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CANADA

# **Standing Committee on Access to Information, Privacy and Ethics**

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**EVIDENCE**

**Wednesday, May 22, 2013**

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**Chair**

**Mr. Pierre-Luc Dusseault**



## Standing Committee on Access to Information, Privacy and Ethics

Wednesday, May 22, 2013

• (1600)

[Translation]

**The Chair (Mr. Pierre-Luc Dusseault (Sherbrooke, NDP)):** Welcome, everyone. Welcome to our 80<sup>th</sup> meeting.

Pursuant to the Order of Reference of Wednesday, March 27, and the motion adopted by the committee on Monday, April 22, we are undertaking our study of Bill C-461, An Act to amend the Access to Information Act and the Privacy Act (disclosure of information).

We are already a bit late, and there will be a further delay later.

We have a witness here with us. This is Mr. Rathgeber, the sponsor of the bill.

Thank you for being here.

The commissioner will not be here, because of the lack of time. However we will have the opportunity of hearing our witness today, if the committee agrees.

You have a point of order, Mr. Angus?

[English]

**Mr. Charlie Angus (Timmins—James Bay, NDP):** Yes, I want to find out what our timeline is for this because I don't want to have it cut short. Do we have a full hour?

[Translation]

**The Chair:** We now have about 20 to 25 minutes until the bells start to ring. Then there will be an interruption of approximately one hour. When we return, there will be about 15 minutes left until 5:30 p.m. There is always the possibility, if the committee gives unanimous consent, to continue the meeting beyond the normal adjournment time. Otherwise, we have about 40 minutes.

[English]

**Mr. Charlie Angus:** It's my understanding that you need unanimous consent to have a shortened session like this. I don't want to shortchange a member who has a private member's bill. I think this is important. We agreed that we were going to move this up because it is important. I don't want to have a short-changed session. I think Mr. Rathgeber is entitled to the full hour without interruption. I would prefer to have him come back next meeting. I'm just not comfortable doing this in a parcelled-out fashion. Given the importance of a private member's bill and how few times members on the backbench get a chance to have their say, I think they deserve their full say.

[Translation]

**The Chair:** I don't know if...

Mr. Warkentin, you wanted to add something?

[English]

**Mr. Chris Warkentin (Peace River, CPC):** I wonder if we couldn't get a commitment to extend into bells and use the majority of this hour. I think if we got moving immediately, we'd be able to do that. That would be my preference.

[Translation]

**The Chair:** You are proposing that we continue the meeting. So we do not have consent to adjourn the meeting now and postpone it.

What we can do is give our witness the opportunity to testify during the time we have at our disposal today. We can always invite him to come back later to make up the time, if it is the wish of the committee to grant him a full hour. That remains a possibility.

Yes, Mr. Angus?

[English]

**Mr. Charlie Angus:** No. Again, I don't want to shortchange a member, but if the bells are ringing, this is the room where it's televised. I don't think it's fair to whomever has got around to questioning to their questions being heard with bells. I want this to be done right, done in a full hour, and I don't want it parcelled out.

[Translation]

**The Chair:** Since we do not have unanimous consent to adjourn the meeting now, we are going to hold the meeting as planned, and interrupt it later for the votes in the House.

[English]

**Mr. Charlie Angus:** I thought you needed unanimous consent to go with a short meeting.

[Translation]

**The Chair:** No, not at all. That is my decision. You asked for consent to adjourn the meeting now, but consent was not given. That was the vote. The committee did not give its unanimous consent to stop the meeting now and postpone it. My understanding was that we were going to continue as planned, during the time we have today, before and after the votes in the House.

So, to get back to what I was saying earlier, the commissioner has agreed to appear on May 29. We do have Mr. Rathgeber with us, the sponsor of the bill. I also want to introduce Mr. Méla, our legislative clerk. He will be able to help us with the process, if we want to look at certain aspects of the bill more in depth or ask him questions. I thank him.

Without further do, I am going to yield the floor to Mr. Rathgeber, who will have 10 minutes to make his presentation. Afterwards, the members will have the opportunity to ask questions, as usual.

Mr. Rathgeber, you have the floor.

[English]

**Mr. Brent Rathgeber (Edmonton—St. Albert, CPC):** Thank you, Mr. Chairman.

I'd like to assure the members that if they don't have sufficient time to question me on this important piece of legislation, I'd be happy to return at any time.

Mr. Chairman, honourable members of the committee, it is an honour for me to appear before your committee this afternoon to speak to private member's Bill C-461. I have provided committee members with a backgrounder describing the contents and the need for Bill C-461, the CBC and public service disclosure and transparency act.

Members, the bill has two purposes. The first is to correct a deficiency within the current section 68.1 of the Access to Information Act, which provides an exclusion for information under the control of the CBC relating to journalistic, creative, and programming activities. However, this exclusion is then subject to an exception for matters of general administration.

This confusion of an exclusion thereafter limited by an exception led to litigation between the Information Commissioner and the Canadian Broadcasting Corporation, with both the Federal Court and the Federal Court of Appeal siding with the Information Commissioner, reaffirming her right to review decisions regarding access. The courts indicated that the drafting of section 68.1 was "not a model of clarity", and moreover was a "recipe for controversy".

I agree with this assessment, and so does this committee. In March of 2012, this committee tabled a report after a study of section 68.1 of the access act, and accepted the Information Commissioner's recommendation that section 68.1 of the access act be repealed and that the exclusion be replaced with a discretionary exemption.

Private Member's Bill C-461 reflects the recommendation of this committee by providing a discretionary exemption on an injury- or prejudice-based test. Accordingly, any Canadian Broadcasting Corporation document that, if released, could reasonably be expected to prejudice the corporation's journalistic, creative, or programming independence ought to be exempt from disclosure.

At second reading on this bill, members of the official opposition claimed that this legislation was somehow an attack on CBC.

Members, I assure you, it is not. In fact, this legislation is not about the CBC so much as it is about transparency and accountability.

The discretionary exemption based on an injury test approach expressly acknowledges that a public broadcaster must enjoy a degree of independence from government. But the Information Commissioner is not part of government; she is an officer of Parliament. I fail to see how allowing her to review decisions of the CBC regarding access to information requests constitutes an attack on the broadcaster. Similar to our collective roles as members of Parliament, the Information Commissioner plays an important role in holding government to account.

The second purpose of the CBC and public service disclosure and transparency act makes a substantive alteration to the Privacy Act. In removing the words "range of" before the word "salary" in the definition of exempt "personal information" in the Privacy Act, this legislation, if adopted, will allow for specific salary disclosure for the highest wage earners in the federal public service.

Currently only ranges of salaries are subject to disclosure, which is, I submit, adequate for low- and middle-income levels, but at the highest levels of income, the increments become so large as to become virtually meaningless.

For example, I have been advised that the current CEO of the Canadian Broadcasting Corporation earns in the range of \$363,800 to \$428,000. That range is \$64,200, larger than the average taxpayer's salary, and therefore, in my view, does not constitute meaningful disclosure.

Accordingly, if Bill C-461 is adopted and not amended, the specific salaries and responsibilities of upper management—defined in this bill as the lowest level of deputy minister, DM-1, and higher—will be subject to access to information requests, specifically salary disclosure.

This is important: this change would apply to the entire federal public service, all government institutions that are subject to the Access to Information Act. CBC is in no way being singled out.

The bill also expressly provides for disclosure of reimbursed expenses for all employees in a government institution.

Mr. Chairman, the government has signalled its intent to amend Bill C-461. With your consent, I would like to address both proposed amendments, although I appreciate that they have not yet been tabled.

The first is with respect to journalistic source protection. Some have argued that journalistic source protection is so sacrosanct that an absolute exclusion must be maintained.

I absolutely agree that it is important that a public broadcaster, any broadcaster, be able to assure its confidential journalistic sources that their identity will not be disclosed. But I dispute that an absolute exclusion is either appropriate or practicable.

Firstly, the Information Commissioner has unlimited power under section 36 of the Access to Information Act to compel production of such documents and things as she deems requisite to the full investigation and consideration of the complaint. Moreover, under subsection 36(2) of the access act, it provides that no document can be withheld from the Information Commissioner for any reason.

•(1605)

Accordingly, I am skeptical that an exclusion can be drafted that could coexist with the Information Commissioner's seemingly unfettered powers to compel document production. Members will recall that the current attempted exclusion in section 68.1 was the basis for protracted litigation between the Information Commissioner and the CBC.

Moreover, as the Information Commissioner herself testified when she appeared in front of this committee on March 8 regarding the estimates, journalistic source privilege is not absolute. The Supreme Court of Canada said so recently in its 2010 decision of *R. v. National Post*. The court held that journalistic source privilege is not a class privilege; it is fact-specific and therefore must be examined on a case-by-case basis to determine if and when it applies.

Who is to determine if Professor Wigmore's four-pronged test, which has been supported by the Supreme Court, is satisfied if the CBC is to be granted an absolute exclusion? The obvious answer is nobody. Is CBC to be made both judge and party to access to information requests? Certainly not.

As the Information Commissioner testified here two weeks ago, decisions of information officers must be reviewed, and as the Federal Court said in the *Canadian Broadcasting Corporation v. Canada* (Information Commissioner), "Disclosing records to the Commissioner does not amount to revealing them." This is an important point. Members should not be misled into believing that having the Information Commissioner review documents will somehow lead to their disclosure. The Information Commissioner will recommend against disclosure when CBC has been able to demonstrate injury or prejudice.

The second matter that the Parliamentary Secretary to the Minister of Justice signalled the government wanted to amend was the benchmark at which federal public service salaries would become subject to disclosure. The parliamentary secretary indicated in the House that the government believes that the highest level of DM-4 would be a more appropriate benchmark than the lowest level of DM-1. In real dollar terms, amazingly this would move the disclosure benchmark from \$188,600 to \$319,900.

However, this is not the entire story. As senior public servants are entitled to maximum performance awards, otherwise known as bonuses, it is conceivable that at the DM-4 level, the said mandarin could earn a maximum performance award of up to a further 39%—although it would be discretionary. According to my math, if a DM-4 earns \$319,900, plus a maximum bonus of 39%, which is \$124,761, his entire compensation would be \$444,661. However, if the government is successful in amending this piece of legislation, taxpayers will only be mindful that the DM-4 earns in the range of \$272,000 to \$319,900.

Members of this committee should ask themselves, does this constitute meaningful disclosure? In my view, it does not, and I strongly recommend that members resist the government's attempt to gut this bill.

Mr. Chairman, in conclusion, Canada has had access to information legislation in force since 1983. Canada was once a leader in providing access to government information and

documents, but sadly, we are becoming laggards. Internationally, we are currently ranked 55th out of 93 countries in terms of our access laws. Moreover, the Centre for Law and Democracy, a think tank, says that Canada is falling behind all of the provinces and ranking behind most of them in terms of openness. Ontario, British Columbia, Saskatchewan, Manitoba, and Nova Scotia all have salary disclosure legislation that is more transparent than this proposed bill, even if you pass it unamended.

Mr. Chairman, in March 2004 a former government announced new policies that mandated publication of all contracts with the federal government over \$10,000. I find it irreconcilable that proprietors and companies who contract with the Government of Canada for as little as \$10,000 will have their names and contracts published on a public website, but that a senior federal executive or public servant earning over \$440,000 is protected by Canada's privacy laws.

Members, again, I invite you to resist the government's attempt to remove both the heart and the teeth of this private member's bill.

Transparency and disclosure allow taxpayers to compare the performance of an organization to the compensation given to the senior people running it. It allows taxpayers to know how their tax dollars are being spent. By allowing disclosure, the public will serve as a critical check on government expenditures and an effective deterrent to any government department or official tempted to treat taxpayers disrespectfully. Transparency, admittedly, is seldom in the interest of the government; however, it is always in the interest of the taxpayers whom we, as members of Parliament, represent.

•(1610)

Bill C-461, the CBC and public service disclosure and transparency act, promotes open and transparent government and holding government to account. It is also a small step, albeit a very small step, in improving the federal government's growing reputation for opacity.

Exclusions for government information prevent Canadians from holding their government to account, which is fundamental to democracy. Knowledge is power, and holding government to account demands that knowledge and information be available to Canadians. Holding to account leads to the establishment of trust—trust that there is proper stewardship over public resources. Opacity, however, leads to mistrust, or at the very least suspicion that there is not proper stewardship of public resources. Accordingly, any attempt to weaken this bill and its attempt to increase access to information and transparency will lead to mistrust and suspicion.

As U.S. Supreme Court Judge Louis Brandeis famously said that sunlight is the best disinfectant.

Mr. Chairman, Canadians deserve to have the light shone on government and government information, and I encourage all honourable members of this committee to pass Bill C-461.

Thank you, Mr. Chairman. I look forward to members' questions.

[*Translation*]

**The Chair:** Thank you for your presentation, Mr. Rathgeber.

I yield the floor to Mr. Nantel.

You have seven minutes for your questions.

**Mr. Pierre Nantel (Longueuil—Pierre-Boucher, NDP):** Thank you, Mr. Chair.

First of all, Mr. Rathgeber, I would like to say that I am in full agreement with my colleague: it is important that you be able to express yourself on this bill, which is clearly very important to you.

You know my opinion. I would like to know precisely what yours is with regard to CBC/Radio-Canada.

First, what do you think about a public network like PBS in the United States? Is PBS's funding method something that you could contemplate for CBC/Radio-Canada?

[English]

**Mr. Brent Rathgeber:** Thank you, Mr. Chairman.

I'm not sure what that has to do with this bill, but I will answer the questions.

As the member undoubtedly knows, I have mused in my blog and elsewhere on what the role of the public broadcaster in 2011, 2012, 2013 might be. As the member undoubtedly knows, technology has changed. The public broadcaster is now 75 years old and was born in a time when people living in remote communities did not have access to any broadcasting.

To answer your question, I support the public broadcaster. Would I like to see the public broadcaster become more accountable and transparent? Yes. Would I like to see the public broadcaster operate more self-sufficiently and with less dependence on government subsidy? Absolutely. Those are questions that we can debate philosophically, but this bill doesn't address any of that. This bill repairs a defect in section 68.1 of the access act that two courts have said needs to be repaired.

• (1615)

[Translation]

**Mr. Pierre Nantel:** Since you want us to get back to the nature of the bill specifically, I would like you to define the word "independence" as it is found in your bill. How do you define independence? That is what concerns us currently, over here.

[English]

**Mr. Brent Rathgeber:** The Broadcasting Act, as you know, indicates that the Canadian Broadcasting Corporation ought to operate independently of government. I support that.

The current section 68.1 of the Access to Information Act talks about exempting or excluding documents in the power and control of CBC that deal with activities. As you no doubt know, I have deliberately changed the word "activities" to "independence", based firstly on the Information Commissioner's testimony to this very committee when it studied section 68.1.

However, I also believe that the access act will now mirror the Broadcasting Act, in that it is CBC's independence from government which must be maintained. The public broadcaster ought to be able to operate independently of government, certainly in terms of its journalistic integrity and its programming sources. It should not be

directed by the Minister of Heritage or any other government official on what it can and can't produce. I do believe that it ought to be governed and ought to operate independently from government, and this bill protects that. Any application for any access request that compromises that independence, as you know, would be exempted from disclosure pursuant to the injury-based exemption.

[Translation]

**Mr. Pierre Nantel:** Mr. Rathgeber, do you think that your bill will be of benefit first and foremost to Canadians, or, as it happens, to certain companies that make a lot of access to information requests?

[English]

**Mr. Brent Rathgeber:** I think it will benefit taxpayers. CBC has its detractors, to be sure, but part of that is from the suspicion that individuals have been frustrated when they've attempted to get information concerning how the CBC operates.

As I said in my opening comments, I believe that transparency is not the enemy of a government institution; I believe that opaqueness is. I believe that by opening up your books, figuratively, which in this context means allowing access to information requests to be processed when appropriate, restores public confidence in the institution. It restores confidence that the public institution is a good steward of taxpayers' resources. My belief is that opaqueness does quite the opposite.

[Translation]

**Mr. Pierre Nantel:** Do you feel that the other private broadcasters who also benefit from subsidies through various programs should adhere to the same principles of transparency?

[English]

**Mr. Brent Rathgeber:** This bill certainly doesn't provide for that mechanism with respect to private broadcasters. I understand that the fear is that private broadcasters will use this amended legislation to get access to confidential documents, whether they be projects that are under development or business models, but that's why we have the prejudice test. If the CBC can demonstrate that it will be prejudiced, that it will be injured by disclosure of those documents, then the documents ought not to be released to the public or to whoever is requesting them, pursuant to the discretionary exemption. But they have to demonstrate that there will be injury, because the access act says that the onus should be on disclosure and that exception should be limited and specific.

[Translation]

**Mr. Pierre Nantel:** But, Mr. Rathgeber...

[English]

**Mr. Brent Rathgeber:** This bill promotes openness, but if you can demonstrate there's a reason not to disclose, then a discretionary exemption applies.

[Translation]

**Mr. Pierre Nantel:** But, Mr. Rathgeber, if you make the CBC bear the burden of proof, it is as though it were presumed guilty. It is the same type of technicality, whether you are presumed guilty or presumed innocent.

I would like to ask you a very simple question. You yourself have made the following statement on several occasions: "I don't know why we would need a public broadcaster". Does that mean that you support the position of the National Citizens Coalition?

• (1620)

[English]

**Mr. Brent Rathgeber:** I certainly didn't state that we don't need a public broadcaster. I said that I encourage a debate and discussion as to whether or not we need a public broadcaster. The member should listen to my testimony.

To answer this specific question, the purpose of the Access to Information Act is enumerated in section 2:

...that government information should be available to the public, that necessary exceptions to the right of access should be limited and specific and that decisions on the disclosure of government information should be reviewed independently of government.

So, yes, the presumption is in favour of disclosure, and those who are opposed to disclosure have the onus to prove that disclosure is inappropriate.

[Translation]

**Mr. Pierre Nantel:** Mr. Chair, I would nevertheless like to table documents that show that he did indeed say:

[English]

"I don't know that we need a national broadcaster."

He said that in 2011.

[Translation]

**The Chair:** You may, as witnesses do, send the document to the clerk, and then we will have it distributed, if you wish.

**Mr. Pierre Nantel:** Perfect. Thank you, Mr. Chair.

**The Chair:** We will now move on to our second intervention.

Ms. Davidson, you have seven minutes.

[English]

**Mrs. Patricia Davidson (Sarnia—Lambton, CPC):** Thank you very much, Mr. Chair.

Thanks very much for being here, Mr. Rathgeber, and for presenting your Bill C-461 to us. I certainly appreciated your presentation and the outline that you went through as you explained what your intent was with the bill.

I know that you're well aware that this committee did an extensive study of section 68.1 of the Access to Information Act when we were doing an earlier study. We recommended that section 68.1 be amended to comply with the Federal Court and Federal Court of Appeal's decisions on the matter of 68.1.

Do you think that your bill responds to the committee's recommendations? Would you also tell me why you feel that way or not?

**Mr. Brent Rathgeber:** I absolutely do. The Information Commissioner testified that she does not fancy exclusions. She prefers exemptions because an exclusion takes the subject-matter out

of the operation of the act and, therefore, takes away any ability for her to objectively review the decisions of the information officers.

I can't take credit for the discretionary exemption. The credit for that belongs to the Information Commissioner who is going to testify in front of this committee next week.

I'm trying to find her exact words, but it's almost verbatim what the new section 28.1 would say. This committee recommended that section 68.1 of the Access to Information Act be repealed in accordance with the expert testimony heard during the study. In so doing, the government should consider international models as presented by the Information Commissioner.

It was the Information Commissioner who came up with the injury-based test and changed the exclusion to a discretionary exemption. I don't take credit for that. There has been some slight wordsmithing with respect to her testimony in front of this committee. But yes, I do believe this amendment is in accordance with the committee's study, which was an important study in light of the litigation between the Information Commissioner and the Canadian Broadcasting Corporation.

**Mrs. Patricia Davidson:** Just a little bit further along that same line, you talked about exclusions and exemptions. Could you talk a little bit more about the differences between the two and how that distinction is important in the context of your bill?

**Mr. Brent Rathgeber:** Certainly, that's a good question.

[Translation]

**The Chair:** Mr. Rathgeber, I am going to have to stop you here, since the bells have begun to ring. Pursuant to Standing Order 115 (5), I must suspend our proceedings, unless the committee gives its unanimous consent to continue. However, I did not get the impression earlier that the committee had given its unanimous consent to do so.

Yes, Mr. Andrews?

[English]

**Mr. Scott Andrews (Avalon, Lib.):** Can we come back after the vote to continue the meeting?

[Translation]

**The Chair:** Yes. There will be about 20 minutes left.

I am going to suspend our proceedings then, and we will see each other again later, unless I have unanimous consent to continue the meeting for a few minutes, since the House is just a few metres from here.

Do I have unanimous consent to continue the meeting, at least long enough to let Mr. Rathgeber answer Ms. Davidson's question?

**An honourable member:** No.

**The Chair:** Very well. In that case, I am going to interrupt the meeting, and we will meet again in approximately 40 minutes.

• (1620)

(Pause)

• (1705)

**The Chair:** We are back. I call the meeting to order.

There are about 25 minutes left. We will now be able to hear the rest of the testimony that was interrupted by the votes in the House.

I am going to let Ms. Davidson repeat her question, if she will, unless Mr. Rathgeber remembers it.

You have ample time, Ms. Davidson.

[*English*]

**Mr. Brent Rathgeber:** I remember the question.

**Mrs. Patricia Davidson:** Okay, go ahead.

**Mr. Brent Rathgeber:** The member asked about the difference between exclusions and exemptions and exceptions. They all start with the letter *e* and are all very confusing.

But in the Access to Information Act, an exclusion would mean that the act does not apply to the situation or the group of documents under consideration. That's what section 68.1 purported to do. It purported to create an exclusion.

Then at the end of it, it created an exception to that exclusion because it said, "other than information that relates to its general administration". So there was an exclusion, and then there was an exception to the exclusion, and that's what led to the controversy and the confusion.

When the Information Commissioner testified, she recommended—and I found her exact words in appendix A of your report—with respect to the CBC, that you replace both the exclusion and the exception to the exclusion with a discretionary-based exemption. The words she chose are as follows:

The head of the Canadian Broadcasting Corporation may refuse to disclose any record requested under this Act that contains information the disclosure of which could reasonably be expected to prejudice the journalistic, creative or programming independence of the Corporation.

If you check that recommendation of the Information Commissioner, which this committee accepted, against the words that I've used in my private member's bill, they are almost identical.

The exclusion means that the act doesn't apply except in certain circumstances, which was the confusion in section 68.1. But all of that is to be replaced by a discretionary exemption, so the act applies. The Information Commissioner can review the situation to determine if there is going to be prejudice, and if there is prejudice then she'll recommend non-disclosure.

**Mrs. Patricia Davidson:** Thank you.

I'm going to share whatever time I have left with Mr. Dreeshen.

[*Translation*]

**The Chair:** Go ahead, Mr. Dreeshen. You have 2 minutes and 30 seconds left.

[*English*]

**Mr. Earl Dreeshen (Red Deer, CPC):** Thank you very much, Mr. Chair, and thank you, Mr. Rathgeber, for being here today.

I know that back in the 2008 campaign when we were both involved with that election, certain folks were telling us that the CBC's funding was being cut. I took a look at it and realized that this was not the case and that there was more money being continually

given. So we were fighting a situation where there was a push on to try to create a perception that this was actually taking place.

You've been criticized because of the suggestion that your bill is in some way designed to hurt the CBC. Mr. Nantel, just a few moments ago, talked about some of the things you might have said during the campaigning and in subsequent elections.

I wonder if you could address a bit of what was being asked at that time when you spoke about different models for public broadcasters.

● (1710)

**Mr. Brent Rathgeber:** Yes, during the break I went back and read some of my old blogs that referred to the town hall or forum in the 2011 election campaign.

For clarification to Mr. Nantel, what I said was that I favoured the continuation of the CBC but I wondered—and he's done his research quite well—whether a charitable model might be better than a perpetual subsidy. The thought, and it was only a thought, would be to attempt to get the CBC less dependent on the taxpayers.

But having said that almost two years ago, with the benefit of time and upon reflection, I'm not convinced that a charitable model is practical. Quite frankly, members, I don't believe the viewers of CBC, as charitable as they might be, could possibly donate the requisite funds that the corporation currently gets from the public treasury. I think the charitable model is an interesting model, but ultimately it's not practical.

**Mr. Earl Dreeshen:** I'd like to address the second part of the bill where you have spoken to a particular number that you feel needs to be addressed. I understand that you put a lot of research into this, but having arbitrarily picked this particular number, I suppose it all depends on where you're at.

When we think about young people leaving high school in Alberta who are finding jobs in the \$100,000 range, we realize that we are taking a look at different types of ranges for salaries. I wonder whether you've determined how many employees would fit into the various categories that there were for different divisions. How that would work? Should one amount of money be reassessed, taking a look at the numbers that exist there?

**Mr. Brent Rathgeber:** I can't give you the specific numbers of how many people this would apply to. I can tell you that using the deputy minister one level, or DM-1, was maybe somewhat arbitrary. The number that it would reflect in real terms would be \$188,600, according to the 2012 Governor in Council appointees.

If this bill passes unamended, it would apply to DM-1, DM-2, DM-3, and DM-4, the highest levels of GC-7, and all of GC-8, GC-9, and GC-10. Those are Governor in Council appointments. It would apply to judicial appointments above the highest level of level 6, and CEOs higher than CEO-3.

If the government does in fact introduce an amendment, and if the members see fit to change the lower level of DM-1 to the highest level of DM-4, all deputy ministers would be exempt. The only people that it would apply to would be those at GCQ-10 and CEO-6, 7, and 8.



Members will appreciate that if... I haven't seen the government amendment. I don't know if the members have, but the parliamentary secretary said in the House that he thought the highest level of DM-4 was more appropriate than the lowest level of DM-1. It will significantly reduce who is covered by this bill and which civil servants and mandarins will need to have their specific salaries disclosed.

**Mr. Earl Dreeshen:** Do I have more time?

[Translation]

**The Chair:** No, you have no more time.

I am now going to give the floor to Mr. Andrews.

[English]

**Mr. Scott Andrews:** Thank you, Mr. Chair.

Thank you, Brent, for coming in today.

I'm going to continue my line of questioning around that salary disclosure piece.

How much does Nigel Wright make? Well, let me rephrase that: how much did Nigel Wright make?

• (1715)

**Mr. Brent Rathgeber:** I have no idea.

**Mr. Scott Andrews:** More than \$90,000?

**Mr. Brent Rathgeber:** I have no idea.

**Mr. Scott Andrews:** How come we don't know that?

**Mr. Brent Rathgeber:** Well, because.... Well, I've never inquired. That would be the short answer.

I would suggest to you that if you did inquire, you would probably be disappointed by the results of your inquiry. The Access to Information Act applies to all government institutions. Although the Privy Council Office is a government institution, I don't believe the Prime Minister's Office is a government institution within the meaning of the Access to Information Act. The government institutions are listed in schedule I of the act. Although the list is not exhaustive, I don't think it applies, but that would be a question better addressed to the Information Commissioner.

**Mr. Scott Andrews:** But your bill would disclose that information if passed?

**Mr. Brent Rathgeber:** Well, it wouldn't if in.... Well, certainly with respect to that individual who is no longer an employee of the government.... The Prime Minister's Office is not a government institution listed in schedule I of the Access to Information Act. Others will argue—the Canadian Taxpayers Federation, I suspect—that the breadth of the Access to Information Act ought to be expanded to include the House of Commons, and certainly to include the Senate in light of recent revelations and, I suspect, the Prime Minister's Office. So—

**Mr. Scott Andrews:** So regardless of the government amendment, your bill wouldn't cover that information being released?

**Mr. Brent Rathgeber:** My bill does not amend the breadth of the institutions the Access to Information Act applies to. That is correct, member.

**Mr. Scott Andrews:** Recently, question number 1267 on the order paper asked: “With regard to the Prime Minister's Office, as of February 1, 2013...how many make a salary of \$100,000 or more...?” Back came the response that 21 individuals in the Prime Minister's Office make over \$100,000. Your bill wouldn't allude to who those 21 individuals are?

**Mr. Brent Rathgeber:** I'm sorry. Your question was posed in the House?

**Mr. Scott Andrews:** No, this was a question on the order paper, to which the government responded with the answer I cited. They had no problem disclosing that 21 people in the Prime Minister's Office make over \$100,000—

**Mr. Brent Rathgeber:** Okay. There are two questions there, Scott. If you had tried to do that under the Access to Information Act, I think you would have gotten nothing, because the Prime Minister's Office is not a government institution within the meaning of the act. But you put a question on the order paper; you didn't apply through the access act. When the government responds to questions on the order paper, it uses the definition of privacy that's in the Privacy Act.

So you're actually right. I just thought of this as we've been having this discussion. Since the amendment of personal information would be amended in the Privacy Act, those individuals would be subject to specific salary disclosure when questions are put on the order paper, but nothing in my bill expands the breadth of the Access to Information Act to include the Prime Minister's Office. I think you would be able to do it through an order paper question.

**Mr. Scott Andrews:** The government is going to propose an amendment that will bring it to the level of DM-4, so that will basically gut your bill, as you've said. It will only include—I think you just answered the question—only about half a dozen ranges of salaries.

**Mr. Brent Rathgeber:** The highest level of DM-4 in 2012 was \$319,900, plus a potential 39% maximum performance bonus of \$124,761. But if DM-4 and everything below it is excluded, that will raise the bar to essentially \$320,000. So the only classifications that would apply would be GCQ-10, which I believe are traditional appointments, and CEO-6, 7, and 8.

**Mr. Scott Andrews:** So if this amendment goes through, how do you see our proceeding with your bill then, if it essentially guts it?

**Mr. Brent Rathgeber:** The members will do with the bill what the members decide to do with the bill.

I would be very, very disappointed if the government believes that individuals making as much as \$444,000 ought to have the privacy laws of Canada protect them from specific salary disclosure, particularly when I indicated that if you have a contract with the federal government for as little as \$10,001 it's on a public website. I find that irreconcilable. I think there are lots of deficiencies with our access regime. I think I indicated that a report from the Centre for Law and Democracy said that we are 55th out of 93 countries in terms of our openness and transparency, and our access.

This bill doesn't fix very many of those, but it would fix a couple of specific ones. I encourage members of this committee to continue to promote greater transparency. Canada was once a leader. When we first had our access to information law in 1983, it was held to be the gold standard of access, but there has only been a minimal incremental expansion of our access laws since then. The Information Commissioner will testify to that effect, I believe, when she's here next week. The government—and I don't mean only this government, but the Government of Canada as an institution—has a reputation for opaqueness. I think that trend needs to be strongly reversed.

● (1720)

**Mr. Scott Andrews:** I agree. We've fallen way behind in our access to information over the current administration, and we're continuing to do so.

Regarding the first amendment the government is going to bring forth to your bill, can you live with that amendment? Is that amendment or some form of it really aimed at protecting journalistic sources? Is there something there with that amendment that you could live with?

**Mr. Brent Rathgeber:** Thanks, Scott, for the question.

Philosophically I am absolutely not opposed to a mechanism that protects confidential journalistic sources. I simply don't know how you'd draft that, given the commissioner's broad powers under section 36, which says that she can enter government offices without warrants, she can compel the disclosure of documents, and she can compel people. Then subsection 36(2) says that no document shall be withheld from the Information Commissioner for any reason.

She testified to this very question when she was here two weeks ago. Exclusions are problematic because they take away any review from any independent entity. If the CBC says this is a journalistic source privilege and invoke their exclusion, that becomes the end of the debate, subject to one going to court.

I would prefer that there be some ability to review documents if journalistic source privilege were in question. I'm simply not convinced it can be drafted. Section 68.1 was an attempt at an exclusion and we all know how badly that ended up with protracted litigation. When the Information Commissioner was here last week, I think she said she has handled 1,200 complaints against the CBC, with 200 are outstanding, and that not a single one of those dealt with journalistic source privilege. I really believe, with all due respect, that the government's approach to provide an exclusion for journalistic source privilege is a solution in search of a problem.

[Translation]

**The Chair:** Thank you for your questions.

Mr. Carmichael, you have approximately five minutes.

[English]

**Mr. John Carmichael (Don Valley West, CPC):** Thank you, Mr. Chair.

Mr. Rathgeber, my colleagues have been speaking to the issues of these levels of disclosure of income. You mentioned in your brief that Ontario, B.C., Saskatchewan, Manitoba, and Nova Scotia all

have sunshine lists. I noticed that Alberta, your home province, does not. I wonder why.

**Mr. Brent Rathgeber:** That's a very good question. I don't know.

Members may recall a scandal about a year ago in Alberta when there was a civil servant, then an employee of Capital Health, who had significantly abused his expense account. I'm sure Mr. Dreeshen remembers this story. The Government of Alberta has moved now to public disclosure with respect to expenses, and they are now posting expenses for ministers and senior bureaucrat online, but there's still no sunshine list.

It was that story of the bureaucrat with Capital Health in Edmonton that really started my thinking about disclosure and transparency, respect for taxpayers and taxpayers' dollars, salary disclosure, and reimbursed expenses disclosure. You see the product of that thought in private member's Bill C-461.

**Mr. John Carmichael:** When we talk about DM-1 versus DM-4, I'm not sure if I am with you yet regarding your concerns about establishing DM-4 as the baseline versus your bill's having it at DM-1.

The sunshine list in Ontario, where I come from, is a growing list. It takes up pages in the newspaper as they disclose all of the various individuals that now fall under that measurement.

I wonder if you could be a little clearer or go into a little more depth of why the baseline should be DM-1 and not DM-4.

● (1725)

**Mr. Brent Rathgeber:** It's a lot lower.

**Mr. John Carmichael:** Clearly, it's lower, but—

**Mr. Brent Rathgeber:** Any number—

**Mr. John Carmichael:** At what point do you...What is your intent?

Is your intent that the net capture everybody who achieves a certain income level, or are you trying to peg a certain segment specifically?

**Mr. Brent Rathgeber:** The intent and the way the bill is drafted is to capture a certain income level and above. The number that's admittedly arbitrarily chosen is \$188,600. I think \$100,000, which is the benchmark in the Ontario sunshine list, is too low. I think it captures too many people, but by the same argument I think \$319,900 is grossly too high.

I want to respect the privacy of the majority of the civil servants, people working for the bureaucracy in lower and mid-level positions, but upper management, the decision-makers...

There are two aspects to this, Mr. Carmichael. It's not just salary disclosure. The benchmark also applies to specific job descriptions, whereas currently, under the Access to Information Act you get a range and the general job description of that category. If my bill passes, with whatever benchmark is ultimately chosen, you will get the specific salary and specific job description of the people above that level.

It will be a little more work for the department to comply not only with providing the specific salary, which will be easy, but also with determining what that person's specific job description is, as opposed to a generic one. Those two pieces of information, I submit to the committee, will allow the taxpayers who are requesting this information to compare the performance of the organization with the compensation awarded to the senior managers.

So no, I have no interest in specific salary disclosure for clerks at the Canada Revenue Agency, but for directors, deputy ministers, and chief executive officers, yes. For those individuals who are the real decision-makers in the bureaucracy, I think that not only their specific salary but also their specific job description ought to be subject to access to information legislation.

**Mr. John Carmichael:** If that were the case then—and I hear you on that—clearly the decision-makers, though, would be fully captured within the DM-4 category. Equally, you could apply the job descriptions at that level just as effectively, but you would have a smaller group. You would effectively have all of the people who are making the decisions and are truly the drivers.

**Mr. Brent Rathgeber:** Well, if you believe that DM-1s, DM-2s, DM-3s, and DM-4s are not decision-makers at a high enough level, then you will support the government's intent. I haven't seen the proposed amendment, but if you believe the above, then you will support the government amendment.

If the government amends the bill, as the parliamentary secretary said it will, it will capture very few people—and certainly a lot of managers and a lot of deputy ministers—

**Mr. John Carmichael:** How many people will it capture?

**Mr. Brent Rathgeber:** I don't know.

[*Translation*]

**The Chair:** Thank you, Mr. Carmichael. Your speaking time has expired.

I would like to thank Mr. Rathgeber for his testimony today.

I would like to read a procedural motion to you concerning our procedure for the amendments. This is the motion:

That the proposed amendments to Bill C-461 be submitted to the clerk in both official languages no later than Tuesday, May 28, 2013 at 12:00 p.m., and that the amendments package be distributed to members as soon as possible.

The point is simply to clarify that amendments must be submitted to the legislative clerk before noon, May 28, since we will be doing clause-by-clause consideration at our May 29 meeting. Nothing prevents members from submitting amendments on the day we are doing clause-by-clause consideration. However, it is preferable to send them to the legislative clerk so that they can be distributed, and

so the members of the committee can get a chance to see them prior to the meeting.

I need a motion. Is there a volunteer?

[*English*]

**Mr. Chris Warkentin:** I so move.

[*Translation*]

**The Chair:** Thank you, Mr. Warkentin.

(Motion agreed to)

• (1730)

**The Chair:** Excellent. So, you must submit your amendments no later than noon on May 28.

As I mentioned, on May 29, we will begin our clause-by-clause consideration. If it takes longer than the three meetings we have planned, we may hold another, unless we prolong the meeting on the same day. However, we had decided to earmark three meetings for this consideration, at most. The necessary time will depend on the number of amendments.

In addition, the information commissioner will appear before the committee on May 29, as I said at the beginning of the meeting. That will take some of the time we have for the meeting. We have to keep that in mind at this time.

**Mr. Alexandre Boulerice (Rosemont—La Petite-Patrie, NDP):** Mr. Chair, if I may, I would like a brief clarification.

**The Chair:** Go ahead, Mr. Boulerice.

**Mr. Alexandre Boulerice:** When is the information commissioner supposed to appear?

**The Chair:** She is supposed to appear on Wednesday, May 29, during the first hour of the meeting, before the clause-by-clause consideration. Since we did not have enough time today, we had to postpone her appearance. She is available May 29, and she has been kind enough to agree to come and share her thoughts with us.

Mr. Warkentin, do you have something to add?

[*English*]

**Mr. Chris Warkentin:** Actually no. I'll defer that to another time.

[*Translation*]

**The Chair:** Fine.

It is 5:30 p.m. and the bells are ringing. We will meet again next Monday.

The meeting is adjourned.





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