department ought not to fulfill a request?

Mr. Drew McArthur: Over the years, we have established jurisprudence in our orders on how we determine “frivolous” and “vexatious”. There are very few circumstances where that is the final result.

Mr. Nathaniel Erskine-Smith: If something is frivolous and vexatious, you can say to a department that they don't have to fulfill that request.

Are there other instances where you would say to the department that they don't have to fulfill that request, or is it simply vexatious and frivolous?

Mr. Drew McArthur: No, there are many other reasons under the act where access is—

Mr. Nathaniel Erskine-Smith: For exemptions and—

Mr. Drew McArthur: Exactly.

Mr. Nathaniel Erskine-Smith: Other than exemptions, I guess, where there is a legitimate request pursuant to the act, but it's a—

Mr. Drew McArthur: Well, if it's solicitor-client privileged information.

Mr. Nathaniel Erskine-Smith: Okay, fair enough.

● (1630)

Mr. Drew McArthur: The list is long.

Mr. Nathaniel Erskine-Smith: Taking Mr. McArthur's point and putting it to Evidence for Democracy, you indicated concerns about vexatious and bad faith. It occurs to me that the appropriate way is not to try to delineate in legislation but to allow the commissioner's orders to create a jurisprudence over time. We do it with civil procedure. It seems to be done in B.C. when it comes to access to information.

What might you have to say to that?

Ms. Katie Gibbs: Our concern isn't so much about that being included. It's about who makes that decision. Our concern is that as it's stated, it's actually the departments and agencies that can decide that; whereas we feel that these requests should have to go to the Information Commissioner, who would then be able to make that decision.

Mr. Nathaniel Erskine-Smith: Do you mean even if there are order-making powers, where the commissioner can rule that the department has inappropriately deemed it to be vexatious and frivolous? That doesn't strike me as—

Ms. Katie Gibbs: I still think so. I think that would be a shorter timeline than having it denied and then having to go through that route.

Mr. Nathaniel Erskine-Smith: Okay.

The final question I have is with respect to the duty to assist. There is a duty to assist in the federal legislation. Perhaps you could point me to the section in the legislation, and I can compare—

Mr. Drew McArthur: I think it's section 6 in the B.C. legislation.

Mr. Nathaniel Erskine-Smith: Great. I'll compare it on my own then and see the difference in language and whether yours is more forceful.

Thanks very much.

The Chair: Thank you, everyone, for being so quick.

I want to thank our witnesses for coming, especially a fellow British Columbian for coming all this way to present.

We will briefly suspend until our next witnesses can take their places.

● (1630)

(Pause)

● (1635)

The Chair: I would like to bring the meeting back to order.

I would like to welcome, from the Office of the Privacy Commissioner of Canada, Mr. Daniel Therrien, Julia Barss, and Sue Lajoie.

Mr. Therrien has asked for a few extra minutes for his presentation. I think that's okay. I'm looking for consent. Thank you.

Go ahead, Privacy Commissioner.

Mr. Daniel Therrien (Privacy Commissioner of Canada, Office of the Privacy Commissioner of Canada): Thank you very much, Mr. Chair.

[*Translation*]

Members of the committee,

[*English*]

thank you for inviting me to provide my views on Bill C-58.

First of all, I want to say that we support the government's commitment to open government, and we see this review of the Access to Information Act as welcome and long overdue. Making more government information available to the public is crucial to fostering transparency, accountability, and trust.

The OPC has frequently championed transparency. For example, as part of Privacy Act reform, but also in our submission to Treasury Board Secretariat on revitalizing access to information, we expressed support for open government, particularly in enabling informed citizens to participate fully in democratic debate. However, it is recognized internationally that open government can and should only be achieved in conjunction with appropriate privacy protections, for societal acceptance is predicated on trust that privacy will not be unduly infringed.

The online environment requires rigorous de-identification techniques to be applied and validated by experts prior to disclosure. The OPC and Statistics Canada can play key roles in minimizing the inadvertent release of personal information by government in the course of implementing open data initiatives.

[*Translation*]

We are confident that access and privacy are parallel goals that can be reconciled. The Access to Information Act and the Privacy Act have long been considered by the Supreme Court to be a “seamless code” of informational rights, the combined purpose of which is to carefully balance both privacy and access.

The court has further held that the personal information exception to access is mandatory and “should not be given a 'cramped interpretation' by giving access pre-eminence over privacy”.

Our previous comments on the Access to Information Act focused on the importance of maintaining this balance. We spoke in favour of maintaining ATIA's public interest exception that permits the disclosure of personal information only where the public interest clearly outweighs a claim of privacy.

We had also recommended that the definition of “personal information” not be amended. We are pleased that Bill C-58 leaves these concepts unchanged.

We further recommended that Parliament defer changing the Information Commissioner's power to order the disclosure of personal information until a legislative review has been done of the Privacy Act and its interplay with the Access to Information Act.

[*English*]

Nonetheless, Bill C-58 proceeds to confer upon the Information Commissioner order-making powers, including in respect of personal information disclosures. This would significantly and clearly disrupt the balance struck in the current legislation. We acknowledge that Bill C-58 takes limited steps to restore balance, primarily through notification requirements and legal recourse against formal OIC orders. However, this falls far short of maintaining the required balance, as privacy would be impacted outside formal orders or through OIC recommendations or institutions' decisions to disclose personal information to avoid OIC orders. I would not be notified or given the opportunity to intervene in such cases, even though the OIC and OPC may diverge on key legal issues relating to the balance of both rights.

For example, the offices may disagree on the degree of risk of re-identifying anonymized information or metadata, which could be determinative in assessing whether it constitutes personal information that should not be disclosed. The commissioners may also diverge on whether personal information is publicly available and whether the public interest clearly outweighs a privacy invasion, particularly in light of the new purpose clause in Bill C-58, which the Information Commissioner finds concerning, but which I find helpful.

● (1640)

Recently, in response to the bill before you, the Information Commissioner has taken issue with the proposed obligation to consult the Privacy Commissioner. She says consultation is unnecessary as the OIC has years of experience in interpreting the relevant provisions. This is very unfortunate, and clearly inappropriate as the Supreme Court has recognized the—quote, unquote —“central role” of my office in protecting privacy.

It is true that the OIC has significant experience in interpreting the personal information exception to access, but that experience has been developed as a champion for access rights. To ignore the views of other actors who have a legal role in ensuring the balance between access to information and other rights plainly makes the case that, as legislators, you must recognize in Bill C-58 the role of the OPC as privacy champion. Furthermore, this should be extended to all situations where privacy is in need of protection. The quasi-constitutional nature of the right to privacy is another reason to enshrine this role in the bill before you.

To restore the balance between access and privacy in Bill C-58, I propose two legislative solutions.

First, the bill should require mandatory notification of and consultation with the OPC in all cases where personal information is at real risk of being disclosed without the individual's consent, and not just when there is a formal order about to be issued. The point would not be to consult in every case in practice. Although the obligation to notify and consult with the OPC would be the rule, this obligation in the interests of resource efficiency would not apply to lower-risk situations where the OIC and the OPC had agreed that consultation would not be necessary. This type of agreement would support collaboration with the OIC to ensure the best balance between these two fundamental rights.

Second, I recommend that Bill C-58 give the OPC the opportunity to seek judicial redress in all cases where personal information is at material risk, and again not only those where an order has been made. Again, this right of redress would not be exercised in every case in practice, but only where necessary to protect privacy and to develop jurisprudence that would guide both commissioners, departments, and citizens on the applicable law.

To bring further clarity to my proposals, I have attempted to put them in statutory language. I believe you have these texts before you now.

Mr. Chair and the committee, with your indulgence I will spend a few more minutes to explain—I think that's crucial—why this bill disrupts the current balance between access and privacy.

The current balance upheld by the Supreme Court of Canada in several judgments is based on a number of factors including, first, the substantive provisions of the Access to Information Act and the Privacy Act, including the definition of personal information, the fact that the personal information exception in the access act is mandatory rather than discretionary, and the wording of the public interest exception, which requires that the public interest and disclosure “clearly outweigh” privacy invasions in order to prevail.

As a result, the Supreme Court held that as the law now stands, the combined purpose of the two acts is to protect both privacy and access rights and strike a careful balance between the two. The court even added that as things stand, privacy is paramount over access.

The second consideration, the roles of the two commissioners currently, one being the access champion and the other having a central role in protecting privacy, both being ombudspersons who can only make recommendations and not orders, and the role of departmental heads who ultimately have the discretion to decide on exceptions in general and specifically when the public interest and disclosure clearly outweighs privacy.

It's important to understand that while Bill C-58 maintains some of these factors, which are important for the Supreme Court in maintaining the balance, it changes others, notably the roles of the Information Commissioner and Privacy Commissioner and their authority to make binding orders. Changing the balance between the roles of the two commissioners and departmental heads may well have an impact on the interpretation of the substantive provisions. Giving the OIC the authority to make these orders could well mean that the OIC's interpretation will prevail between disclosure in the public interest and privacy.

● (1645)

The problem is not that the OIC is inherently unfair or unknowledgeable—it's true that they have experience—but rather that it is a champion of one side of the balance. Someone needs to speak for the other side, particularly when the Information Commissioner in her special report on this bill is on record as saying it is unnecessary and inappropriate to consider the other side.

The OPC will rarely be involved according to Bill C-58, despite having a central role according to the Supreme Court. The bill provides that the OPC will be notified only in the case of formal orders and only in these cases will we be able to see judicial redress. Yet, privacy may be at risk not only where OIC formal orders are made, but in other situations. Departments are much more likely to comply with the OIC's interpretation, knowing that the OIC ultimately has the authority to make binding orders. As government officials acknowledged to you last week, it is only in very rare cases that departments will use their resources to challenge OIC orders.

Similarly, when the OIC makes a recommendation under the new regime, or even when discussions take place between the OIC and departments during the investigation of a complaint, departments are much more likely to comply with the OIC's view, knowing that the OIC can ultimately order the department to accede to its interpretation of the law.

Bill C-58 ultimately creates an incentive to give access pre-eminence over privacy, which is contrary to the Supreme Court jurisprudence. I am deeply concerned about this and have suggested a few simple solutions to this poor balance.

Thank you for your attention, and I look forward to answering your questions.

The Chair: Thank you, Commissioner.

First up for a seven-minute round is MP Erskine-Smith.

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

Thank you very much, Commissioner.

I want to make sure I'm clear in my head as to the concern in relation to the risk of personal information being disclosed. Section 19 of the current act provides that the head of a government institution shall refuse to disclose any record request under this act that contains personal information, but then subsection 19(2) authorizes disclosure in certain instances if the individual consents. You have no issue there as I understand it. The information is publicly available.

Paragraph 19(2)(c) refers to the disclosure being in accordance with section 8 of the Privacy Act. It's in that instance you're asking that not just the Information Commissioner would consult with you, but every department on every ATI request, provided if there's disclosure, you're looking for consultation.

Mr. Daniel Therrien: With respect to consultation by departments, my request is limited to not all ATI requests.

Mr. Nathaniel Erskine-Smith: No, but it's only ATI requests that implicate paragraph 19(2)(c).

Mr. Daniel Therrien: And not even all of those of that group.

Mr. Nathaniel Erskine-Smith: Only the ones under section—

Mr. Daniel Therrien: Only those that lead to a complaint to the Information Commissioner, which is about 300 cases a year.

Mr. Nathaniel Erskine-Smith: That's the part I can't figure out, because wouldn't we also be concerned with departments if we're concerned...? This is the privacy angle specifically, not the access to information angle. Why am I concerned about the Information Commissioner ordering disclosure of personal information, but not the department disclosing information? If there's personal information either way, I'd be equally concerned.

Mr. Daniel Therrien: I am concerned, but less so in the case of departments in large part because the substantive part of the legislation says that this balancing, whether the public interest clearly outweighs privacy, is an assessment that is done within the discretion of a department. In the current law it is the institutional head who ultimately decides, although I would like to be able to review these and we have not seen a major issue. The combination of institutional heads having the discretion and the Supreme Court jurisprudence to the effect that privacy must not be given a narrow or cramped interpretation that binds institutional heads, that is a regime that could be perfected, but it adequately protects privacy.

With the bill the Information Commissioner will be able to order a department on the exception to this mandatory protection of personal information, including provisions that go to the balancing between the public interest and the protection of privacy. What is the net effect of giving order-making to the Information Commissioner on the exception with the discretion remaining, at least in theory, for departmental heads? That's a bit unclear to me.

● (1650)

Mr. Nathaniel Erskine-Smith: That's a good question.

Just so we're all clear here, I think the section you're talking about.... The way the legislation interacts is that we have paragraph 19(2)(c) which interacts with section 18 of the Privacy Act. Once we get to section 8 of the Privacy Act—correct me if I'm wrong—but you're talking about subparagraph 8(2)(m)(i)?

Mr. Daniel Therrien: Yes.

Mr. Nathaniel Erskine-Smith: It occurs to me that maybe it ought to be clear.

You make a good point. An Information Commissioner here, with order-making powers, only has the ability to enforce disclosure where she feels that the department has made an improper decision pursuant to the act to refuse disclosure. But paragraph 8(2)(m) of the Privacy Act, as you said, does specifically state in the statute "for any purpose where, in the opinion of the head of the institution". It's unclear who then has the authority where there's a dispute between the head of the institution and the Information Commissioner.

If I were resolving that, I think it would actually lie with the head of the institution, given that's the way the statute reads, but I guess your concern is clarity.

Mr. Daniel Therrien: We would like to be part of that discussion, hence being consulted, and hence being able to seek judicial redress of that issue, and not to do that 10,000 times a year forever until the jurisprudence settles the question, which will not take all that long.

However, in order for that to happen.... Yes, it could happen based on the initiative of a department, but you heard last week that judicial redresses by government will be few and far between. I think the Supreme Court has recognized a role for the institution that I head. I think it's reasonable to ask to be part of the conversation and to be able to raise before the courts these issues when privacy is at risk.

Mr. Nathaniel Erskine-Smith: Is the request limited to when subparagraph 8(2)(m)(i) is implicated?

Mr. Daniel Therrien: It's whenever the exceptions of section 19 apply.

Mr. Nathaniel Erskine-Smith: So any section 8 privacy—

Mr. Daniel Therrien: I agree that where the individual concerned consents, we will never seek judicial redress.

The question of whether information is publicly available could lead to some differences of use too. It's in part what is publicly available, in part how to balance public interests and privacy invasions.

Mr. Nathaniel Erskine-Smith: How much time do I have?

The Chair: One minute.

Mr. Nathaniel Erskine-Smith: Well, with that, I would simply say I can appreciate that when it comes to subparagraph 8(2)(m)(i) where the head of the institution has more authority, but, frankly, when it comes to the rest of section 8, I don't see any difference between the Information Commissioner compelling disclosure and a department compelling disclosure where it implicates personal information.

Frankly, if you want to be consulted on all of section 8, I think you have to make a case as to why there's a difference between the Information Commissioner and the department.

Mr. Daniel Therrien: Sorry, I may not have been clear.

There are exceptions—

Mr. Nathaniel Erskine-Smith: Section 19—

Mr. Daniel Therrien: The exceptions where I would like to have the right to be consulted and intervene in court essentially are, point one, what is publicly available versus what is personal information, and, point two, the balance between the public interest and privacy invasion.

Mr. Nathaniel Erskine-Smith: And that's specific to subparagraph 8(2)(m)(i).

Okay, thanks very much.

The Chair: Thank you, MP Erskine-Smith.

Next up is MP Gourde, for seven minutes.

[*Translation*]

Mr. Jacques Gourde (Lévis—Lotbinière, CPC): Thank you, Mr. Chair.

Mr. Therrien, thank you for being here this afternoon.

We all agree that the protection of privacy is really important. But there may be some exceptional cases where a public office holder may be in conflict with the provisions of certain pieces of legislation. Public office holders may influence legislation or major directions for our country. They may also inadvertently promote their privacy and personal affairs.

It's a very fine line. In fact, we more or less have the information needed to know if this person is breaking certain laws or, sometimes, we don't necessarily have the answers we might expect from this person.

● (1655)

Mr. Daniel Therrien: It's true that the identity of officials or other people may sometimes have to be protected and that, in other cases, it is unreasonable to protect them.

I imagine that there may be differences of opinion, and the circumstances are important. I'll talk to you about the provision of Bill C-58 that states the purpose of the act, because I think it's important to the question you're asking. The purpose of the act is amended to read that the purpose is "to enhance the accountability and transparency of federal institutions in order to promote an open and democratic society and to enable public debate on the conduct of those institutions".

So there will be cases where information affecting a political position or topic *x* from the public service will be disseminated, which is very much in the public interest. Do the individuals involved in this policy need to be identified? I think the new purpose of the act is helpful in answering this question. It's a tool that did not exist previously.

In the example you gave, would knowing the identity of the public servant enhance the accountability and transparency of federal institutions? It may, or it may not.

Would it promote democratic debate? It may, or it may not.

The purpose of the act is very helpful here in answering these questions. Sometimes, the public debate can be complete, quite democratic, without the need to identify the individuals involved. Sometimes, it will be quite relevant to know the individuals involved to judge the merits of someone's point of view, in order to have an open and informed democratic debate.

Mr. Jacques Gourde: That's why access to information is really very important so that anyone who submits a request can know whether a public office holder is in a conflict of interest, right?

Mr. Daniel Therrien: Yes, absolutely.

Mr. Jacques Gourde: In the version of this act before us, can a public office holder hide behind the act for not disclosing certain personal information under the Privacy Act?

Mr. Daniel Therrien: This trend is possible, but the provision relating to the purpose of the act informs everyone, including public servants, politicians, the Information Commissioner, and the courts, to achieve a better outcome on these issues.

Mr. Jacques Gourde: Would it be possible for someone to want to test this and for the matter to go before the courts?

Mr. Daniel Therrien: Absolutely.

Mr. Jacques Gourde: Right, so it's possible.

That said, privacy protection is of great importance to all Canadians and to democracy in general. However, with respect to access to information, new policies will be developed in the future to which Canadians are entitled.

Will the provisions of this bill that exclude the Prime Minister's Office and ministers from access create a grey area that will affect access to information?

Mr. Daniel Therrien: In this regard, I recommended, in the context of the possible reform of the Privacy Act, that the offices of ministers and the Prime Minister's office be subject to access, in the same way as the other departments. I believe this principle also applies to access to information. It would certainly be desirable for the Prime Minister's Office and the ministers' offices to be subject to the provisions of the act and the access mechanism provided for by the Access to Information Act.

Mr. Jacques Gourde: If this isn't the case, would our democracy be affected in the long term? In fact, if we didn't have responses in the House of Commons or responses concerning access to information in the provisions of the Access to Information Act, what recourse would we have?

Mr. Daniel Therrien: I didn't fully analyze the consequences that a lack of information might have on the principle of proactive disclosure. That's why I can't know what the outcome would be on democracy. This is obviously not a perfect situation and there are improvements to be made.

I would like to bring you back again to the provision on the purpose of the act. What I find very helpful in this provision is that the purpose of the act is to achieve the objectives I have mentioned to you, namely transparency, accountability and democracy. A link has been established between two mechanisms: formal requests for access to information under the Access to Information Act and proactive disclosure.

In addition, the formal access to information mechanism is very important, but it is not an end in itself. Indeed, it is a goal to achieve the true end, that of improving transparency, accountability and democracy. There are other ways to do this, such as proactive disclosure.

Lastly, is it desirable that the Prime Minister's Office and ministers' offices be subject to a formal mechanism? Yes, it is. However, the tool for requesting access under the formal access-to-information mechanism is not the only one that would lead our country to achieve the broader goals of accountability, transparency, and democratic life. Proactive disclosure is another legitimate way of achieving that.

● (1700)

Mr. Jacques Gourde: Thank you.

The Chair: Thank you, Mr. Gourde.

[*English*]

Next up we have MP Weir. You have seven minutes.

Mr. Erin Weir (Regina—Lewvan, NDP): Thanks very much.

The government was elected promising to extend access to information to the Prime Minister's Office and then to the offices of other cabinet ministers. I'm wondering if you could tell us whether there's a privacy reason for not doing so or whether you think it would be feasible to administer access to information in those offices, with appropriate privacy protections.

Mr. Daniel Therrien: There is no privacy reason not to extend the application of the formal mechanism to ministers' offices and the Prime Minister's Office. They could be seen and subject to this law, as any other department would be.

Mr. Erin Weir: I think that's an important point to get on record.

A second aspect of Bill C-58 that is quite concerning is that it would give the government new grounds on which to deny access to information requests. Specifically, it would provide the power to decide that a request is frivolous or vexatious. The argument we heard in Parliament in favour of that provision was the example of an ex-spouse requesting a former spouse's address and work hours. It strikes me that this information should already be protected as personal information and that there's really no need to empower the information officers to determine that the request itself is frivolous or vexatious, but I'm curious what you think about that.

Mr. Daniel Therrien: That's another point that goes to the Access to Information Act being a means to a broader end. On that point, my understanding is that my colleague the Information Commissioner has sought provisions allowing for refusing to investigate complaints based on their having a vexatious or frivolous nature. She has not recommended, I believe, based on her special report, that she is opposed to other access limitations provided in proposed sections 6 or 6.1 of Bill C-58, including the need for complainants or requesters to identify in some manner the information they are seeking. The Information Commissioner herself is in favour of the concept of "frivolous and vexatious", but not other limitations.

As a fellow commissioner, having to balance the desire to respond positively to complaints under my act, the Privacy Act, for personal information, and to do that in an effective manner, I can see the need for "frivolous and vexatious" as a ground to refuse to investigate certain complaints. Moreover, I would see that this is something that would make sense to give to departments as well, as long as, as the bill provides, there is a review of the decision by the relevant commissioner. So I'm not opposed to the notion of the concept of frivolous and vexatious.

The other limitations are new, and I'm not opposed to them in principle, on the basis that perhaps some requests could be so voluminous that they would impede the normal workings of a department. The question for me goes back to the objective and purpose of the act. Is it linked to transparency and accountability to answer that request or not for a number of reasons. I'm not opposed to the concept of the limitations, but the language in the wording of the limitations deserves close consideration.

● (1705)

Mr. Erin Weir: For sure. What I'm trying to get at is if one of the goals is to protect people's personal information, is the best way to do that to empower government officials to question the motivation of the request, or is the best way to protect personal information to have this exception for personal information and to empower your office to speak up for privacy in the process?

Mr. Daniel Therrien: I'm not opposed to giving that kind of authority to departments in the first instance, provided that there is a substantive review by the appropriate commissioner and ultimately the courts.

Mr. Erin Weir: One of the concerns about the access to information system is the length of time it sometimes takes. I think that timely access to information should be the goal we're striving for. Given that there needs to be appropriate consultation with you and your office, can you think of ways to speed up the process?

Mr. Daniel Therrien: Proactive disclosure is one way, but you need to be careful how that is done. All tribunals, the Information Commissioner, my office, have a responsibility to look at our processes to make sure that they are as efficient as possible. That's also part of the solution. Both the Information Commissioner and the OPC are getting pretty close to the bone. We need sufficient resources to ensure that our mandates can be carried out rigorously and speedily. That is also part of the solution.

Mr. Erin Weir: Assuming that your office and the Information Commissioner's office were properly resourced, would it be realistic to shorten the length of time to respond to requests for access to information?

Mr. Daniel Therrien: If you mean the time would be shortened to certain periods, like 30 days, no, but if you mean shortened vis-à-vis the time it actually takes currently, which is months and sometimes over a year, absolutely.

Mr. Erin Weir: Yes, I think that's where the concern comes in. It's all these requests for extensions and that kind of thing. I don't think anyone is complaining about the initial 30 days.

Mr. Daniel Therrien: One thing I would add along the lines of refusing to deal with certain requests or requiring requesters to provide certain information is that being more explicit in giving the commissioners the authority to manage their caseloads through mechanisms like mediation would also help.

The reality is that we have a large volume of files. We want to deal with them as best we can. Some of them require extensive, substantive examination; others less so. More authority for the commissioners to manage the caseloads in a way that is fair and just but also efficient would be helpful.

The Chair: We're out of time. Thank you.

Mr. Erin Weir: Thanks a lot.

The Chair: Next up is Mr. Picard for seven minutes.

● (1710)

[*Translation*]

Mr. Michel Picard (Montarville, Lib.): Thank you, Mr. Chair.

Mr. Therrien, it's a pleasure to see you again.

Let's look at the problem from a different perspective. There is concern about how the government passes information on to the public. Let's take the perspective of the people who receive the information and have in their possession information that could potentially be harmful to a third party because of the nature of the information or something that may be relevant to some aspect of another person's privacy.

What is the recourse available to the person who receives the information or the person who has been harmed by the information, given that we're asking for more and more transparency and for the floodgates to be opened?

Mr. Daniel Therrien: My answer will have two parts.

First, under the mechanism that I call the formal access mechanism—in other words, access to information requests made to the department—there are certain provisions in the Access to Information Act and the Privacy Act to protect certain third parties, particularly those with commercial interests, but not others.

For example, if person A makes an access to information request that deals, among other things, with information about person B, the department should normally refuse to disclose information about person B. I am concerned about the impact of the Information Commissioner's orders in such cases. Normally, information about person B should be protected, but the person has no recourse if the wrong decision is made under the current act, except for certain third parties, including those with commercial interests.

Mr. Michel Picard: Does this danger give a little more justification to the relevance of addressing your office?

Mr. Daniel Therrien: Yes, but my recommendation is very limited. It targets cases where a complaint is made to the Office of the Information Commissioner of Canada. In fact, if I don't go further, it's partly because I don't have the resources needed to study more files.

Moreover, in the context of an open government policy, the public will now receive the information—and this will be increasingly the case in the future—following a proactive disclosure process or as a result of making government information available to the public. It will not necessarily be through a formal access to information mechanism, which is actually rarely used.

It is in part for this reason that I consider it quite commendable, but there is a risk for individuals in this regard. Among other things, the government may think that certain anonymized information may be made public for the public interest, but it is possible that this information is, in fact, personal. That is why I would like to play a more active role and why Statistics Canada could also play a role in ensuring that disclosure made in this way does not endanger third parties.

Mr. Michel Picard: Thank you.

Please excuse me for making a bit of a weak comparison. When a search warrant is issued during a criminal investigation, you have to be extremely precise about what you're asking for—you're not allowed to go fishing, for example. It's clear, understood and accepted. But when a request for information is so broad, at least as far as I can see, can we ask for almost anything, and the fact of asking for the information won't have any repercussions, if I use a criminal investigation as comparison?

What I'm referring to here are the comments of certain organizations and journalists who appeared before the committee. They assured us that this doesn't apply to fishing trips, but there is no limit to what you can ask, although you want to know what the purpose of the request is. You can't ask an individual who says they aren't fishing why they want access to a given piece of information. If information considered to be public is accessible to everyone, there is no limit to the information that can be requested. I could ask for access to a Government of Canada database, and there would be no limit. To me, no fishing trip is finer than that.

What's your opinion on that?

Mr. Daniel Therrien: There can be abuse on both sides. An applicant may file an extremely broad application which, to use your term, is a fishing trip and requires the government to allocate resources to respond to that request.

According to the witnesses who appeared earlier, members of the public may have difficulty defining the parameters of their requests. That's absolutely true. Conceptually, I don't see any problem in asking individuals to specify their demands, insofar as they can, which isn't always the case. There must be good faith on both sides. The commissioner must also review whether people acted in good faith in defining the scope of their requests and the government's response.

● (1715)

Mr. Michel Picard: Can a department also assess the good faith of a request and then decide that it is vexatious or ridiculous, instead of having absolutely just the decision—

Mr. Daniel Therrien: I don't have a problem with this. I presume the good faith of the departments. It's true that some requests can be vexatious. Departments could abuse this power. That's why the Information Commissioner has to look at cases like that. I don't see any problem in giving this authority to departments at first instance.

Mr. Michel Picard: Thank you, Mr. Chair.

[*English*]

The Chair: Thank you.

We have one last question from MP Kent. You have five minutes.

Hon. Peter Kent: Thank you very much, Chair.

Thank you to you and your staff, Commissioner, for appearing before us today.

I'd like to focus on your disagreement with the Information Commissioner with regard to consultation, and although you see an improvement in Bill C-58 in terms of strengthening the relationship, there is still disagreement.

I'd like to ask you about the past, or coming to the present, do you often meet with your counterpart to discuss some of these issues, your concerns, her concerns?

Mr. Daniel Therrien: We have a good relationship. The discussions rarely touch on—

Hon. Peter Kent: Specifics.

Mr. Daniel Therrien: —the interpretation of privacy, personal information, and so on because that arises in the context of specific files, and the practice has not been to consult much on these issues in part for reasons of confidentiality of investigations, and so on. On that particular issue, the consultation has not been frequent.

On other issues, for instance, we just jointly signed a resolution along with provincial commissioners on the question of solicitor-client privilege in the context of access requests, so we often will agree on certain issues. On this question of what I'll refer to as the tension between access and privacy, it's less so.

Hon. Peter Kent: Has it been in your experience that institutions, departments, or officials in those departments, or even ministers, public office holders, have come to you with concerns about information requests that they are considering fulfilling with concerns for privacy?

Mr. Daniel Therrien: They do that very infrequently, but they do it. I think the point is that they don't have to do that. When people make requests for information under access to information that includes personal information, it is the responsibility of the departments to assess what to do with the personal information, and there is no obligation whatsoever for the departments to consult us. Because they want to make the right choice, in some cases, very few, they consult us.

One of the advantages, I would suggest, of the amendment that I'm suggesting, which would call for agreements between the Information Commissioner's office and my office, would be to enhance that co-operation, because I think co-operation is necessary and useful. There's an area where our mandates merge. We need to talk, and one of the advantages of the amendment that I'm recommending to you would be that it would require consultation in some cases.

● (1720)

Hon. Peter Kent: As you have laid it out here and you suggested in your remarks, this is a reason to enshrine the constitutional nature of privacy in the act itself, in Bill C-58 amendments.

Mr. Daniel Therrien: Ultimately, there are cases where two important quasi-constitutional rights can be in tension or in opposition. That's normal in a democracy. That's not the only case. This is not a personal thing.

My point is that, if there are two important quasi-constitutional rights that can be in tension, the law should not rely on the goodwill of one to consult the other. The law should require consultations, to ensure that the right result is achieved.

Hon. Peter Kent: Thank you.

Thank you, Chair.

The Chair: Thank you, Commissioner Therrien, for coming again today.

We have some committee business that will take about five minutes. We're going to briefly suspend and go to committee business in two minutes.

[*Proceedings continue in camera*]