HOUSE OF COMMONS
CHAMBRE DES COMMUNES
CANADA

Standing Committee on Access to Information, Privacy and Ethics

ETHI • NUMBER 071 • 1st SESSION • 42nd PARLIAMENT

EVIDENCE

Wednesday, October 18, 2017

Chair

Mr. Bob Zimmer

Standing Committee on Access to Information, Privacy and Ethics

Wednesday, October 18, 2017

● (1535)

[*English*]

The Chair (Mr. Bob Zimmer (Prince George—Peace River—Northern Rockies, CPC)): I call to order this meeting of the Standing Committee on Access to Information, Privacy and Ethics. This is meeting number 71, on Wednesday, October 18, at 3:38 p.m.

I'd like to welcome to the committee the Honourable Scott Brison and the Honourable Karina Gould.

From the Treasury Board Secretariat we have Jennifer Dawson, and from the Privy Council Office the representative is Allen Sutherland.

Go ahead, whoever would like to start.

Hon. Scott Brison (President of the Treasury Board): Thank you, Mr. Chair. I am delighted to be here with you today and with your committee.

I am joined by Parliamentary Secretary Joyce Murray as well as my colleague Minister Gould, and as you mentioned, Jennifer Dawson from TBS.

I want to thank members of the committee for your work and your consideration of issues around Canada's access to information system.

As we developed these reforms, we were guided by the principle that government information belongs to the people we serve.

[*Translation*]

We remain committed to this principle, which the Access to Information Act first enshrined in law in 1983.

[*English*]

Now, 34 years later, our proposed reforms advance the original intent of that act in a way that better reflects today's technologies, policies, and legislation.

This is not a one-off exercise. Rather, we've kicked off a progressive, ongoing renewal of the ATI system, one that will protect Canada's right of access to government information well into the future.

[*Translation*]

Our efforts began over a year ago. In May 2016, I issued an Interim Directive that enshrined the idea of government being "open by default".

[*English*]

Open by default means having a culture across government in which data and information are increasingly released as a matter of course, unless there are specific reasons not to do so.

[*Translation*]

It's about allowing Canadians to better understand how government functions and to give them the information they need to contribute to a healthier democracy.

[*English*]

The Canadian government is being recognized by global partners for our efforts in this area. In March we were elected to the steering committee of the Open Government Partnership for the first time, and on September 21 Canada agreed to take on the role of lead government chair of the OGP in 2018-19.

The OGP is a multi-stakeholder organization that brings together 75 governments and hundreds of civil society organizations. I can tell you that as a government we are excited to take on this leadership role for Canada over the coming two years as co-chair.

The CEO of the Open Government Partnership, Sanjay Pradhan, called our country “a beacon of openness” last month in New York. Additionally, earlier this year, Canada was ranked number two in the Open Data Barometer survey, which is a global assessment of how governments are using open data for accountability, innovation, and social impact. The report commented on how political will in Canada has translated into strong policy foundations on openness and transparency.

A year ago we eliminated all fees for access to information requests, apart from the $5 filing fee, and directed the release of information in user-friendly formats whenever possible.

[*Translation*]

Now, with the amendments proposed in Bill C-58, we're taking the next step.

[*English*]

These amendments would create a new part of the act relating to proactive disclosure, one that puts clearly into practice the idea of open by default.

Of course this does not absolve us of our responsibility to strengthen the request-based system. We know that the access to information system has been the subject of widespread and warranted criticism. That's why we're developing a guide to provide requesters with clear explanations for exemptions and exclusions; investing in tools and technology to make processing information requests more efficient; allowing federal institutions with the same minister to share request processing services for greater efficiency; and increasing uniform government training to get common and consistent interpretation and application of ATI rules.

Mr. Chair, we are also following the guidance of this committee.

● (1540)

[*Translation*]

We are moving to help government institutions weed out "bad faith" requests that put significant strain on the system.

[*English*]

By tying up government resources, vexatious requests can interfere with an institution's ability to do its work and to respond to other requests.

Let me be clear: we have heard the concerns expressed about how we must safeguard against abuse of this proposed measure. We need to get this right and recognize that, while this new tool is needed to significantly improve the system, everything, from sound policy to training and proper oversight, must be done to prevent its abuse.

Our proposed amendments also give the Information Commissioner new powers, including, for the first time, the power to order the release of government records. This is an important advancement, which was first recommended by a parliamentary committee studying the Access to Information Act in 1987. Our government is acting on it, and Bill C-58 would change the commissioner's role from an ombudsperson to an authority with the order-making power to order the release of government records.

We are also giving the Information Commissioner's office more financial resources to do its job.

And that's just the first phase of our access to information modernization.

Bill C-58 includes a mandatory review of the act every five years. The first review will begin no later than one year after the bill receives royal assent. What's more, we require that departments regularly review the information being requested under the act.

Mr. Chair, after 34 years, Canada's access to information system needs updating. This is going to be an ongoing work in progress.

I'd now like to pass it over to my colleague, the Minister of Democratic Institutions. *Merci*.

Hon. Karina Gould (Minister of Democratic Institutions): Thank you very much, Minister Brison.

Mr. Chair, colleagues, committee members, thank you for inviting me to appear alongside my colleague, Minister Brison, to address Bill C-58. I'd like to acknowledge that Allen Sutherland from Democratic Institutions is here.

I want to acknowledge the important work of the public service in putting this bill together.

[*Translation*]

The Government is taking measures to maintain the openness, the transparency and the accountability of our democracy. To this end, we have introduced Bill C-33 in order to increase voter turnout and to enhance the integrity of our electoral system.

[*English*]

We've also put forward Bill C-50, which would make political fundraising more transparent.

As Minister of Democratic Institutions, I have also acted to help protect our electoral system from cyber-threats.

[*Translation*]

Earlier this year, I asked the Communications Security Establishment, or CSE, to undertake the very first assessment of threats to our democratic process. Since the release of the report, in June, the CSE has communicated with political parties and with provincial and territorial chief electoral officers to provide them with advice against cyberthreats.

[*English*]

Today, I am here with you to discuss Bill C-58. This legislation includes long-overdue amendments to an access to information law that has not been updated since it passed almost 34 years ago. The amendments to the act being brought forward by my colleague, Minister Brison, would help to significantly update and improve how Canada's access to information laws function.

Right now, I would like to focus in particular on how Bill C-58 would impact three areas: the offices of the Prime Minister and his ministers, members of Parliament and senators, and the administrative institutions that support Parliament and parliamentarians.

[*Translation*]

The bill would require the Prime Minister’s Office and ministerial offices to proactively disclose a variety of documents, including mandate letters, transition handbooks, information packages for ministers and their deputies, as well as information regarding travel and accommodation costs for ministers and their exempt staff.

● (1545)

[*English*]

It would also require disclosure of contracts over $10,000.

Information prepared by departments for question period and parliamentary committee appearances would also be subject to the act.

[*Translation*]

As you know, some of this information is already proactively disclosed by ministerial cabinets. However, this practice is not consistent and is not set out in the law. The aim of this bill is to obtain uniform disclosure from all cabinets. It would require the public release of those documents for the first time.

Of course, exemptions and exclusions under the law would still apply in the case of requests concerning certain issues, such as personal and national security issues.

[*English*]

Bill C-58 also extends the act to senators and members of Parliament. For the first time, this disclosure will be formalized in law. Bill C-58 also applies to institutions that support Parliament. I am referring to organizations like the Library of Parliament, the parliamentary budget officer, and the Senate and Commons administrations.

[*Translation*]

We're improving the openness of these offices while ensuring security laws and parliamentary privilege.

Bill C-58 will make it possible to achieve the necessary balance while implementing measures that will contribute to modernize the Access to Information Act. Canada's democratic institutions will thus increase their transparency and accountability.

[*English*]

To conclude, Bill C-58 will significantly advance the availability and efficiency of the Access to Information Act as it is related to the Prime Minister's office and ministers' offices, parliamentarians, as well as the institutions that support Parliament.

The reforms proposed in Bill C-58 are an important step in the ongoing review and modernization of the Access to Information Act, and I look forward to working with all members to enhance accountability.

With that, I welcome your questions. *Merci*.

The Chair: Thank you.

The first question goes to Mr. Erskine-Smith.

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

Our committee, as you know, issued a report to recommend that the act apply to ministers' offices, and it was a platform commitment as well. It's great that we have proactive disclosure, and I think that's an important step.

However, perhaps you could explain to this committee why we don't see other provisions of the act applying to ministers' offices. What considerations were you looking to in making that decision?

Hon. Karina Gould: Thank you very much for the question.

It should be stated that ministers' offices and the Prime Minister's office will fall under the act with this legislation. For the first time, we are legislating the proactive disclosure. Even though this was a practice that began under Prime Minister Martin and continued, we're expanding what will be considered to be documents that will be required to be proactively disclosed.

One of the key things that will be disclosed are mandate letters, for example, and that's required by legislation. Prior to this government coming into power, mandate letters were never disclosed. In fact, they were extraordinarily secretive. Only the minister, and maybe the deputy minister and very few officials, had access to the contents of them.

This is an important step that enables parliamentarians and Canadians to hold governments to account. Furthermore, we're talking about briefing notes, transition binders, QP binders, and committee binders that Canadians will have access to. All of these things are some of the most requested items by Canadians. We took a look to see what the items are that Canadians are most interested in, how we can provide a more efficient system so it's more usable for the user and the person who is interested, and doing it in a way that's cost-effective as well.

Mr. Nathaniel Erskine-Smith: It's good that there are a number of requests that will be met with the proactive disclosure. Is there a sense of what percentage of the volume that represents?

Hon. Karina Gould: Well, the majority of access to information requests go to Immigration, Refugees and Citizenship Canada. With regard to the specific numbers, I don't have that.

Do you have that, Allen?

Mr. Allen Sutherland (Assistant Secretary to the Cabinet, Machinery of Government, Privy Council Office): When it comes to departmental requests, Immigration, Refugees and Citizenship Canada takes about 55% of the total volume.

● (1550)

Mr. Nathaniel Erskine-Smith: I meant more the extent to which proactive disclosure will lessen the current burden. Is there a sense of how much it will lessen the burden?

Hon. Scott Brison: Nathaniel, one of the things we're looking at —and something we'll be guided by as a government in the future— is that as we see the volumes grow for request-based areas of information, that will be a signal to our government, and we'd hope to future governments as well, to move those areas into proactive disclosure, and as such reduce the burden on the request-based system. That's one of the reasons that the review is every five years, with the first one beginning within a year after this legislation receives royal assent. It will enable us to observe the impact of the changes that are part of Bill C-58. It will also enable us to look at future expansion of proactive disclosure in other areas.

Mr. Nathaniel Erskine-Smith: Since we're on the topic of proactive disclosure, the Information Commissioner has asked for authority or jurisdiction to police proactive disclosure. I would imagine that if there are redactions in relation to the material that is proactively disclosed, the Information Commissioner would look to make sure those redactions are accurate and in accordance with the law. She says that she doesn't currently have that authority as Bill C-58 is drafted, and wants it. I wonder what would you say to her?

Hon. Scott Brison: One of the things Bill C-58 does provide to the Information Commissioner is order-making power for the first time. In terms of the application of her authority over the proactive disclosure part of this legislation, that's something on which I would look forward to receiving—we would look forward to receiving—a recommendation from this committee. We're open to recommendations from the committee on some parts of this, and that could be one of the recommendations you could consider.

Mr. Nathaniel Erskine-Smith: To that end, there were a few smaller items that the commissioner had noted as well. She had a few different concerns, but the real concern, I think, was requiring that the type of record be specified and rather than create more openness and transparency, that would actually be a drawback and more limitations for requesters. I wonder if there's an openness to addressing that concern of the Information Commissioner.

Hon. Scott Brison: She made a number of recommendations. In some cases they require a clarification.

In terms of areas where the committee sees we could strengthen the legislation, we do have an interest, and we look forward to hearing from the committee. We do not want requests rejected by departments or agencies if in fact they're legitimate requests. If a request is too general, we would hope that we could help narrow the request with the requester and that we could in fact work to fulfill that request.

Mr. Nathaniel Erskine-Smith: I have a minute left, so I think I'll return to my first question in relation to the rationale for not expanding access as broadly as it could be.

We heard testimony on both sides in the course of our committee's study. I think the majority of the testimony that we heard suggested it should be extended further, but there were countervailing considerations. I recognize proactive disclosure is important, and it's certainly an important step forward given decades of inaction from a number of different governments, but I still wonder what the rationale would be for not extending the act, as it was understood before we had a proactive disclosure to ministers' officers.

Hon. Karina Gould: Thank you for recognizing that this is an important step forward, and it is something new that's happening and that will be in legislation.

As the Supreme Court has decided previously, there is importance to having space for cabinet confidence as well. That's one area that is really important to ensure that there is opportunity for frank policy advice that is given to ministers to make those decisions. It was the case of Babcock v. Canada in 2002, and the court said:

> The process of democratic governance works best when Cabinet members charged with government policy and decision-making are free to express themselves around the Cabinet table unreservedly.

We do think it's important for Canadians to have more access to information. With the items that are being proactively disclosed, it will provide much greater access to the information that ministers are using to make decisions, but there is that important space for decision-making that we think should continue.

● (1555)

The Chair: Thank you, Nathaniel

Next up is MP Kent for seven minutes.

Hon. Peter Kent (Thornhill, CPC): Thank you, Chair, and thank you, Ministers, for appearing with us today.

The same week that we began debate on Bill C-58, the commissioner issued an extraordinary document entitled "Failing to Strike the Right Balance for Transparency". I'll just very briefly read into the record a couple of paragraphs from her opening statement. She goes into great detail in the rest of the report.

The Commissioner said:

> In short, Bill C-58 fails to deliver.
>
> The government promised the bill would ensure the Act applies to the Prime Minister's and Ministers' Offices appropriately. It does not.
>
> The government promised the bill would apply appropriately to administrative institutions that support Parliament and the courts. It does not.
>
> The government promised the bill would empower the Information Commissioner to order the release of government information. It does not.

The final line that I'll quote, Ministers, is the most telling. The Information Commissioner of Canada writes:

> Rather than advancing access to information rights, Bill C-58 would instead result in a regression of existing rights.

Minister Brison, could you respond?

Hon. Karina Gould: If you don't mind, Mr. Kent, I'll start, and then I'll pass it over to Mr. Brison.

Hon. Peter Kent: Okay.

Hon. Karina Gould: I want to point out that in her 2015 report "Striking the Right Balance for Transparency", when it comes to ministers' offices and the Prime Minister's Office, she also notes there should be a dividing line between a minister's departmental and non-departmental functions. With regard to the application to administrative bodies, in that same report she also notes that there has to be room and space for parliamentary privilege.

Really what we tried to do with this legislation, this update to the Access to Information Act, is to strike that balance to ensure we are providing for parliamentary privilege. As all of you know as members of Parliament, it is extraordinarily important so that you can exercise your functions in an independent manner. The same applies with regard to ministers' offices and the Prime Minister's Office.

Hon. Scott Brison: Thank you, Karina.

Mr. Kent, Bill C-58 for the first time provides the commissioner with order-making power. The first time that was called for by a parliamentary committee was in 1987. We're the first ones to actually provide that. It was in 1987 that a parliamentary committee called for the application of the Access to Information Act to ministers' offices. We do, through proactive disclosure, and for the first time ever, we're even applying it beyond that, to the administrative offices supporting the courts and to Parliament.

Peter, we've known each other quite a while. Your party, the Conservatives, actually committed in its platform in 2006 to modernize the Access to Information Act. You had 10 years to do it, and when asked in the final days of your government why it wasn't done, Tony Clement said, "Well, we didn't get around to it." We're doing this in the first two years of our government.

Beyond that, Peter, your government was the first government to be found in contempt of Parliament for not providing information to Parliament, the first government in the history of the Commonwealth —

Hon. Peter Kent: Minister, the time is short for my questions.

Hon. Scott Brison: —in fact, and I'm saying that we're actually acting on this, and this is a significant advancement.

Hon. Peter Kent: Minister, with respect, you promised to be different. You offered transparency, and with regard to proactive disclosure—

Hon. Scott Brison: We're actually keeping our promise.

Hon. Peter Kent: Well, you certainly disappointed the Information Commissioner of Canada.

With regard to the proactive disclosure provisions in Bill C-58, which is something of a bait and switch, I think, in terms of what it qualifies, it is actually a false promise to the opening of ministerial offices. Remember, the Liberal campaign promise was to ensure that access to information applies to the Prime Minister's Office and ministers' offices, as well as to the administrative institutions that support Parliament and the courts. The proactive disclosure provisions don't come anywhere close to that, and compounding that broken promise are the conditions involving requests for information that your government may determine to be frivolous or vexatious.

The experts are unanimous in these criticisms. It's not only the Information Commissioner.

● (1600)

Hon. Scott Brison: In terms of the frivolous and vexatious clause, that's important because it was called for by this committee, and in fact by the Information Commissioner. I understand in her report she has suggestions as to ways we can strengthen that, and I'm open to those suggestions.

Let's be very clear. There are bad faith requests. Within the system there are some cases where people are requesting information on their ex-spouses who are public servants with regard to their work schedules, and that sort of thing. Those are bad faith requests.

This committee and the Information Commissioner have called for a frivolous and vexatious clause to help address those issues and to help take some of the gum out of the system for truly bad faith requests. Our government wants to ensure that this clause is not abused by departments and agencies, and we would be interested in the guidance of this committee, as well as that of the Information Commissioner, on how we can do that, including having her role strengthened in terms of the determination of what is or is not a bad faith request.

Hon. Peter Kent: The aspect of Bill C-58 that gives the commissioner the authority to order disclosure from government departments also prevents the commissioner from doing it if cabinet confidence can be invoked. All of the access to information experts in Canada, in different provincial situations, say that represents the biggest black hole of access to information in Bill C-58.

Hon. Scott Brison: Mr. Kent, as regards cabinet confidence, my colleague Minister Gould has referred to the Babcock v. Canada case in the Supreme Court in 2002. The court was clear that the process of democratic governance works best when cabinet ministers charged with government policy and decision-making are free to express themselves around the cabinet table unreservedly.

You've been a minister and understand the importance of that.

Hon. Peter Kent: I have.

Hon. Scott Brison: That is a principle that we will adhere to. By the same token, however, we are taking steps to strengthen the Access to Information Act to give real order-making power to the commissioner.

The way it would work is this. If her office issues an order demanding that a government department provide information, the department has 30 days to challenge her order. If they do so, the decision will be made by a court. They either provide the information or they would challenge the order, and a judge would make the ultimate decision. You've been a minister and know that a department or an agency is going to be reticent about challenging her order and ultimately seeing the decision be made by a judge, unless there is some good reason.

This is a significant advancement in terms of her authority.

The Chair: We're out of time.

For the next questions, seven minutes go to MP Cullen.

Mr. Nathan Cullen (Skeena—Bulkley Valley, NDP): Welcome, Ministers.

Minister Brison, let me start the questioning this way. Do you think there have ever been times when that advice to a minister has been abused? If someone doesn't want something, a piece of information, ever to get out, all you have to do is present it to a minister as advice and it's not ever disclosed. Is that right, just under the current rules?

Hon. Scott Brison: There are provisions for cabinet confidences and advice to ministers. In part they are based on having and wanting to preserve the ability of public servants to speak freely to ministers.

Mr. Nathan Cullen: As you just said to Mr. Kent, when you provide advice to a minister, it's no longer captured by access to information. The Canadian public will never see it. You and I have talked about this.

A voice: [*Inaudible—Editor*]

Mr. Nathan Cullen: I'm asking Mr. Brison a question because he and I have spoken about this.

If government is feeling a little under pressure or they know there is some information that, if it were ever to get out, would be bad for them politically, let's say, one way to shield it is to give it as advice to cabinet.

Ms. Jennifer Dawson (Deputy Chief Information Officer, Treasury Board Secretariat): May I add to this?

The matter of advice to cabinet is an exclusion, so that is something that is not subject to the act. The advice to a minister is an exemption, so there is discretion that can be applied by the institution concerning the release of that information. Advice to a minister, then, is not universally precluded from disclosure.

Mr. Nathan Cullen: You heard my question, though. Has it ever been misused? I think Minister Brison would be more comfortable answering it than perhaps you would be.

My suggestion is that, using, as Mr. Kent suggested and all the experts coming before us say, when a reporter is going after a question on something that's sensitive, one way governments in the past.... There are two ways. You can Post-it note it, as some previous Liberal governments did at a certain sponsorship time—you put a Post-it note on it and don't write it down, and you can take it off later. Another way is to provide advice to ministers whereby they are no longer subject to this.

I guess this becomes a question of whom to believe. We have the Information Commissioner who says that previous committees that sat around this table and looked at the act made recommendations, as did the commissioner. You ignored those recommendations in this new Bill C-58.

I'm not sure it's really time to pop the champagne corks when the commissioner says that this bill would instead result in a regression of existing rights.

● (1605)

Hon. Karina Gould: If you don't mind, I'll jump in here.

Advice that's provided by the public service to ministers is subject to the act. It could be redacted, if there are issues of cabinet confidence within it, but this is already part of the act, and I think it's an important thing. Of course it's redacted for personal information, and it's redacted for anything that may be considered a cabinet confidence or international defence policy—

Mr. Nathan Cullen: Sure.

You made the argument earlier that already captured in this disclosure is a vast.... You couldn't put a number to it, but you said that in the case of many of the requests already, we're going to just disclose.

What government discloses is what they want to disclose, the things concerning which they're comfortable with their being out. The whole point of access to information is that there are times, as you both well know now, when there are things that are uncomfortable for the government to release.

Why not apply this act as you promised to do? I'm looking at your website: “We will make government information more accessible.” This is from the Liberal platform. You both promised this one. It's in your mandate letter, too, I believe, Scott.

Hon. Scott Brison: There's a reason you could quote my mandate letter, because we proactively—

Mr. Nathan Cullen: Congratulations, but why is quoting it so helpful?

Voices: Oh, oh!

Mr. Nathan Cullen: It may be funny, but why is quoting your mandate letter so helpful if you're asking following your mandate letter?

Hon. Scott Brison: We were the first federal government to actually publish our mandate letters, which is why you're able to quote from it.

Mr. Nathan Cullen: Are you congratulating yourself for publishing a mandate letter that you're not actually following?

Hon. Scott Brison: Actually, we are.

Mr. Nathan Cullen: In your mandate letter you say you will go forward and present a bill that will open up the Prime Minister's Office and ministers' offices to access to information, and you're not.

Hon. Karina Gould: And it is because for the first time in legislation we are legislating proactive disclosure for many different items that are there, making information—

Mr. Nathan Cullen: No, no. Hold on. You say that you will ensure that the Access to Information Act applies to the Prime Minister's Office and ministers' offices. Are you doing that?

Hon. Scott Brison: Yes.

Mr. Nathan Cullen: How?

Hon. Scott Brison: We are actually proposing a modern Access to Information Act that actually combines proactive disclosure and a request-based system to ministers' offices.

Mr. Cullen, I know why you're uncomfortable with proactive disclosure.

Mr. Nathan Cullen: Am I?

Hon. Scott Brison: You were uncomfortable with proactive disclosure when you were in the NDP at a time when the Liberal Party was in opposition, and our Prime Minister made our party the first to proactively disclose expenses, and it was the NDP—

Mr. Nathan Cullen: Careful.

Hon. Scott Brison: —who were opposed to that—

Mr. Nathan Cullen: Why I would suggest caution—

Hon. Scott Brison: —and were dragged kicking and screaming to actually proactively disclose their expenses.

Mr. Nathan Cullen: Why I would suggest caution on this, Mr. Brison, is I have an access to information request into the finance minister's department that was rejected this summer, July 10 in fact, where an access to information request was made of Mr. Morneau's personal holdings. That would not change under any of the changes you've made here today. His department not only denied the access to information request, it also said that there were no records whatsoever of even the request of access to information. This is going into the dark dark ages, where his department sees no access to information request existing at all. That's a new one for me, where you not only deny the access to information, but you also deny the request even exists, even though it was filed with his department.

So my question is this—

Hon. Scott Brison: No, but I have a response to this.

Mr. Nathan Cullen: I have a question and limited time. You refer to if something's deemed in bad faith, but who decides what's bad faith?

Hon. Scott Brison: Ultimately, the Information Commissioner can actually act as per this legislation—

Mr. Nathan Cullen: That is something that's vexatious.

Hon. Scott Brison: —and there's an appeal process whereby she can actually have a role.

Mr. Nathan Cullen: Not initially. I'm asking for the initial determination. If I write into the Department of Finance and to your department and ask for access to information, who is it that decides that access to information request is bad faith or vexatious? Is it the Information Commissioner?

Hon. Scott Brison: Ultimately a decision can be appealed to the Information Commissioner.

Mr. Nathan Cullen: Come on, Scott. Answer the question.

If I ask your department for access to information, and it is denied and it is deemed bad faith, vexatious, any of those things, I'm asking a simple question, who makes the determination?

Hon. Scott Brison: There is a role for the Information Commissioner through an appeal process. If this committee believes that role ought to be at the front end—

Mr. Nathan Cullen: You bet.

Hon. Scott Brison: —of the process, we are open to that.

Mr. Nathan Cullen: I asked you three times now for a very specific example. You keep referring to the ultimate appeal process, which sometimes might lead to court.

Hon. Scott Brison: I actually just said, Nathan, and you could take yes for an answer, that we would be open to actually providing the commissioner with a different role in this and actually—

● (1610)

Mr. Nathan Cullen: You didn't put it into this legislation.

Hon. Scott Brison: That's because we have respect for the work of committees—

Mr. Nathan Cullen: Oh, good.

Hon. Scott Brison: —and if this committee has guidance that they want to provide us.... We don't operate committees like branch plants of ministers' offices.

Mr. Nathan Cullen: The ethics committee already did make that recommendation to you, Minister. The previous committee who studied this act said it should apply to the ministers' offices. And the determination of vexatious or bad faith—

Hon. Scott Brison: Nathan, I'm telling you I actually am open to this—

Mr. Nathan Cullen: That's wonderful.

Hon. Scott Brison: —we are open to this, and we respect the work of committees.

Mr. Nathan Cullen: I look forward to it.

Hon. Scott Brison: Absolutely.

Mr. Nathan Cullen: I look forward to it.

The Chair: That is time.

Next up, for seven minutes, is MP Saini.

Mr. Raj Saini (Kitchener Centre, Lib.): Good afternoon, Ministers. Thank you very much for coming.

I want to start off on what Mr. Kent and Mr. Cullen have said.

We know that for the access to information regime to work, we have to make sure that the system is working properly and those who are tasked with providing the information are able to focus on the legitimate access to information request by also avoiding those that are maybe pursued for other reasons and may bog down the system. We have to be absolutely certain that legitimate requests are not discarded in the process or the power to discard them isn't abused. Can you explain what safeguards will be put in place to ensure this doesn't happen? Also, could you describe what the usual process is to help ensure that people get the information they actually want even when their initial request might not be clear or is missing information?

Hon. Scott Brison: Thanks, Raj.

First of all, there are genuinely bad faith requests, and I think we understand this. The commissioner understands this. This committee understands it.

We want to make sure that no government abuses the frivolous and vexatious clause of this, and we are open to suggestions as to how to strengthen it. Let's keep in mind that eight provinces and three territorial governments have similar clauses in their legislation, in their access to information acts, because this is an important issue.

These bad faith requests do gum up the system. This committee has in fact called for this type of approach as well. There is currently a process in this legislation whereby somebody who doesn't believe their request is in fact frivolous and vexatious can appeal to the commissioner. The commissioner has sought more of a front-end role in the process, and we are open to that. So, I'd be interested in the guidance of this committee.

Mr. Raj Saini: Most normal legislation is reviewed within a five-year period but on this one, your ministry has put in a special case where you want it reviewed in one year. Can you explain why you've put this one-year review into the bill? What do you hope to gain within one year's time?

Hon. Scott Brison: First of all, by putting into this legislation a mandatory five-year review, it will ensure the Access to Information Act never becomes as out of date as it is today, 34 years after it was first introduced.

We believe that after one year of this bill receiving royal assent, we will have a better understanding of what some of the changes in Bill C-58 made to the act, some of the differences those changes have effected, and it will help inform future changes. We will have a better idea of some of the impacts of the changes, including what we intend on doing in terms of strengthening the technology, the resources, and the training.

We are committed as a government to a more efficient and responsive access to information regime, one that is consistent with open and transparent government. We will have a better idea after one year of this bill receiving royal assent as to what other changes we can make to further strengthen it. The Access to Information Act and its regime ought to be an evergreening process that our government and future governments on an ongoing basis look at to find ways to strengthen the access to information regime for the Government of Canada. I think we'll learn more. Also, technologies change, approaches change, and we learn from other governments. That's part of our role as a co-chair of the Open Government Partnership, that we are learning from and sharing practices with other countries as well.

● (1615)

Mr. Raj Saini: Prior to this bill, the current model was the ombudsperson model which put unreasonable demands on their requesters for information, and also to seek judicial redress from the government. Something that we heard about during the study of this bill was different types of systems. One of the systems that we heard more profoundly about was the system in Newfoundland and Labrador, which has a hybrid model.

Why did you feel that the change was necessary, and why do you feel that the hybrid model would be the best to pursue?

Hon. Scott Brison: The commissioner has not had order-making power in the past, and, Raj, Nathan actually brought up a specific example. If a requester of information felt that a request was being refused inappropriately, order-making power would enable the commissioner to demand that a particular piece or request be fulfilled by the department. The department would have 30 days to either provide the information or to challenge the order in court. I can tell you that departments and agencies aren't going to do that unless they believe very strongly that they can defend their decision in court. That does raise the bar, and it gives her real authority.

Mr. Raj Saini: To follow up on that point, during committee testimony, some witnesses complained that in some cases their request for information took a very long time, sometimes weeks, months, and in some cases, years. Clearly, we know that the model we have right now isn't working. Do you think these new powers that we're going to give to the Information Commissioner will help provide an opportunity for information to be received in a more timely manner?

Hon. Scott Brison: First of all, we are still working with the system we inherited from the previous government. We hope that this legislation will help address some of the challenges.

There are issues around resources. We need to make sure that the commissioner's office is properly resourced, that the departments and agencies are resourced in terms of being able to fulfill requests, that they have the right technology and platforms, and that we provide more uniform training across government departments and agencies.

What we're proposing in this legislation will make a difference. I hope we see an improvement in terms of the responsiveness of departments and agencies to ATIP requests. We will be working to ensure that. We want to take very much a service focus to access to information and make it more responsive. Again, we believe we will know more as we see the impact of some of these reforms, and that information will help inform future changes.

There's a lot to be done, both in terms of the operations and the scope of the legislation, but we're committed to making it work better for Canadians.

The Chair: That's time.

Mr. Raj Saini: Thank you.

The Chair: Next up for a five-minute round is MP Gourde.

[*Translation*]

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

I thank all the witnesses and the two ministers for being here. We know that you have very busy schedules, but it is important for you to take the time to come and see us.

I'd like to get back to requests that are thought to be frivolous or made in bad faith. This concept is relatively wide, and the bill contains no provisions that would make it possible to understand it. It's up to public servants to determine if a request deserves or not to be processed. It can offend certain Canadians seeking information.

Can you tell us how we will determine that a request is frivolous?

Hon. Scott Brison: First of all, it's very important to avoid abusing that. We agree with the Committee and the Commissioner that we must avoid doing it.

We must put in place adequate oversight to guarantee that we will note use this measure abusively. It's very important, and we're open to using the Committee's advice and its study to define this concept.

● (1620)

Mr. Jacques Gourde: If we implemented this measure, it has to be because we've determined that a percentage of access to information requests were frivolous. Are we talking 10%, 15%, 20% or even more?

Hon. Scott Brison: I must say that this was in response to a recommendation that this committee made in the past, as well as a recommendation made by the commissioner. Eight provinces and three territories have the same provisions; consequently, we're not the first government to do so. There are important reasons to include such provisions.

Once again, in our opinion, it's very important to implement an oversight mechanism to guarantee that this measure will not be used abusively. We agree on this principle and we're open to committee suggestions to reinforce it.

Mr. Jacques Gourde: I understand your answer, Minister, but I would like to know something. To come up with such a measure, did we determine how many access to information requests were deemed to be frivolous or inadmissible? Was that 10, 20 requests out of 100?

Hon. Scott Brison: I'm not sure how many were deemed frivolous or inadmissible. Ms. Dawson might have this information.

Ms. Jennifer Dawson: We looked at statistics from provinces and territories which, for the most part, have information concerning frivolous requests. We found that less than 1% of requests were deemed to be frivolous.

Mr. Jacques Gourde: So it was deemed necessary to include that provision in the bill even though only 1% of requests are considered frivolous. Was this whole process really necessary?

Hon. Karina Gould: It might only be 1% of the total requests, however it can exert tremendous pressure on the system. So it's not necessarily the percentage of total requests that matters, but the fact that those vexatious requests can result in a lot of work. It's possible that a lot of information be requested and this weighs heavily on the system. Since this oversight is not conducted at the moment, we're not able to put a number on its impact. If this bill were passed, it would provide us with a new tool. We would have statistics that are more concrete.

Mr. Jacques Gourde: How much time do I have left?

[*English*]

The Chair: That was timed perfectly, Mr. Gourde, five minutes and six seconds.

The next five-minute round is for Ms. Fortier.

[*Translation*]

Mrs. Mona Fortier (Ottawa—Vanier, Lib.): Thank you, Chair.

Good afternoon, everyone, and thank you for coming to testify before us.

I'm really happy that we're taking action. I see that you have worked really hard on this new bill so we can examine it as a committee.

I'd also like to remind you, as was mentioned earlier, that this was a promise made during the campaign. In my riding, during the by-election six months ago, questions were asked about it. The people with whom I spoke wanted us to take action. So, I'm happy to see that we're making headway. Thank you for your work.

I'd like to understand the reasons why we had to wait this long to present the new statutory review mechanism of this legislation. Could you explain why?

● (1625)

Hon. Scott Brison: Thank you very much, Ms. Fortier.

It's not an easy file for a government; that's why it took more than 30 years to modernize the Access to Information Act.

Our government is the first to give order-making powers to the Information Commissioner. This is significant progress. We're the first to add ministerial offices and the Prime Minister's Office to the act. Once again, this is progress. For the first time, the act applies to more than 240 federal agencies. That's another positive development.

We'll continue to raise the bar as far as openness and transparency are concerned. I hope that, in the future — especially with mandatory reviews every five years — we'll continue to see progress, under this government and future ones.

In fact, it's unacceptable that an act should not have been modernized in 34 years. That's the reason why it was so important for us, as an opposition party and, later, as the government, to continue to make progress in order to better serve the population and to increase government's openness and transparency.

[*English*]

Mrs. Mona Fortier: Thank you.

Mr. Chair, my time is probably is running out, but I still have another quick question.

There has been a lot of conversation in the media and the public about two very specific parts of this legislation: first, the order-making powers given to the Information Commissioner; and second, the ability for departments to rule a request as frivolous and vexatious. We've been talking about this.

Can you explain why these two sections are important to the access to information legislation and system?

Hon. Scott Brison: First, on the frivolous and vexatious part of this legislation, this was called for by this committee, in fact, by the commissioner. It does reflect a reality that we do have bad faith requests that come up the system and don't serve Canadians well. We want to make sure this does not get abused. It's important to realize that eight provinces and three territories have similar clauses in their legislation.

There is a provision in the legislation where the commissioner has a role through an appeal process. If there are ways we can strengthen her role, we are open to that. I know she has, in her report, sought a strengthening of her role. This is something to which we are open as a government. I look forward to the committee's looking at that as one of the areas.

In terms of order-making power, if somebody seeking information is refused that information, they can appeal to the commissioner, and she can order that department to provide the information. The department has 30 days to either provide the information or to challenge her order, and ultimately, the decision is made by a judge.

Again, I would assert that a department or agency is not going to challenge an order of the Information Commissioner in a court unless they have some level of certainty as to their arguments and the legitimacy of their arguments. That would be something which I expect will not be done frivolously.

The Chair: Thank you.

The next and last questions go to MP Kent.

Hon. Peter Kent: Thank you, Chair.

Ministers, I began my questions referring to what the Information Commissioner has characterized in her response to Bill C-58 as failing to strike the right balance for transparency.

Chair, I'd just like to table for the record in both French and English the Information Commissioner's report. In that report, it's interesting that she concludes by doing a very basic grade of Bill C-58 with passes and fails. She found that five elements of Bill C-58 are positive. She found that 15 elements of Bill C-58 are, in fact, regressive. Could you respond to that?

● (1630)

Hon. Scott Brison: I guess there's a reason why no government has ever fulfilled its promise to modernize the Access to Information Act until we came along, because it's not easy, and it's hard to please everybody. What I would say to the commissioner is that this does provide her with order-making power for the first time ever and, in fact, 30 years after a parliamentary committee first recommended order-making power. This does apply the act to ministers' offices for the first time ever. This does apply, in fact, to 240 governmental organizations, including the courts. This is significant progress.

There may be individuals and organizations that are not totally satisfied with what we've proposed. By having a mandatory five-year review, we can consider further improvements in the future.

Again, I want to remind the committee that we are open to amendments from the committee that can strengthen the legislation. This is really important legislation, and your work at this committee at this critical point of modernizing the Access to Information Act is historic and important. We can't please everybody all the time, but we are acting to strengthen the Access to Information Act.

Hon. Peter Kent: Time is short, and I know that you're about to make your departure, but you spoke earlier to respect for this committee's recommendations, most of which you've ignored from a year ago and which are before us again. I suspect they will be in our response after committee study.

You also spoke positively of your commitment to open government. This committee recommended a year ago that, in the first phase of the reform of the Access to Information Act, the act be amended to include a general public interest override applicable to all non-mandatory exemptions with a requirement to consider the following non-exhaustive list of factors: open government objectives with environmental, health, or public safety implications, and information that reveals human rights abuses or would safeguard the right of life, liberty, or the security of the person. That recommendation, like so many others, was ignored.

What are your comments?

Hon. Scott Brison: Again, Peter, giving the commissioner order-making power is a significant step forward. That has not been done before. Applying it to ministers' offices and to Parliament and to the administrative branches supporting the courts is a significant step. This legislation strengthens the act.

We are open to amendments and will consider them as a government.

Beyond that, in a year from this bill receiving royal assent, there will be the first mandatory review. That will lead to this coming back to this committee and we will have an understanding of what difference these changes have made, and that can inform this committee and our government. Every five years, as we make successive changes in an evergreening process, this will lead to learning from them and we will be able to strengthen this. We're proceeding in good faith, Peter.

Hon. Peter Kent: Okay.

Hon. Scott Brison: And we are committed to strengthening this act.

It may not go as far as some people want it to go now, but some other groups may be concerned that it goes too far in certain areas.

I believe you're going to be meeting with the Privacy Commissioner at some point here, and there is a balance between privacy, for instance, and access to information. In most provinces, I believe the privacy and access to information act offices are in the same branch.

As a government we seek a balance between those factors and we will defend both.

Hon. Karina Gould: The Information Commissioner's report does acknowledge that there are steps forward, and particularly with regard to ministers' offices and the Prime Minister's Office with regard to proactive disclosure. We did try to find a balance here and it's an act that's being updated for the first time in 34 years, and as Minister Brison mentioned, with a review within a year, we're going to be able to see how this has changed.

One thing which I think is important to note and to look for is how it enables citizens to access information in a more timely, efficient manner, and in a way they wouldn't have had before, because right now, the burden is on them to specifically request information, whereas they will have a more holistic view.

● (1635)

Hon. Peter Kent: I thank you both for your appearance before us today, and we'll continue with the officials.

A great deal of time could be saved in the review process if the government would accept the recommendations not only of this committee, but of the commissioner herself.

Thank you.

The Chair: We're at time, and I'd like to thank Minister Brison and Minister Gould for appearing at committee today.

We'll suspend until the new witnesses are seated.

Thank you.

● (1635)

(Pause)

● (1640)

The Chair: We'll bring the meeting back to order. We still have a quorum, so we'll keep going.

From the Treasury Board Secretariat, I'd like to welcome Jennifer Dawson, deputy chief information officer, and Ruth Naylor, executive director at the information and privacy policy division of the chief information officer branch.

From the Privy Council Office, we have Allen Sutherland and Stéphanie Vig.

From the Department of Justice, we have Adair Crosby and Sarah Geh.

I would like to say to our members that there are no opening statements by the officials. We're going to go straight to questions.

The first question, for seven minutes, goes to Mr. Erskine-Smith.

Mr. Nathaniel Erskine-Smith: Thanks very much.

I have some more technical questions that I'd like to get through.

First, I'll follow up on proactive disclosure. I was asking the ministers, and it would be good to have a sense of the percentage of existing requests in relation to ministers' offices that the proactive disclosure would address. I think that would be useful for our consideration. If you don't have an answer now, that's okay. Hopefully, you can get it for us.

Ms. Jennifer Dawson: The proactive disclosure that would be applied to ministers' offices and the Prime Minister's Office is a new provision, so we would not have an existing comparison in terms of requests to ministers' offices that we could align to the proactive disclosure requirement.

Mr. Nathaniel Erskine-Smith: Okay, fair enough. I think Minister Gould said that it would be a large proportion, so that was what I was building that question on. But if we don't have the numbers, we don't have the numbers.

Ms. Jennifer Dawson: I can add to that. What Minister Gould was speaking to was the fact that we know that people are interested in receiving this type of information. For example, the proactive publication of briefing notes is something that has been done as a best practice at the Treasury Board Secretariat without existing policy. What we found was that requesters do come back regularly to follow up with specific requests for briefing notes, so we know that it has been tested and it has been facilitating.

Mr. Nathaniel Erskine-Smith: That's useful to know.

When it comes to the question of order-making powers, the Information Commissioner has expressed some concern about a situation where a department neither follows through on the commitment to release the information within 30 days, nor goes to court to appeal. In that situation, the commissioner has said, there is a difficulty with enforcing the order.

She has asked for an easy certification process, presumably something like this: after the 30-day period has expired, one can easily, just over the counter with the registrar, certify the order as an order of the court.

Perhaps you could speak to that. Is that a good idea? Is it something we should consider, and if not, why not?

Ms. Jennifer Dawson: Our intention, in the way that the bill is worded, is actually that we would not require that additional step, and in fact her order would have the weight of a court order. If her order was not being followed, she would be able to seek mandamus, in other words, an order to enforce the order, directly, without having to ask for a certification first. That's our intention with the bill.

Mr. Nathaniel Erskine-Smith: Is there something in the legislation that we can point to, to give comfort to the commissioner when she is here before us?

● (1645)

Ms. Jennifer Dawson: As I understand it, the order-making power does have the force of a statute. It's not explicitly written within the act, but in fact it's inherent in the bill.

Mr. Nathaniel Erskine-Smith: Okay. Perhaps when we have the CBA in front of us we can get into the nuts and bolts of that.

This brings me to judicial independence. I think it's proposed section 90.22 in the bill. I could have it wrong. It's in relation to the individual who expresses the concern in relation to judicial independence. It occurs to me that the one who raises the concerns ought to be perhaps the chief justice of the affected court. It shouldn't be an official who is raising the concern of judicial independence.

Would there be an objection from the department to that recommendation?

Ms. Adair Crosby (Senior Counsel and Deputy Director, Judicial Affairs, Courts and Tribunal Policy, Public Law Sector, Department of Justice): I can't speak to how that recommendation would be received, but I can certainly say that the bill reflects the decision to provide the commissioner for federal judicial affairs with the authority to determine that information disclosure—

Mr. Nathaniel Erskine-Smith: Obviously, I can read proposed section 90.22, and that's what it says, but it makes more sense...so I would appreciate some feedback on this, as to whether there's a reason to think otherwise. It strikes me that on the question of judicial independence, rather than an official, there should be a chief justice of the affected court who is raising the concern of judicial independence. I leave that with you, and if we could get some response to that consideration, it would be appreciated.

The second thing I couldn't figure out is at proposed section 90.25. The Canadian Judicial Council is exempted. I can't figure out why, if we're exempting the Canadian Judicial Council, we wouldn't exempt courts more broadly. What's the rationale for that?

Ms. Adair Crosby: The rationale for excluding the Canadian Judicial Council is that it's actually not a government institution. It's an independent statutory body that fulfills non-government functions. It has a mandate that's much broader than a government institution. It would, no question, raise serious concerns about judicial independence.

Mr. Nathaniel Erskine-Smith: How would it raise considerations about judicial independence if the very same provisions applying to courts aren't raising those considerations?

Ms. Adair Crosby: The provisions don't apply to the courts. The provisions apply to the commissioner for federal judicial affairs in respect of judicial expenses. With respect to the administrative institutions that support the courts, you're speaking of the Courts Administration Service, as well as the registrar of the Supreme Court of Canada. They are government institutions. As with the other provisions—

Mr. Nathaniel Erskine-Smith: The CJC is funded by federal dollars, though.

Ms. Adair Crosby: Yes.

Mr. Nathaniel Erskine-Smith: For the purposes of how the 37 chief justices, through the CJC, are spending money, wouldn't I as a taxpayer be just as concerned about that as I am about how the court administration is spending money? They're all federal funds.

Ms. Adair Crosby: I'm sure Jennifer could speak to the range of bodies that are not subject to access to information that are getting public funds. The point, though, with the CJC is that it comprises the 39 chief justices and associate chief justices who are performing functions that are often constitutionally protected by judicial independence.

Mr. Nathaniel Erskine-Smith: Okay, so it's a judicial independence argument, which for some reason doesn't apply to courts as well.

A lot of the proposed changes when we issued our original recommendations were legislative changes, but there's a larger question, especially as requests keep increasing year after year, month after month, and the system is as creaky as it is. Are there any efforts under way that you can perhaps tell us about with respect to digitization, centralization, and the additional resources and training of staff that you're looking at doing?

Ms. Jennifer Dawson: Yes, we are thinking very much about process improvements, and we're recognizing that there is that increasing pressure year over year in terms of the number of requests and the volume of material that departments are processing. One thing we proposed in the bill is to enable institutions that are in the same portfolio to share resources, to have shared access to information and processing units, which can be really helpful. In some situations, you may have a large department that's under the same minister paired with a small department to enable the use of those resources more effectively which is going to help.

We're also looking at improving the access to information processing tools that departments have. We have software that could do with modernization. We would really like to improve, and we are targeting increasingly operating as a digital government and providing information in digital formats.

● (1650)

The Chair: That's time; we're well over.

Mr. Nathaniel Erskine-Smith: We were on a roll.

The Chair: I tried to let you finish.

Next up for seven minutes is MP Kent.

Hon. Peter Kent: Thank you, Chair.

Time ran short in the last hour, but in response to the suggestion by Minister Brison that the Privacy Commissioner be called as a witness, I'd just like to move a motion that the Privacy Commissioner be added to our list of witnesses, along with the Information Commissioner herself.

The Chair: We'll deal with the motion on the floor right now. Would anyone like to speak to it?

Hearing no debate, we will vote on the matter.

Hon. Peter Kent: I would like a recorded vote please, Chair.

Mr. Nathaniel Erskine-Smith: The specific wording of what you're asking is for the Privacy Commissioner to—

Hon. Peter Kent: —be added to the list of witnesses, with appropriate time for discussion before the committee, as well as the Information Commissioner herself.

Mr. Nathaniel Erskine-Smith: I think we would welcome that. I don't think anyone here takes issue with him being on the list.

In terms of time, do we want to specify that it be an hour?

Mr. Raj Saini: I think an hour is fine.

Hon. Peter Kent: I think the Privacy Commissioner could well speak to it.

Minister Brison seemed to give great import to what the Privacy Commissioner may add to the discussion.

Mr. Nathaniel Erskine-Smith: We have the Information Commissioner who is more relevant to this, for two hours, so I think the Privacy Commissioner for an hour would be fair.

Hon. Peter Kent: Sure.

The Chair: The mover of the motion is MP Kent.

What would you like in the motion for time, specifically?

Hon. Peter Kent: I agree that given the two hours with the Information Commissioner, who is actually the most relevant to Bill C-58, that an hour for the Privacy Commissioner would be appropriate.

Mr. Nathaniel Erskine-Smith: Yes.

The Chair: I see no further debate.

(Motion agreed to [See *Minutes of Proceedings*])

Hon. Peter Kent: Thank you.

I'm sorry for the delay, folks.

One of the recommendations—

Mr. Frank Baylis (Pierrefonds—Dollard, Lib.): We thought you wanted a recorded vote, though.

The Chair: That's correct. We'll follow through with that.

Mr. Frank Baylis: From what I saw on the floor, it was unanimous.

The Chair: Unanimous usually gets everybody.

Hon. Peter Kent: Thank you.

Moving to questions, among the recommendations of this committee last year that were not implemented, specifically recommendation 23 said:

> That the mandatory exemption for Cabinet confidences would not apply to:
>
> purely factual or background information;
>
> information in a record of decision made by Cabinet or any of its committees on an appeal under an act;
>
> where consent is obtained to disclose the information; and
>
> information in a record that has been in existence for an appropriate period of time as determined by the government and that this period of time be less than the current 20 years.

Was there anything unworkable or inappropriate in that recommendation that the government has chosen not to include in Bill C-58?

Ms. Jennifer Dawson: The focus of what has been brought forward in Bill C-58 is strongly aligned to the government-specific mandate commitments.

That question of exclusions versus exemptions is something that can be considered in that first full review of the act, which would be one year within the royal assent of the bill. I don't have a view to offer on that particular recommendation, but we observe that there definitely is an intent to undertake a full review that would go much more broadly than the amendments that are proposed today.

● (1655)

Hon. Peter Kent: It's been punted for later deliberation, more or less.

Quite a number of experts have said of the provision of appeal to a decision made by a minister or a department that in fact it would be better if the appeal were made directly to the Information Commissioner.

Is there a problem with a more direct appeal process and the commissioner's ruling than the court's?

Ms. Jennifer Dawson: I apologize, I just want to make sure I understand your question.

Are you talking about in terms of a determination of whether a request could be declined to be processed because it's frivolous or vexatious, or—

Hon. Peter Kent: Well that's sort of a secondary question, but I'm talking about the original decision on cabinet confidence, or the refusal of decision without a reason.

Ms. Jennifer Dawson: On cabinet confidence, currently it's not subject to the act, so it's outside of the Information Commissioner's purview. Again, that's something we could be looking at in a future review of the act, but right now it's—

Hon. Peter Kent: With regard to a minister or the department refusing a request, though, the right of appeal directly to the Information Commissioner would seem to be logical, given her authority.

Ms. Jennifer Dawson: Under the existing system, if a requester asks something from a department and isn't satisfied that it has been provided, essentially they have recourse to the Information Commissioner, who can help to investigate the situation and who today has a recommendation power and would provide a recommendation to a head of an institution to do something in that regard.

The order-making power that we're proposing now would create a situation in which requesters may have concerns that they haven't received what they should have. There would be still the investigation power, working with the department. There would be still a capacity for mediation and discussion among parties to try to resolve it. Ultimately, however, if issues can't be resolved, the Information Commissioner will have an order-making power, will have the ability to issue an order that says to a department, “In my view, you must release.”

In those very rare circumstances in which an institution feels that there's something that absolutely can't be released, it will have to go to court to demonstrate that it is on the right side of the Access to Information Act and demonstrate that it has been applying the act appropriately.

Hon. Peter Kent: Would the Information Commissioner's message to the department that rejection was inappropriate be privileged or public?

Ms. Jennifer Dawson: It's something that we are aware the Information Commissioner is keen to have the ability to report. As the bill is proposed, this would be done through her annual report. She would be able to provide transparency concerning the orders she has issued and her reasons, and their resolution.

Hon. Peter Kent: Thank you very much, Chair. I think I've taken my time.

The Chair: I'd like to welcome to committee MP Blaikie.

You're up next, for seven minutes,

Mr. Daniel Blaikie (Elmwood—Transcona, NDP): Thank you very much, Mr. Chair. It's good to be back. I'm sure they're all happy to see me.

One question I have had around the act, and one of the big conversations we had when we did a study of the act, was around the difference between exclusions and mandatory exemptions.

Can you explain for us whether this changes in any way the regime around exclusions in the Access to Information Act?

● (1700)

Ms. Jennifer Dawson: You are correct; it doesn't. This bill does not propose to change exclusions or exemptions.

Mr. Daniel Blaikie: In terms of the discussion we had, which said that one of the main problems with having exclusions as opposed to mandatory exemptions is that there's then no oversight at all by the Information Commissioner, if the government says that something is a cabinet confidence or that it falls in any category that is subject to an exclusion, there's no way to check that those matters are appropriately excluded or that the government has made the right call on whether or not this is something that ought to be excluded.

Ms. Jennifer Dawson: I'll be repeating myself a little bit, but this set of amendments doesn't address that issue. Without judgment concerning that view of the committee, there's a focused set of amendments in this bill, and that issue remains as something that could be addressed in the first full review of the act, which would be within one year of its receiving royal assent.

Mr. Daniel Blaikie: One other issue that jumped out for me, given some of what we heard during our study, was the failure of this particular bill to expand the access to information regime to the Prime Minister's Office and to ministers' offices. What we've heard is that because there's going to be a new kind of proactive disclosure regime ushered in, we ought to be happy with the changes, because this is a new era in—I think the phrase might even have been used—openness and transparency.

Can you just explain for the benefit of the committee in what ways having proactive disclosure requirements allows Canadians to get access to information that the government doesn't want to release?

Ms. Jennifer Dawson: I think we found, in looking at the types of proactive disclosure that are included in this bill and that do apply to ministers' offices and the Prime Minister's Office, that there is an alignment between the types of proactive disclosure that have been identified and information that we know is of interest. For example, the publication of briefing binders for deputy ministers and for ministers provides a level of information proactively that hasn't previously been available, and not only to requesters who are willing to pay their $5 and follow that process but to Canadians in general. We're hoping, through the proactive disclosure of these materials online in both official languages and accessible, that actually does offer much greater transparency than there is today.

Mr. Daniel Blaikie: How will ministers' offices establish what they want to proactively disclose? Is there any kind of threshold? If the same kinds of requests or requests for the same kind of information are made by a certain number of Canadians, is there any requirement on the minister's office to disclose that information, or is it really up to the minister's office to interpret according to its own criteria, whatever the criteria may be, what kinds of information would be subject to proactive disclosure?

Ms. Jennifer Dawson: I'd say two things. Currently, there's a specific list of proactive disclosure that's proposed in this bill and against a regular reporting timeline so it'll be a predictable schedule for certain kinds of information. There's something else that we're looking at doing as well, which is asking institutions to do a regular review of the requests that they get so they can use that analysis to increase proactive disclosure over time. We want to have a continuous improvement cycle. We're beginning something new, so it's a starting point, but the intention over time is to track the kinds of things that are being requested. As you were suggesting, if many Canadians ask for certain kinds of information, then use that information in terms of enhancing and expanding what is proactively disclosed.

Mr. Daniel Blaikie: But there's no way, through the legislation, that Canadians, by either the aggregate of their actions or by organizing collectively, could drive certain kinds of proactive disclosure, except as they could now by applying political pressure. There's no legal mechanism in the act that would make it the case that Canadians could push governments to reveal certain kinds of information that they don't want to.

Ms. Jennifer Dawson: You're correct. The bill wouldn't legislate a responsive proactive disclosure. But, I guess, the other opportunity, as well, is if there is an ongoing review of the bill, that also provides parliamentarians with an opportunity to revisit what is in there to ensure that it is reflective.

● (1705)

Mr. Daniel Blaikie: Is there anything the government would be forbidden from proactively disclosing now that it would be able to proactively disclose after this bill passes?

Ms. Jennifer Dawson: Forbidden?

Mr. Daniel Blaikie: Part of what I'm saying is do they need to change the law to proactively disclose anything? Would the law enable some kind of proactive disclosure that's not permitted now?

Ms. Jennifer Dawson: I think what it would do is entrench in legislation a requirement to proactively disclose. So you're right. Maybe you don't need a law to compel that from all governments at all times, but if parliamentarians support the bill, what it would do is create a legislative requirement for this and future governments.

Mr. Daniel Blaikie: Does it include any penalties for ministers' offices that aren't compliant with the proactive disclosure provisions in the legislation?

Ms. Jennifer Dawson: In terms of legislation, it's as with other legislation. If you're not complying with what the law requires, then you're outside of....

Mr. Allen Sutherland: That's one of the benefits of putting it in statute, that it's clear to everyone whether a minister is fulfilling the requirement that's set out for him or her.

The Chair: That's time, MP Blaikie.

We'll go to another seven-minute round to minister—not minister —

An hon. member: Not yet.

The Chair: —but Mr. Erskine-Smith.

Mr. Nathaniel Erskine-Smith: Probably not ever.

Some hon. members: Oh, oh!

Mr. Nathaniel Erskine-Smith: When it comes to Info Source, I'm not too familiar with it, but I'm reading the special report from the OIC, and there's some concern that information that would provide Canadians with a working knowledge of how to make requests in a more efficient way has been taken down, and the response seems to be that it's available on the Internet on government websites otherwise. Why would we not simply provide a digital version of Info Source? Perhaps that is the intention.

Ms. Jennifer Dawson: Info Source is something that has been associated with the act since 1983. It was created at a point in time when each institution had a reading room. You could go to the reading room to get access, typically to paper files, which would be brought to you. Info Source was typically found in hard copy, in public libraries. It was essentially a phone directory, like the white pages, which we don't use too much today.

Our intention here is to recognize that departments make available, through the Internet now, a lot of information about their programs, but it is also linked. We have a legislated duty to assist requesters. If they can find us and they have an idea of their request, we should and must help them in fulfilling their request.

Mr. Nathaniel Erskine-Smith: I take it the purpose of Info Source was to make it easier for requesters to understand how to best go about it. Generally, then, Info Source was a specific way to assist individuals. I don't know what the answer is, but I think you may want to look into prescribing some more specific version of the duty to assist, ensuring that Info Source and its underlying purpose live on online.

I asked the ministers when they were here about the rationale for not going further in applying the act to ministers' offices. One of the answers was cabinet deliberations, but as I understand it—and correct me if I'm wrong—the act currently has a mandatory exclusion in relation to cabinet confidences, and there are exemptions in relation to advice and recommendations to ministers. So I don't completely understand the rationale. Perhaps you could clear up that confusion.

Ms. Jennifer Dawson: In bringing forward a proactive disclosure regime that applies now to institutions that have never been covered under the act before, we are really trying to provide access to information that can be provided and is of interest. Typically the kinds of proactive disclosure that we're proposing relate, for example, to the use of public funds. This is a way of capturing ministers' offices and the Prime Minister's Office, as well as the institutions that support the courts.

● (1710)

Mr. Nathaniel Erskine-Smith: To put it a different way, there are other jurisdictions that have their freedom of information or access to information laws applied to ministers' offices in different ways. There may be problems in those jurisdictions, for all I know. When the department looked at this and put this legislation forward, and the minister put this legislation forward, were there countervailing considerations that this committee ought to be aware of as to why the government did not make the decision to apply the act, as it was understood before proactive disclosure, to ministers' offices?

Ms. Jennifer Dawson: The only thing I would like to add to the earlier part of my answer is a reminder that the two-step process still applies in terms of access to information in ministers' offices. If an institution could reasonably expect to have access to the information —for example, a deputy minister might have access to what's in a minister's office—and it applies to the work of the department, it is subject to the request and the system.

Mr. Nathaniel Erskine-Smith: Okay. The Information Commissioner has taken issue with what seems to me to be some vague language in the act, which is a "large number of records". That is combined with where it might unreasonably interfere with government operations. There has to be a better way. The idea of a large number of records, I don't exactly know what that means. Is this a concern that the department is looking at addressing, in terms of perhaps more precise language?

Ms. Jennifer Dawson: The policy guidance and training for institutions will be really critical in this. In the provinces and territories that have an ability to decline to process, they provide guidance and examples to help their organizations. For us, when we're taking a look at what is so large that it impedes the ability of an organization to do its work, that has to be context specific. There are completely legitimate requests that will be associated with a very large number of records. One of those, for example, might be first nations that are looking for information about their histories. There are going to be big requests, and that will need to be responded to.

Mr. Nathaniel Erskine-Smith: When we have the discussion about vexatious and frivolous requests, the minister's answer is that if the wrong determination is made, the Information Commissioner can fix that through an order. Does the same answer apply in relation to the large numbers of records?

Ms. Jennifer Dawson: Yes. The authority to decline to process a request is subject to the oversight of the Information Commissioner.

Mr. Nathaniel Erskine-Smith: There's some comfort there for citizens then to say that the Information Commissioner can ensure that this would actually be so voluminous that it would interfere with...and the public interest doesn't outweigh that.

Ms. Jennifer Dawson: That's right ,and we do have a duty to assist as well. Therefore, we will be working with requesters to try and ensure that we have a good understanding of what they're looking for, so that we can best deal with the volume of requests.

Mr. Nathaniel Erskine-Smith: I think that another concern of the Information Commissioner is when the order-making powers and the rules take effect. It occurs to me that we're going to enter into a strange situation where there's a certain class of cases before the Information Commissioner, up to today's date and until a year from now, to which order making does not apply and then there's going to be a second class, after that date, when order making does apply. I wonder why we wouldn't just defer to the best practices and expertise of the Information Commissioner to do as they see fit, give them more order-making powers for all cases, and let them do their job.

Ms. Jennifer Dawson: I think that's an interesting question. Our intent in having a transition period was to avoid confusion in the system, where some investigations began under one process and shifted to another, but it's something to—

Mr. Nathaniel Erskine-Smith: It might be even more complicated for them, but I would leave it to them to—

The Chair: That's time.

Mr. Nathaniel Erskine-Smith: It might be even more complicated to have a dual system in place for an extended period of time. We may want to have them weigh in and listen to their advice.

The Chair: Thank you, MP Erskine-Smith.

The next five-minute round goes to MP Gourde.

[*Translation*]

Mr. Jacques Gourde: Thank you, Mr. Chair.

Are there provisions within departments to restrict access to information for national security reasons? Do we refuse to give out certain information because it could compromise the safety of Canadians, such as disclosing details about certain security systems that the National Defence might have bought? If some foreign countries knew how much they've cost, they could have an idea of the equipment that we have. Do such provisions exist?

● (1715)

[*English*]

Ms. Jennifer Dawson: Yes. The existing Access to Information Act does include provisions to consider the protection of some information that would either be of harm to the national interest, if released, or of harm to individuals, so we have not proposed any changes in terms of those existing provisions.

[*Translation*]

Some of these provisions are at the discretion of departments.

[*English*]

In those situations where we have discretion, the idea is to ask ourselves, how can we be open to the greatest extent possible, while protecting that small piece of information that must be protected? That's part of education, training, and consistency in the system that we need to continue to advance. In spring 2016, we issued an interim directive that reminded people of the importance of being open by default and leaning to openness when they are making interpretations where discretion can be applied. However, other than information that is excluded, there is a recourse to the Information Commissioner to ensure that discretion is being appropriately applied.

[*Translation*]

Mr. Jacques Gourde: Is this recourse used from time to time? Are there statistics that show that, in certain cases, the commissioner had to clarify the situation?

Ms. Jennifer Dawson: Yes, we do have statistics that indicate every time exemptions were granted. Most of the time, they are granted when personal information or information regarding international affairs or national defence are concerned, or in the case of a strengthening of the legislation or investigations. In reality, most of the time, it serves to ensure confidentiality of information related to one person or to national defence, or in other situations, of information pertaining to the strengthening of the legislation.

Mr. Jacques Gourde: Thank you.

That's all for me.

[*English*]

The Chair: That's four minutes. Thank you, MP Gourde.

Next up, for a five-minute round, is MP Baylis.

Mr. Frank Baylis: I'm rather new to the committee, so my questions may be a little more general and less detailed.

I was curious to understand whether what is being proposed had been compared against best practices, say, in foreign jurisdictions, or what various provinces are doing. Has that work been done?

Ms. Jennifer Dawson: Much of the work of thinking about declining to process requests has been based on taking a look at what is done in provinces and territories and talking to our colleagues in those jurisdictions—

Mr. Frank Baylis: —and pulling on their expertise to see what has worked and what doesn't work?

Ms. Jennifer Dawson: —yes, and having a look at how their legislation is framed as well.

What's different for the provinces and territories is that they typically have a single commissioner who is responsible for both access to information and privacy.

Mr. Frank Baylis: That person is naturally, inside himself or herself, making that balance, then.

Ms. Jennifer Dawson: That's right. What we're also trying to ensure in the proposal that we have is that there.... For example, in the order-making power, what we have proposed is that the Information Commissioner have an order-making power, but the Privacy Commissioner could in appropriate circumstances be involved to ensure that the appropriate views of both commissioners are brought to bear.

● (1720)

Mr. Frank Baylis: It's always the question of whether you over-divulge or under-divulge and how you find the medium. You're saying that the provinces, because it's all within one person's department, can themselves more easily adjudicate that, as opposed to having to....

Ms. Jennifer Dawson: It's a different model from the federal model, but it brings together very closely considerations of both access to information and protection of privacy.

Mr. Frank Baylis: In the case of a minister's office, or specifically the Prime Minister's Office, much of what is going to be discussed there is clearly not meant for general consumption. Even if people think they have a right to know, there are things that they just can't or shouldn't know.

Is any of that happening at the provincial level, such that there's access to information within the premier's office?

Ms. Jennifer Dawson: In some jurisdictions, the records within ministers' offices are considered to be departmental records. In other jurisdictions, that's not the case.

Mr. Frank Baylis: It depends on the jurisdiction, then.

Ms. Jennifer Dawson: Yes, it does.

Mr. Frank Baylis: What would be the dangers or consequences of, say, looking at something like this and trying to arrive at a balance between access to information and privacy? We have to get the right balance. There's always the concern about whether we over-divulge or under-divulge. When these things happen, I always like to err on the side of caution; that is to say, we've never done this, and we're going to start doing something.

If I understand correctly, this is the first time anything is going to be happening coming from the federal government, from the minister's or the Prime Minister's Office, in effect, this proactive disclosure. Is that correct?

Ms. Jennifer Dawson: That's right, and it's a pretty significant change.

Earlier, Minister Gould was speaking to the publication of mandate letters, and she described a situation in which bureaucrats previously working within the departments were affected by those mandate letters but really did not have exposure to them. Today there's public access. There is, then, a significant change here, and it's—

Mr. Frank Baylis: These are pretty significant changes, then. I understand that some people might argue that it's not enough, but what is enough? It's always difficult to find, when you've never been there, the right balance. If I understand correctly, however, these are fairly major changes, although arguments could be made that even more should be done.

Ms. Jennifer Dawson: Yes. It's the first time that the act is applying to ministers' offices and the Prime Minister's Office as well as to the institutions that support the courts and Parliament—and the Senate.

Mr. Frank Baylis: Yes. As I said, I am normally of the belief that there's no exact right or wrong. Who knows what is right or wrong in this area when we're trying to find the balance?

My personal feeling would be, if we're going to make an error, let's under-divulge, let's err on the side of caution. It would always be caution, and then we can always add to it later. Is that correct?

Ms. Jennifer Dawson: The first full review of the act, which would take place within a year of royal assent, would provide, in shorter than the normal five-year cycle, an opportunity to see what is working, what has begun working, or what is maybe not working as well as it needs to.

Mr. Frank Baylis: So it's a good step, and we can go in a certain direction and come back and look at it again.

Ms. Jennifer Dawson: That's why the approach that we've been taking is to bring forward a bill that focuses very specifically on some important commitments that were made and to support the government in advancing those, but to ensure that also in the bill there is an ability for a full review in short order to go further.

Mr. Frank Baylis: It also gives you a chance to look at those, the law, from a—

Am I done?

The Chair: Go ahead and finish what you were—

Mr. Frank Baylis: I was just saying there is always the law of unintended consequences, so we end up trying to do something, but pretty quickly we'll have a look at it and say, “Hey, this is working the way we expected” or “Maybe it's not working”, and you'll be able to catch this at that time. Is that correct?

Ms. Jennifer Dawson: The intent is for the ongoing reviews to allow parliamentarians to have that discussion.

The Chair: Thank you.

The chair is going to take some discretion and ask you a question, Ms. Naylor, if you're ready to answer. It is with regard to the firearms registry and the earlier copy that was requested by a certain Bill Clennett. It was concerns about what was in that information.

There was a copy of 120,000-plus pages of Canadians' information given to one individual because he simply requested it. It goes to what has been asked on both sides about who decides on what's redacted, who decides in your office who gets what. The concern is I've tried to obtain a copy of what was given to Mr. Clennett and was told I would not be able to get a copy of what he received. The nearest I could find is that the information was redacted, but he was able to obtain postal codes of firearms owners across this country. The concern is with the private information, even as a state actor, on that level, to know where everybody's personal property exists in different neighbourhoods around our country. I think it is alarming, to say the least, that one individual would obtain this information.

Getting back to the original question, who decides on what level of redaction, or who in your office decides what level of information is actually given out to the public?

Thank you.

● (1725)

Ms. Ruth Naylor (Executive Director, Information and Privacy Policy Division, Chief Information Officer Branch, Treasury Board Secretariat): Thank you very much for the question.

To clarify my role, I've been involved in the development of the bill, as opposed to making decisions about access to information requests. We have another unit at the Treasury Board Secretariat that is responsible for that. So I can respond at a general level to how these decisions are made.

The act, as it now stands, sets out certain discretions, but the ultimate accountability is for the head of the institution. That's delegated down generally to access to information coordinators to exercise those discretions on the part of ministers, and there's very clear guidance provided about how those discretions are to be exercised, if that helps.

The Chair: Do you have a set of guidelines as a document that you could provide to committee?

Ms. Ruth Naylor: We have a very large set of policies that exist right now, as well as a manual that we provide. It's actually available online, so we can provide the information to the committee on that.

The Chair: Thank you. That's all I had.

We still have approximately five minutes. We'll go to MP Dubourg for five minutes.

[*Translation*]

Mr. Emmanuel Dubourg (Bourassa, Lib.): Thank you, Mr. Chair.

It’s my turn to greet you and to bid you good afternoon.

I would like to follow the example of my colleague Frank Baylis and ask a very general question. As we all know, Bill C-58 concerns the Access to Information Act and the Privacy Act.

Certain departmental documents are labelled “PROTECTED”, “SECRET”, or “TOP SECRET”. Do they continue to be accessible? What does Bill C-58 provide for these types of documents?

Ms. Jennifer Dawson: Documents are classified based on the sensitivity of their content. For example, in a classified document, there could be only one sentence to keep from disclosing. In those cases, we provide the whole document without that confidential sentence. The system used to label documents does not really allow to determine if content can be disclosed in part or in whole.

Mr. Emmanuel Dubourg: I’m asking you this because in 2011, we saw situations where entire sections of memoranda had been redacted, for instance when environmental situations were concerned, given the policies of certain groups.

If Bill C-58 is passed, would it still be possible to redact almost all those memoranda that would be publicly released?

Ms. Jennifer Dawson: Bill C-58 in no way impacts exemptions and exclusions. As such, the current situation would not change.

Mr. Emmanuel Dubourg: All right.

[*English*]

The Chair: I would like to thank those who appeared at committee today for your time and for answering our questions.

The meeting is adjourned.