HOUSE OF COMMONS
CHAMBRE DES COMMUNES
CANADA

Standing Committee on Public Safety and National Security

SECU • NUMBER 045 • 1st SESSION • 42nd PARLIAMENT

EVIDENCE

Thursday, November 24, 2016

Chair

Mr. Robert Oliphant

Standing Committee on Public Safety and National Security

Thursday, November 24, 2016

● (1530)

[*English*]

The Chair (Mr. Robert Oliphant (Don Valley West, Lib.)): I'm very happy to call this meeting to order. This is the 45th meeting of the Standing Committee on Public Safety and National Security as we continue with hearing from witnesses with respect to Bill C-22, an act to establish a national security and intelligence committee of parliamentarians. Before we begin, I want to thank the analysts for their summary of evidence from our national security framework study apropos of Bill C-22. I have read it once and found it to be a very helpful organization of information. Did everybody get that? It's a good piece of work. Thank you, both of you, I assume.

I want to welcome Madam Legault, the Information Commissioner of Canada, and Madam Gendron, the legal counsel. Thank you for accepting our invitation to join us today. We will begin with an opening statement from you and then we will turn to committee members for questions.

Ms. Suzanne Legault (Information Commissioner of Canada, Office of the Information Commissioner of Canada): Thank you, Mr. Chair. Good afternoon, honourable members of this committee. It really is a pleasure for me to be here today. I'm very grateful to have been invited to speak to Bill C-22.

First, I wish to commend the government on tabling legislation to create a parliamentary oversight body for our national security agencies. The recommendation to create such an oversight committee dates back many years. The committee could, with a properly designed legal framework, do much to increase public trust in our national security agencies. However, I do have some concerns with the bill. These concerns are very much based on my own experience in an oversight role as the Information Commissioner of Canada. My comments today will be directed, first, to the review function of the proposed committee, and second, to the application of the Access to Information Act to the newly created secretariat that will support the committee.

[*Translation*]

With respect to the review function of the committee, I have concerns with the following six areas: first, the ministerial override of the committee's review function; second, the committee's ability to obtain information; third, the time frames to provide information to the committee; fourth, the private nature of the committee's meetings; fifth, the limitations placed on other review bodies when collaborating with the committee; and sixth, the final nature of decisions made by ministers.

The committee will have a broad mandate to review matters related to national security and intelligence. A broad mandate is important as it will allow the committee to direct its inquiries as it sees fit.

However, clause 8(b) of the bill undercuts this mandate by providing that the minister of a department may override a review where the minister determines it would be injurious to national security.

This override essentially turns the committee's broad mandate into a mirage. It will undermine any goodwill and public trust that may have built up towards the committee and, by extension, the national security agencies it oversees.

● (1535)

[*English*]

My next area of concern will Bill C-22 is the exclusions to the committee's right to obtain information. These are found at clauses 14 and 16 of the bill. Based on my seven years' experience as Information Commissioner, I can tell you that exclusions to oversight significantly undermine the review function. Under the Access to Information Act, but for a few exclusions, I have access to all records during my investigations so that I may independently review decisions on disclosure.

The notable exception to my review power is cabinet confidences. Cabinet confidences are excluded from the application of the Access to Information Act. This means that when I investigate a complaint about cabinet confidences, I cannot require that those records be provided to my office. I cannot independently assess whether they are, in fact, cabinet confidences and therefore not subject to the right of access. This severely curtails my ability to provide effective oversight of this exclusion. I still do investigate complaints about the application of cabinet confidences to the best of my abilities. In fact, in 2015-16, I was able to conclude, in 12% of complaints closed, that the cabinet confidences exclusion was not well applied, even without being able to see the records. I can tell you that consistently, year over year, that percentage varies between 10% and 20%, and that's without seeing the records, and it's only on cabinet confidences. Based on my experience, I am of the view that the committee will face difficulties in fulfilling its mandate if it cannot obtain relevant records.

[*Translation*]

In contrast to the committee, as the Information Commissioner of Canada, I have the authority to review records related to national security and intelligence. There is, in fact, a large discrepancy between the records that I can see and what the committee will be able to see. I have prepared a chart setting out those differences.

Based on my experience viewing those records, there is a tendency for institutions to interpret exemptions in an over-broad manner.

[*English*]

My final concern related to the exclusions at clauses 14 and 16 is that they include no explicit consideration of the public's interest in providing the committee with this information. A public interest component would require that the minister balance the public interest against the national security interest when deciding whether to disclose the information to the committee.

My third area of concern with the bill is found at subclause 15(3). This provision states that, after the appropriate minister receives a request for information, he or she must provide or cause the information to be provided to the committee "in a timely manner". Similar language to this is used in the Access to Information Act, which provides that extensions in responding to access requests may be taken for "a reasonable period of time".

I have found over the years, as have all my predecessors in the last 30 years, language like this to be vague and open to abuse. In the access world, delay is a frequent subject of complaint by requesters. Where timeliness is at issue without resolution, requesters and I can seek redress from the Federal Court. Under Bill C-22, there is no such dispute resolution mechanism should information not be provided to the committee in a timely manner.

● (1540)

[*Translation*]

My fourth concern with the bill relates to the private nature of the committee's meetings. Clause 18 provides that:

> Meetings of the Committee are to be held in private if any information that a department is taking measures to protect is likely to be disclosed during the course of the meeting or if the Chair considers it to be otherwise necessary.

This strikes me as an unclear threshold for the committee to go in camera and could easily result in nearly all of these meetings being private.

I next wish to discuss clause 22 of the bill.

This clause provides that the review bodies of the RCMP, CSIS and CSEC may provide information under their control to the committee related to the fulfilment of its mandate. In fact, these bodies are directed to co-operate with the committee at clause 9 of the bill.

However, this direction to co-operate and share information is weakened by clause 22(2) of the bill. This clause prevents the review bodies from sharing with the committee all the information listed in the mandatory exclusions at clause 14. It also prevents the review bodies from sharing information that a minister had decided to withhold from the committee, per clause 16. I have already voiced my concerns with clauses 14 and 16. It is my view that clause 22 compounds those issues and will prevent the review bodies from co-operating in a meaningful way with the committee.

[*English*]

The sixth area of concern I have with this bill is the final nature of decisions made by ministers. The bill prohibits the committee from seeking judicial review of a minister's decision. This can be found at clause 31 of the bill. I have concerns that giving the minister final decision-making authority could lead to overly broad interpretations of the law that favour non-disclosure to the committee.

I am concerned with how the Access to Information Act will apply to the secretariat of the committee. Bill C-22 proposes to extend coverage of the Access to Information Act to this new institution, which is designated with assisting the committee in fulfilling its mandate.

The purpose of the ATIA is to provide a right of access to all records under the control of institutions that are subject to the act, subject to limited and specific exceptions. Balancing the right of access against claims to protect certain information is clearly at the core of the access to information regime. Extending coverage of the act to the secretariat is a positive step and a positive aspect of Bill C-22 in ensuring transparency and accountability of this new institution.

However, given the way it is drafted, it is not clear to me how much information requesters will actually be able to obtain from this institution. Bill C-22, at clause 35, adds an exemption to the Access to Information Act that is, in my view, overly broad and could result in the secretariat having only the veneer of transparency. The bill proposes to exempt from the right of access any record that contains information created or obtained by the secretariat or on its behalf in the course of assisting the committee in fulfilling its mandate.

This is drafted as a mandatory exemption, which means that once the secretariat has determined that the exemption applies, it is under a legal obligation to refuse any kind of access.

[*Translation*]

My issue with the breadth of this exemption is three-fold.

First, the proposed exemption is mandatory. Discretionary exemptions are preferable because they allow for a balancing of factors, including the public interest in disclosure.

Second, it applies to any record that contains the protected information. When language like this is used in an exemption, it means that once it has been determined that a record contains protected information, the entire record is protected. This is the case even if only a small portion of the record actually contains information that legitimately requires protection. This essentially nullifies an institution's otherwise mandatory obligation to sever and disclose non-protected parts of a record.

Third, the exemption applies to any information obtained or created in the course of assisting the committee in fulfilling its mandate. This begs the question: what is considered to be assisting the committee on fulfilling its mandate? Does it encompass assistance of a more administrative, technological or financial nature?

One thing is certain: if we have to deal with a financial document that contains a mention of something that was said during a committee meeting and is protected, the actual text of the provisions means that the entire document must be protected. In my view, the exemption, as currently drafted, goes beyond protecting national security.

● (1545)

[*English*]

I have raised several concerns about Bill C-22, many of which have been raised by other participants in this committee review, that I believe will impede the committee in carrying out its mandate, but there are also relatively simple solutions to address these concerns.

First, there should be no ministerial override of the committee's review function.

Second, the committee should have robust access to records, with no limitations. This is necessary in order for the committee to properly fulfill its mandate.

I do not recommend giving the committee broad access to national security and intelligence information lightly. I am acutely aware of the security risks posed in sharing information like this. However, I would point out that, at my office, we are entitled to review records of any security classification, up to and including records that relate to signals intelligence. For all investigation files, security measures are put in place to meet the security classification of the records. In the 30-plus years my office has seen these records, we have never had a security breach. It is my belief that similar security measures could be put in place for the national security and intelligence committee and its secretariat.

It is also important to understand that giving access to information to the committee does not necessarily mean disclosure of the information to the public. In the event that limitations on the committee's access to information are deemed to be necessary, I recommend that a public interest override be added. This way ministers will be required to determine if non-disclosure to the committee is necessary and proportionate as compared to the public interest in having the committee review the information, bearing in mind the accountability function of the committee.

[*Translation*]

Third, there should be a precise number of days to provide information to the committee. In my experience, 30 days is generally sufficient time. Extensions should be available, but only with the permission of the committee.

Fourth, it should be clearly stated in the bill that the committee's meetings will be public by default. Meetings should only go in camera where a clear threshold is met, such as where disclosure of the information during a public meeting would be injurious to national security, and only for the length of time necessary.

The process would be similar to what we see in court, when they handle particularly sensitive cases. The open-court principle applies, and the court does not proceed in camera unless it is absolutely necessary.

Fifth, there should be no limitations placed on other review bodies when collaborating and sharing information with the committee.

Sixth, decisions made by ministers should be reviewable by the Federal Court. If, for example, there was a provision that made it possible to gauge public interest in the disclosure of the committee's information, those decisions could be reviewed by the Federal Court.

Hand in hand with this recommendation, I would also recommend that if it is determined that some exclusions to the committee's access to information are necessary, any disputes about the application of exclusions should be subject to judicial review. This will limit over-claiming of exclusions.

● (1550)

[*English*]

Finally, the exemption under the Access to Information Act for the secretariat should be discretionary and focused on protecting only the information that is subject to the review function of the committee.

I also recommend that the exemption protect only information and not any record. This is a nuance, but it is a significant nuance, in terms of having the ability to sever information that should be disclosed from the information that needs to be absolutely protected from disclosure. This will result in meaningful access to the secretariat.

Events such as the recent Federal Court decision regarding CSIS's retention of Canadians' metadata, the revelation that Quebec's provincial police have been spying on journalists, and the Snowden affair have eroded the public's trust in its security and intelligence agencies.

The work of the committee will be a key pillar in regaining that trust and increasing the accountability framework of our national security agencies. However, if we want the committee to be successful, it must function under an appropriate legal framework. At present, in my view, Bill C-22 does not strike the right balance between protecting the national security interest and maintaining transparency and accountability. In its current form, I do not believe the committee will be able to achieve its goals.

In closing, I would like to thank the committee for the opportunity to present my views on Bill C-22, and I'm pleased to answer any questions you may have.

The Chair: Thank you, Madam Legault.

To the committee members, I did give the commissioner a little bit of leeway in time because of the importance of her opinion and her report, which was thoroughly done.

May I ask just one question before we begin? Did the government avail itself of your office for advice on this bill, or did you provide it to the government?

Ms. Suzanne Legault: No.

The Chair: So this your chance.

We will begin questioning with Mr. Di Iorio.

[*Translation*]

Mr. Nicola Di Iorio (Saint-Léonard—Saint-Michel, Lib.): Good afternoon, Ms. Legault.

As I understand clause 35 of the bill, the committee, through its secretariat, will essentially have two types of information: information communicated to it and information that it will generate.

As for the information communicated to it, we agree that it will be subject, or not, to the legislation that you are responsible for enforcing.

Ms. Suzanne Legault: That's right.

Mr. Nicola Di Iorio: So there are rules about accessing that information from other entities.

Ms. Suzanne Legault: All the access rules would apply, but I think the way the clause is worded poses a problem. In fact, it makes it possible to refuse the disclosure of the file in full, which means that if a document contains a single reference to information that must be protected, the entire document would be protected.

In the current Access to Information Act, one very specific section gives institutions an obligation to separate information within a document, which is why when we make access to information requests, we receive partially redacted documents. I think clause 35 is worded in such a way that, depending on the nature of the secretariat's work, no information will be disclosed.

Mr. Nicola Di Iorio: The information sent to the secretariat for the committee's work is subject to the legislation you are responsible for enforcing. The issue is whether or not we have access to the information, according to the rules.

Do you agree?

Ms. Suzanne Legault: Yes, I agree.

Mr. Nicola Di Iorio: We are talking here about the work that the secretariat does internally and about access to that work.

What importance would you give to the fact that this is a committee of parliamentarians, so elected individuals who are accountable to the public?

Your work to enforce the legislation involves delegating work to people who are part of the government machinery. But in this case, we're talking about the parliamentarians themselves, so people who must face the public every four years and be held accountable.

● (1555)

Ms. Suzanne Legault: The way I understand it, it's a committee of parliamentarians but a statutory committee. The application of parliamentary privilege is specifically excluded from the membership of this committee. My understanding of the bill is that the committee will include senators and House of Commons members, but it will be a statutory committee. The secretariat will also become a statutory entity that will be subject to the access to information provisions.

I understand your concerns, but I have often recommended and still recommend that there be an exemption in the Access to Information Act to protect parliamentary privilege. It seems entirely appropriate to me, especially since I also recommend that ministers' offices be covered by the Access to Information Act.

In this case, it really is a statutory creature, and in that context we are excluding the application of parliamentary privilege to protect its members.

Clause 35 of the bill is so broad, in any event, that I don't see how any information received or created by the secretariat could be disclosed. The wording of this clause makes it really very broad. The disclosure of documents containing any information obtained or created by the committee must be refused. In law, this is a positive obligation. There is no discretion; this disclosure must be refused.

I asked myself the question seriously when I looked at the bill. Having the experience of over 10,000 files, I think that even a purely financial document that might talk about the number of committee meetings, for instance, would be covered under this provision, in my view. Given the current wording, I don't see how there could be any transparency on the part of the secretariat.

Mr. Nicola Di Iorio: This committee of parliamentarians is made up of members from different parties. Despite our best intentions, we can't control what the Conservative Party or the New Democratic Party does.

Don't you see this as a safety valve?

Ms. Suzanne Legault: In what way?

Mr. Nicola Di Iorio: Compared with a federal agency where people all work for the federal government, the members of the Conservative Party and of the New Democratic Party do not work for us. Even if we invite them to join our party, they do not listen to us. In this case, the nature of this committee is still unusual. It is an all-party committee.

Ms. Suzanne Legault: Yes.

Mr. Nicola Di Iorio: Some people are in possession of information sent to the committee, and those people are not just members of the government party. The situations you are referring to —

[*English*]

The Chair: I'm afraid we have come to the end of the time, Mr. Di Iorio.

We're moving to Mr. Miller who, I believe, is sharing his time with Ms. Watts.

Mr. Larry Miller (Bruce—Grey—Owen Sound, CPC): Thank you, Mr. Chairman, and I will be splitting my time with Ms. Watts.

To our guests, thank you very much for being here. Your testimony coming near the end of all the testimony is very appropriate. With your basic condemnation of this whole bill, I hardly know where to start, but there are a couple of issues I'd like you to expand on a bit.

You talked about clause 8 undercutting the authority of the committee, and you mentioned the public trust. You made the comment also, Ms. Legault, that it turns the committee mandate into a mirage. That can mean almost anything in a negative way, I think, if that's how you meant that.

What would be the worst-case scenario under that when you made that comment? What were you thinking of?

● (1600)

Ms. Suzanne Legault: What I was thinking of was that the committee would be under public scrutiny because there would be some issues in relation to actions and activities of our national security agencies. The committee would be unable to do its work because it would not have access to information.

It's a difficult situation for a statutory committee when on the one hand it has quite a large mandate in terms of its review and oversight function of security agencies, but on the other hand it can be refused such a wide gamut of information that I can hardly see, in any kind of situation, except for very innocuous work, that the committee would actually have access to the information it needs to do its assessment of what would be before it.

That's why it's a very serious matter when we create a statutory body to do a very important function, but we don't give it the appropriate tools to do its work. This is the concern I have with the bill.

It's a very good initiative. In order to do this work, you really do need to have access to the information.

My own experience is that national security is always over-claimed, and this is probably a function of security agencies being very cautious and very careful, and that's understandable. At the same time, if we're going to have an oversight function of these various security agencies, we really do have to have the proper tools to do that.

It's particularly important in the context where it is a statutory committee. It doesn't have all the powers and privileges that a regular parliamentary committee would have, particularly if we think back to former speaker Milliken's ruling a few years ago.

If it's going to be a statutory creature, then the legislative framework has to make sure that the committee is going to have the appropriate tools to function.

Mr. Larry Miller: We've heard this, or a general theme of that, many times throughout the testimonies. Something that's come up, which a number of us have brought up, is the fact that.... I'll use Great Britain as an example. It has this framework and the British did a review. I'm not sure when it started, but I believe they made some wholesale changes in 2013 on how their committee works. The government here says, “No, we're starting new.” Should we not be learning from the mistakes, or using the improvements that other jurisdictions have used around the world?

Ms. Suzanne Legault: I'm not an expert on how the British model functions. I'm really approaching this from the perspective of someone who reviews these files. That's really my contribution and my experience. I do think we need an oversight function of our security agencies, so I would really like to see the committee have the proper tools.

Mr. Larry Miller: Thank you.

With that, I'm going to turn it over to Ms. Watts.

Ms. Dianne L. Watts (South Surrey—White Rock, CPC): Thank you very much.

I would agree, too. In setting it up, we need to set it up right, and make sure the proper mechanisms are in place.

I would just carry on the thinking of my colleague. Within the context of what you do, if you were looking at information, and you breached information in any way, what's the repercussion for you?

Ms. Suzanne Legault: I would be fired for sure. I'm subject to—

Ms. Dianne L. Watts: You're governed by legislation, which is no different from what any one of us would be in terms of any breaches of information. I think that puts aside the element of partisanship and who the government is or isn't. In something like this, it has to be conducted in a fashion of trust and accountability, and governed by the necessary acts related to national security.

I do want to say that I found your report very helpful, because there is a thread that we've heard from many witnesses. Again, having someone who actually deals with the files that you deal with reconfirms what we've heard about the changes that should be undertaken if we want to have success. At the end of the day, all of us sitting around this table want to make sure we have success in terms of the oversight, in terms of the mandate and what we're supposed to undertake.

This was just a comment in terms of your giving us this information based on your expertise and looking at it and making sure we get it right. Thank you for that.

● (1605)

The Chair: Thank you.

Mr. Stetski, welcome to the committee.

Mr. Wayne Stetski (Kootenay—Columbia, NDP): Thank you.

I have to start by saying I found it quite a strange concept that a Liberal member of Parliament would protect information on national security better than a Conservative or an NDP member of Parliament would.

I want to turn back to the thing that started a lot of this for us, and that was Bill C-51.

Right across my riding of Kootenay—Columbia, which is located in southeastern British Columbia, in the Rocky Mountain area, there were protest rallies in many communities around Bill C-51, and a lot of it was focused on the need for oversight. Canadians truly want to have complete confidence that the committee can provide meaningful oversight over national security and intelligence, and I really appreciate the depth of the information that you've provided us today on how we can better get there.

I do have a question for you. There are many grounds on which a government may withhold necessary information from the oversight committee. Some are automatic and others are discretionary, but in all cases, the way the government chooses to interpret the exclusions is key.

Let's take one example, which is actually the least controversial of all, cabinet confidences. In February you said the following to the ethics committee when you met with them:

> Under the law right now, cabinet confidences are described very broadly.... For instance, any record that contains anything that's described in the whole definition of cabinet confidence can be excluded as a cabinet confidence. In our investigations at this time, we are not allowed to see the records. We see a schedule, a brief description of the records. Without seeing any records, in 14% of the cases of cabinet confidence investigations we find that it was improperly applied....

In other words, even the least controversial exemption, if interpreted too broadly, can lead to a significant amount of information being withheld inappropriately.

What advice can you give us about the general manner in which governments interpret these types of exemptions or tests, such as being injurious to national security? In your view, would it be preferable for the committee to simply have an all-access pass, as other existing review bodies do?

Ms. Suzanne Legault: Well, first, on the very specific, on the cabinet confidence, the way it is in Bill C-22, it actually refers to the Canada Evidence Act. This definition of cabinet confidence is not the same definition as we have in the Access to Information Act. The jurisprudence has actually interpreted that to include some weighing of public interest, which I think is actually good here in C-22, the way that it's referring to the Canada Evidence Act for cabinet confidences. That's better than what we have in the Access to Information Act.

As I said, I do believe that the committee needs to have access to the information to do its work. There are too many ways to preclude information from being shared with the committee for the committee to do its work. What I did recommend is if, at the end of the day, Parliament decides that it's appropriate to keep these caveats as they are here, at the very least, if there were a discretionary component in a public interest override and the possibility of having the ministerial decisions reviewed in Federal Court, it would actually provide some measure of oversight on the exercise of discretion to disclose or not disclose to the committee. At the very least that would provide a little bit of discipline in the overall scheme, which I think would improve it quite significantly.

Under the access act currently, the exemption for national security is actually a discretionary exemption. So what you have in Bill C-22 is actually more restrictive than what we have currently under our Access to Information Act. I think we should keep the same model. I mean, why not? It has worked. As I said, it has not resulted in breaches of national security information certainly in a review function of my office.

The committee is supposed to be specifically mandated to do this work. It's going to be subject to significant penalties if there are breaches of security. Parliamentary privilege does not apply to protect the members. The Security of Information Act will apply in terms of consequences. Those are very, very serious consequences. We are putting in place a scheme where the participants in this committee, the members of this committee, will have a very high threshold of responsibility with this information, so I think the flip side should be that we should provide the committee with the necessary information it requires.

If Parliament decides to keep all of these restrictions, then at the very least there should be discretionary public interest override and the possibility of judicial review. The parliamentary budget officer has the ability to get these decisions on disclosure reviewed by the Federal Court. My office has the ability to do that. It provides a good measure of discipline in the process when the decisions are made not to disclose because the participants know that it is subject to judicial review by a court. I think that would at least provide some discipline extra to Bill C-22 that might actually go some way. If the purpose is to see with experience how this unfolds, it will allow us to see how it unfolds, but it will provide the potential scrutiny of the Federal Court which, by the way, has a lot of expertise in reviewing matters of national security in the first place.

● (1610)

Mr. Wayne Stetski: Without putting you on the spot too much, I really do think it's important that the committee have the complete confidence of Canadians, that they will provide meaningful oversight over national security and intelligence. How comfortable are you that without the recommendations you put forward Canadians will have that sense of confidence?

Ms. Suzanne Legault: I think what can possibly happen is it's very difficult when you have a statutory creature that's given a very broad mandate but not the tools to do that mandate, it's over time that the public trust erodes because the committee will be hamstrung in doing its work. It's over time that public trust will diminish. That's what I think is a likely possibility.

Mr. Wayne Stetski: Thank you.

The Chair: Thank you, Mr. Stetski.

Ms. Damoff.

Ms. Pam Damoff (Oakville North—Burlington, Lib.): Thank you for the information that you provided to us. This chart is very helpful.

Ms. Watts was asking what the repercussions would be if something were provided to the public, and you said, “I'd be fired.” But in fact, it could be catastrophic.

I know that, on the first point in the chart, you're okay, but we'll just go to the second point, on information respecting ongoing defence intelligence activities supporting military operations. That looks different from the type of information that you're given. Certainly, if that type of information were ever to be made public in any way, it would be catastrophic. Is that the kind of information you're given, ongoing information? How often does that come up?

Ms. Suzanne Legault: Currently on our inventory, we have 400-and-some files dealing with national security. We see everything that we need to see. Whenever there are requests for information, we see the full gamut of the information. However—and this is an interesting option for the committee being formed under Bill C-22—when we're dealing with highly sensitive information, we go on site to view and review the information. We don't actually take it out physically from where it is. The information doesn't leave it's location, if it is at CSIS or CSEC or wherever. As I said before, the fact that the committee would be provided with the information does not mean that the information would become public. I think it's very important to understand the distinction. For a review committee or a review body to have access to information to properly assess what it is assessing at the time—and, as I said, the mandate is very broad—it really does need to see the relevant information. Seeing the relevant information does not mean disclosing the information.

● (1615)

Ms. Pam Damoff: No, and I wasn't.... It's certainly much more than that, right?

Ms. Suzanne Legault: Yes.

Ms. Pam Damoff: We had testimony last week that getting information on ongoing operations could be difficult for the body, whatever it might be. The witness felt that it wouldn't be necessary to get it immediately because it could interfere with what they were doing.

Do you get information real time to divert attention away from what the...?

Ms. Suzanne Legault: We do. If it is the subject of a request and the subject of a complaint, we have the ability to review all the records, regardless of whether it's ongoing, not ongoing, human sources. We see all the information.

Ms. Pam Damoff: Okay.

I have one last question and then I'm going to share my time with Mr. Mendicino.

Clause 21 lays out how the committee is going to report to the public. If it was not given information, do you think it would be helpful if it reported the number of times it wasn't given information?

Ms. Suzanne Legault: It is helpful. That's the kind of thing that would go to the issue of public trust, and it then becomes an issue of public trust for the government, as well. It will actually touch both politically and on the work of the committee. Ultimately, it is a decision for Parliament, but I think those are the concerns.

Ms. Pam Damoff: Thank you.

The Chair: I'm just letting you know that you will get five more minutes on this side after Mr. Miller. You can share if you want, because sharing is good, but somewhere on this side you'll get another five minutes.

Mr. Mendicino.

Mr. Marco Mendicino (Eglinton—Lawrence, Lib.): Thank you, Mr. Chair.

Thank you, Ms. Legault, for your very thoughtful evidence.

I, too, have found the chart that you put before this committee to be helpful. I've also taken a look at your mandate as the Information Commissioner. Looking at section 4 of your enabling statute, as well as some other related provisions under section 30, your mandate is also very broad. You have a complaints and inquiries function. Am I right in saying that?

Ms. Suzanne Legault: It's a review. We basically investigate the government's decisions on disclosure.

Mr. Marco Mendicino: That also involves complaints.

Ms. Suzanne Legault: It does.

Mr. Marco Mendicino: Essentially, as long as you're a Canadian citizen or a permanent resident, you can request, or have a right on request to be given access to any record under the control of any government institution.

Ms. Suzanne Legault: Subject to exemptions.

Mr. Marco Mendicino: Subject to the exemptions that are enumerated later in the act.

There is no complaints or inquiries function currently listed within the mandate of Bill C-22. Am I right about that, as well?

Ms. Suzanne Legault: That members of the public could complain to the committee—

Mr. Marco Mendicino: Right.

Ms. Suzanne Legault: —under Bill C-22? Not that I can see.

Mr. Marco Mendicino: Okay.

When looking at paragraph 8(b), it says that the mandate of the committee is to review:

> (b) any activity carried out by a department that relates to national security or intelligence, unless the appropriate Minister determines that the review would be injurious to national security;

There are two parts. One is that, obviously, there's some ministerial discretion involved there. The other is that the activity has to relate to national security or intelligence. It does not say that it would have to relate to national defence. Am I right?

Ms. Suzanne Legault: That would probably be included in there.

Mr. Marco Mendicino: Okay, but it is not in the language that we have before us in Bill C-22.

Ms. Suzanne Legault: It depends what you mean by “national defence”.

Mr. Marco Mendicino: As it is defined under the National Defence Act.... That phrase is not used under paragraph 8(b), nor is “international affairs”.

I guess what I—

The Chair: I'm afraid I need to end it there.

Mr. Marco Mendicino: I would just like to be able to ask one more question.

If what we are talking about is just the mandate under 8(b), there is, it seems to me, some definition of what the domain of that information is. That's national security or intelligence. Is that fair?

● (1620)

Ms. Suzanne Legault: That's what I am reading there, yes.

The Chair: Thank you.

Mr. Miller, it's a five-minute round.

Mr. Larry Miller: Thank you, again. There are two things here, Ms. Legault.

You made the statement earlier, and these are your exact words, that, first, “there should be no ministerial override of the committee's review function”—nada, zero.

Obviously, that isn't the intention of the government here, as you correctly point out. Should that include the Prime Minister?

Ms. Suzanne Legault: I think so.

Mr. Larry Miller: Again, under the worst-case scenario, what would be your biggest concern as Information Commissioner, if that isn't changed?

Ms. Suzanne Legault: It just seems to me that there could be a political decision to refuse to disclose information to the security committee. If that is the wish of Parliament, then that's what will happen. In my view, that is going to undermine the work of the committee. That's my own personal view. That's why I am here testifying. Obviously, the legislators are going to decide what they want.

At the very least, if there is a decision such as this.... The difficulty is making a determination that something is injurious to national security. The experience that I have is that this is over-claimed. That's the worry. If that remains, then there should be some assessment of whether or not it is in the public interest—notwithstanding that disclosing information could be injurious to national security—to have the committee, in its oversight function of security agencies, get information in order to do its work, and that decision should be reviewable in Federal Court.

Then it becomes a question of whether the decision of the minister involved was reasonable under the circumstances. That seems like an appropriate discipline to put into a scheme like this. As I said, the Federal Court does have a lot of experience in terms of security matters. It would be a fairly simple way to amend this bill in order to provide a little more discipline and oversight in the decisions to not disclose information by the various actors here.

Mr. Larry Miller: Your worry here is about a political decision versus—not to put words in your mouth—a practical decision. Just so we get an understanding of what could happen, can you think of a situation, going back as many years as you want, where a bad political decision that was made may have jeopardized something?

Ms. Suzanne Legault: I think the example that we have—and I am sure most of us will remember—was when the parliamentary committee wanted to review the situation of Afghan detainees. That led to Speaker Milliken's ruling. I think that was a very difficult time. This was an ongoing national security and national defence issue, a military issue. At the same time, grave concerns were expressed by many involved, in terms of what was happening with the treatment of Afghan detainees. There was significant resistance to providing information, based on cabinet confidences, national security issues, and so on.

The question becomes, was it something that was appropriate for parliamentarians to be able to scrutinize at the time? Eventually, a means was found in order to properly do this work.

That's a very recent example of something that I think would have seen the weighing of the national security interests and the public interest at play.

Mr. Larry Miller: I have one last issue. You talked earlier about the concern you had with in camera meetings. This has come up in testimony at previous committee meetings.

Going back to my days on municipal council, and I know Ms. Damoff and some.... Very few meetings ever start in camera. You have a council meeting, but from time to time, whether it's personnel or whatever, the committee moves to go in camera and then comes back out after the issue has been dealt with. Is that not a way in camera meetings and your concerns with them could be addressed? Would you agree with that?

● (1625)

Ms. Suzanne Legault: I think that's a very easy fix in the legislation.

To say meetings are to be held in private.... The bill should probably have the open court principle and open by default in mind and say that meetings should be held in public except in those.... I think it's more of a perception as well for the functioning of the committee and the transparency around the committee.

I think that's quite an easy fix. It's a question of giving the public the perception that whatever can be conducted in public will be. I think it's just a reversal of language here.

The Chair: Thank you, Madam Legault.

The last questioner is Mr. Erskine-Smith, for five minutes.

Mr. Nathaniel Erskine-Smith (Beaches—East York, Lib.): It's nice to see you again today.

I want to start with national defence.

My understanding, sitting on the privacy committee, and you've attended before us, is that when someone makes an access to information request related to national defence, they're entitled to it, but there's a discretionary exemption for national defence. Then you would review that information to make sure it is an appropriate refusal in accordance with a national defence matter. In reviewing that discretionary exemption, you would be entitled to review all this information. Is that correct?

Ms. Suzanne Legault: Yes.

Mr. Nathaniel Erskine-Smith: You have significantly more access to information specifically on national defence, but also on almost every other item in clause 14, than the committee would.

Ms. Suzanne Legault: Yes. We haven't detailed what that section 15 entails, but it's a very broad definition. It has multiple subsections dealing with military tactics and strategy, quantity, characteristics, capabilities, deployment of weapons. A very long list of things are included in that provision.

Mr. Nathaniel Erskine-Smith: Is it fair to say that it's odd that your office would have access to all this information but a security-cleared committee of parliamentarians would not?

Ms. Suzanne Legault: That's somewhat the point I'm trying to make. The experience we've had in reviewing these records is that there are significant over-claims.

Mr. Nathaniel Erskine-Smith: Absolutely.

You're suggesting we delete the ministerial veto power in paragraph 8(b). CSIS director Michel Coulombe testified in front of us. His example and a justification for a refusal might be that it would prejudice ongoing operations by pulling people out of the field. That makes a certain degree of sense. Would you be more comfortable with paragraph 8(b) if it were limited to a circumstance such as that?

Ms. Suzanne Legault: The more specific it can be, the better it's going to be. I think it would be important to recognize that the committee is also there to serve the public interest in the oversight of security agencies—and that's what I'm not seeing in the bill—and to have the possibility of the review of those decisions.

Mr. Nathaniel Erskine-Smith: When we get to clause 14, your advice, I take it, would be to delete paragraphs 14(b) to 14(g), keep cabinet confidence, and also to delete all of clause 16. Is that correct?

Ms. Suzanne Legault: Yes.

If you want to be more surgical, I have less of a concern when we're dealing with human sources, if that remains there in protecting this type of information.

The two I have the most concerns with are paragraph 14(b), because that's very broad, and also paragraph 14(e), dealing with ongoing investigations, everything that can be excluded under the Security of Information Act, because that's—

Mr. Nathaniel Erskine-Smith: Yes, though interestingly, we had Mr. Fadden before us last week, and he said you wouldn't need sources nine times out of 10, which raises the question that maybe you do need them some of the time.

Ms. Suzanne Legault: I agree.

Mr. Nathaniel Erskine-Smith: We had the government representatives before us talking about a first step and improving this over time. I've been trying to find some middle path myself. If we don't delete all of clause 14, other than paragraph 14(a), and we don't delete all of clause 16, what does that middle ground look like?

I actually took your previous testimony at the privacy committee at heart about the importance of discretionary exemptions. If we were to move paragraphs 14(b) to 14(g), currently automatic exemptions, into clause 16, which would make them discretionary, and also require the additional criterion of “injurious to national security”—and I recognize you have issues with that as well, and you want judicial review—would that strike a better balance, in your view?

● (1630)

Ms. Suzanne Legault: It would strike a better balance, but we're still dealing with the Security of Information Act, which I think now captures everything that's in clauses 14 and 16.

Mr. Nathaniel Erskine-Smith: It captures everything, and in my view it would be better than clause 14. Clause 14 is an automatic exemption. Clause 14 doesn't require reasons, and clause 14 doesn't require the additional criterion of “injurious to national security”. So it would be not perfect, in your view, but it would be better.

Ms. Suzanne Legault: It would be better, and it would be better if there were a public interest recognition of the work of the committee and judicial review.

Mr. Nathaniel Erskine-Smith: Judicial review would be a critical element of that as well.

Ms. Suzanne Legault: I think so, because it would provide case law over time. It would provide some direction. It would actually act as a discipline measure in how the refusal is done.

Mr. Nathaniel Erskine-Smith: And confidence in the interpretation of "injurious to national security".

Ms. Suzanne Legault: Exactly.

Mr. Nathaniel Erskine-Smith: Thanks very much.

The Chair: Thank you very much, Commissioner. In terms of public interest recognition in the different senses of that word, thank you for your public service both in Canada and around the world, and for what you do in taking Canadian understandings of openness of information around the world. It's very much appreciated by our committee.

Thank you both.

We're going to take a brief pause and we're going to move into an in camera business meeting.

[*Proceedings continue in camera*]

Published under the authority of the Speaker of the House of Commons

SPEAKER'S PERMISSION

Reproduction of the proceedings of the House of Commons and its Committees, in whole or in part and in any medium, is hereby permitted provided that the reproduction is accurate and is not presented as official. This permission does not extend to reproduction, distribution or use for commercial purpose of financial gain. Reproduction or use outside this permission or without authorization may be treated as copyright infringement in accordance with the *Copyright Act*. Authorization may be obtained on written application to the Office of the Speaker of the House of Commons.

Reproduction in accordance with this permission does not constitute publication under the authority of the House of Commons. The absolute privilege that applies to the proceedings of the House of Commons does not extend to these permitted reproductions. Where a reproduction includes briefs to a Committee of the House of Commons, authorization for reproduction may be required from the authors in accordance with the *Copyright Act*.

Nothing in this permission abrogates or derogates from the privileges, powers, immunities and rights of the House of Commons and its Committees. For greater certainty, this permission does not affect the prohibition against impeaching or questioning the proceedings of the House of Commons in courts or otherwise. The House of Commons retains the right and privilege to find users in contempt of Parliament if a reproduction or use is not in accordance with this permission.

Also available on the Parliament of Canada Web Site at the following address: http://www.parl.gc.ca

Publié en conformité de l'autorité du Président de la Chambre des communes

PERMISSION DU PRÉSIDENT

Il est permis de reproduire les délibérations de la Chambre et de ses comités, en tout ou en partie, sur n'importe quel support, pourvu que la reproduction soit exacte et qu'elle ne soit pas présentée comme version officielle. Il n'est toutefois pas permis de reproduire, de distribuer ou d'utiliser les délibérations à des fins commerciales visant la réalisation d'un profit financier. Toute reproduction ou utilisation non permise ou non formellement autorisée peut être considérée comme une violation du droit d'auteur aux termes de la *Loi sur le droit d'auteur*. Une autorisation formelle peut être obtenue sur présentation d'une demande écrite au Bureau du Président de la Chambre.

La reproduction conforme à la présente permission ne constitue pas une publication sous l'autorité de la Chambre. Le privilège absolu qui s'applique aux délibérations de la Chambre ne s'étend pas aux reproductions permises. Lorsqu'une reproduction comprend des mémoires présentés à un comité de la Chambre, il peut être nécessaire d'obtenir de leurs auteurs l'autorisation de les reproduire, conformément à la *Loi sur le droit d'auteur*.

La présente permission ne porte pas atteinte aux privilèges, pouvoirs, immunités et droits de la Chambre et de ses comités. Il est entendu que cette permission ne touche pas l'interdiction de contester ou de mettre en cause les délibérations de la Chambre devant les tribunaux ou autrement. La Chambre conserve le droit et le privilège de déclarer l'utilisateur coupable d'outrage au Parlement lorsque la reproduction ou l'utilisation n'est pas conforme à la présente permission.

Aussi disponible sur le site Web du Parlement du Canada à l'adresse suivante : http://www.parl.gc.ca