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Chair

The Honourable Shawn Murphy

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• (1530)

[English]

The Chair (The Honourable Shawn Murphy (Charlottetown, Lib.)): I will now call the meeting to order.

I want to welcome everyone here today. This is the 50th meeting of the Standing Committee on Access to Information, Privacy, and Ethics.

The committee is very pleased to have today witnesses from CBC/Radio-Canada, represented by the president and chief executive officer, Monsieur Hubert Lacroix. He is accompanied by Maryse Bertrand, vice-president of real estate, legal service, and general counsel. And from the Office of the Information Commissioner of Canada, we have the Information Commissioner, Suzanne Legault.

On behalf of all members of the committee, I want to extend a welcome to everyone.

We're going to ask for opening comments. First of all, we're going to turn the floor over to you, Madame Legault, and then we're going to hear from the CBC. But before we do that, I want to make a few comments, just to set the context and the framework of today's meeting.

As everyone is aware, Canada has access to information legislation. In a nutshell, it means any Canadian citizen or resident can, upon completing the required application forms and paying the required fee, obtain information that is in the hands of the government that is not protected by privacy, national security, commercial interests, or for other legitimate reason. This legislation applies to all government departments and now most government agencies and crown corporations. However, this committee, unfortunately, has seen situations where some government departments and agencies are basically not following the legislation, and instead of providing information in 30 days, they're averaging 70, 80, 90, and in some cases in excess of 150 days. They are refusing to disclose information for no apparent or legitimate reason. On the other hand, many departments and agencies have no difficulty whatsoever in complying with the legislation, and they deserve the commendation of this committee.

Each year the Office of the Information Commissioner does an audit or analysis on a number of departments and agencies and the office rates them. This report is tabled in Parliament and is of course available to the public. In last year's report card, the Information Commissioner reviewed ten departments and agencies. Some, through strong leadership, were outstanding or above average. Unfortunately, five were unsatisfactory or received an F from the

commissioner. These departments or agencies were National Resources Canada, CIDA, Correctional Services Canada, Canadian Heritage, and Environment Canada. Foreign Affairs and International Trade received an off-the-chart rating and a red alert. These ratings, of course, are of great concern to this committee.

Two weeks ago, the Information Commissioner tabled her 2009-10 report. She reviewed eight smaller agencies or offices of officers of Parliament. In this review, six of these offices received an above average rating. These offices were the National Arts Centre Corporation, the Office of the Auditor General of Canada, the Office of the Information Commissioner of Canada, the Office of the Privacy Commissioner of Canada, Atomic Energy of Canada Ltd., and VIA Rail Canada Inc. All members of this committee want to thank and congratulate the management and staff of these organizations.

Unfortunately, not unlike last year's report card, there were two crown corporations that received an unsatisfactory assessment. First, CBC receive an F, or an unsatisfactory assessment, and, more alarming, Canada Post received a red alert or off-the-chart rating. It's quite likely that Canada Post will be called before this committee to explain why they have failed, if you accept the assessment and information given to us by the Information Commissioner, and refuse to follow the access to information legislation.

Today, as I've already indicated, the committee is dealing with the CBC. The CBC is in a little unusual position, in that their reporters and producers use, quite correctly, I hasten to add, Canada's access to information legislation in preparation of their products. Again, if you accept the findings of the Information Commissioner, they're in the dubious position of explaining to Parliament, through this committee, why they want every department and agency within the Government of Canada to follow this legislation, whereas they, themselves, do not follow the legislation. Again, that's if you accept the findings of the Information Commissioner.

The committee takes this matter very seriously and is pleased to have the Information Commissioner with us today, as with the chief executive officer of CBC.

I'm now going to turn the matter over to the Information Commissioner for her opening remarks. Again, welcome to the committee.

Ms. Suzanne Legault (Information Commissioner, Office of the Information Commissioner of Canada): Thank you, Mr. Chair.

My remarks today will address the report cards contained in my special report entitled "Open Outlook, Open Access". I will also briefly speak to my office's experience with the CBC in investigative matters. However, before I discuss these two issues, Mr. Chair, I would like to express my thanks to the committee for the follow-up it did on last year's report cards exercise. The report and the work of the committee in this regard ensured that federal institutions are held accountable for their performance in complying with the act.

As noted in this committee's twelfth report, the purpose of the report cards is not to chastise institutions. The process is a tool at my disposal to effect greater compliance with the requirements of the act. It allows me to see compliance issues in their full context and to recommend meaningful solutions. With this in mind, my office undertook a report card on the performance of the CBC and made four recommendations to the institution on ways to improve their compliance with the act.

Right from the start, in September 2007, CBC struggled to respond to access requests due to an initial downpour of requests in the first few months that it became subject to the act. Subsequently, my office received 534 complaints against the CBC between September 2007 and April 2008, which represented 22% of all complaints registered by my office that year. Most of these complaints were delay-related. In fact, since 2007 the CBC has consistently been in the top three institutions against which complaints are filed with my office.

As you mentioned, the CBC received an F rating because of the delays in processing access requests, the high deemed-refusal rate, and the long average completion time, which is 158 days. These delays were largely due to the backlog of requests CBC carried over from the previous years. We noted, however, that they also reflected long retrieval, review, and approval processes.

• (1535)

[Translation]

Towards the end of 2009-2010, we saw signs of improvement in CBC's performance, in terms of backlog reduction and a shorter response time for new requests. As a result, the number of delay complaints registered by my office has decreased this year.

Prior to coming here today, I surveyed some of my investigative staff to get their views on the CBC's performance in the current reporting period. They felt that the CBC has made efforts to improve the effectiveness of their internal processes and to provide more timely responses to requesters. Most notably, they indicated that there is good collaboration with the new ATIP director at the CBC.

I noted in my special report that, as a result of the legislative changes introduced by the Federal Accountability Act, the act now has an increased level of complexity that causes uncertainty in the legal interpretation of these new limitations. For example, under section 68.1, the Act does not apply to any information that is under the control of the CBC that relates to journalistic, creative or programming activities other than information that relates to its general administration. Consequently, my office deals with more complaints against new institutions and is involved in more litigation, including one involving Canada Post.

[English]

The CBC has refused to provide investigators in my office with records that it claims are excluded by section 68.1 of the Access to Information Act. This approach, it is notable, differs from that taken by Atomic Energy of Canada Limited, which provides my office with all information it claims to be excluded under their section 68.2 of the act.

I fundamentally believe, Mr. Chair, that an independent review of the records or information withheld by CBC is essential to ensure that the exclusion has been properly applied.

The scope of my investigative powers in relation to CBC's refusal to disclose records under section 68.1 is, as you know, the subject of litigation. In the first instance, the Federal Court ruled in favour of such an independent review by my office. The court explained that I must have the authority to determine in an objective and independent fashion if the records fall under the ambit of the exception and if they qualify for exclusion. This decision is currently before the Federal Court of Appeal, which limits my ability to make further comment on the matter. However, I note that due to this ongoing litigation, my office has suspended investigations in more than 180 refusal complaints relating to section 68.1. Some of these complaints go back as far as 2007.

Mr. Chair, the delays caused by this litigation have had a significant impact on the ability of the public to obtain public sector information in a timely way. I'm concerned that there may be further delays once these legal proceedings are over. It has been the experience of my office, while investigating some of our old complaints, that an institution's access request processing file has been incomplete, and responsive records have often been difficult to find and retrieve; electronic information has sometimes been deleted, and personnel knowledgeable about the requested information have no longer been available. Therefore, I would suggest that a best practice for institutions in which access to information requests are subject to litigation would be to ensure that the search, retrieval, and processing of responsive records be completed and held in abeyance until all proceedings are completed. This will ensure that no further delays occur after the end of litigation.

• (1540)

[Translation]

I urge this committee to do what it can to ensure that the recommendations made to the CBC in its report card are implemented and that the impact of the delay resulting from the ongoing litigation is minimized.

Thank you.

[English]

The Chair: Thank you very much, Madame Legault.

Now we're going to hear from the CBC and Monsieur Lacroix.

[Translation]

Mr. Hubert T. Lacroix (President and Chief Executive Officer, CBC/Radio-Canada): Mr. Chair, members of the committee, thank you for the opportunity to talk with you today.

I am sure you have seen stories about CBC/Radio-Canada and access to information. And almost all of that likely in the *Sun* and *Le Journal de Montréal* newspapers, owned by Quebecor. I'll talk a little bit about that in a minute, but first I would like to address our performance under the Access to Information Act.

We received an "F" for the year ending March 31st, 2010. No one at CBC/Radio-Canada finds that grade an acceptable one, and we have been working to ensure that it is not repeated. In fact, in her report and remarks, the commissioner pointed to our improvements since March of last year, and I can tell you that we appreciate the recognition.

Let's look at the record on deemed refusals for example. When we came under access, our resources were frankly overwhelmed by an unpredictable volume of requests. We had hired three full-time and one part-time staff for the ATI office based on the advice we had received from other organizations about how many requests we could reasonably expect in the first year. No one predicted we would receive 434 requests in the first two months alone. This led to complaints about delays in responding within 30 days—the deemed refusals.

In 2007/2008, our deemed refusal rate was about 80.5%. We have worked very hard since then to fix this. We've dedicated more resources—we now have seven full-time staff to process requests. We've developed better internal procedures, and we've worked collaboratively with the commissioner's staff to respond to complaints in a way that is prioritized and transparent. I can tell you that our record has improved every year since.

[English]

Last year, as the commissioner reported, our deemed refusal rate was down to 50.7%. This year, to the end of February, it has fallen to 20.17%. In fact, in this fiscal year we have received one deemed refusal complaint, which was subsequently withdrawn.

The average number of days it has taken to respond to a request has also dropped, from a high of 187 to 61. As I said, we're working at this and we are committed to meeting the commissioner's expectations.

We've also been doing more. This year we posted on our websites over 24,000 pages of documents that have been released under access to information so that they are easily available to any Canadian. These documents include information on agendas, audits, policies, and retreats, as well as all invoices submitted with the expenses of senior management. This is in addition to the expense reports we already publish proactively each quarter. As you know, posting this material goes beyond what is required under the act. In fact, no other federal institution has made so many access documents available on its websites, and we will enhance this service and keep adding additional categories of information in the months ahead.

We continue, though, to receive a large volume of requests for access to information. In fact, of the organizations graded in the commissioner's most recent report, we recorded the highest number of new requests: 247 for the year ending March 31, 2010. The next closest was 108 at Atomic Energy of Canada. Canada Post received 78. The Information Commissioner received 28. In total, as of March 4, CBC/Radio-Canada has received 1,340 requests for information

under the act. We've responded to 1,307 of those and released over 77,800 pages of information.

One would think that all of these requests reflect Canadians' interest in CBC/Radio-Canada, but by its own admission, most of these requests have been filed by Quebecor Media Inc. They have every right to do so, of course. Our own journalists use access to information to support their reporting, as the chair pointed out a few seconds ago. The difference is that we don't use ATI to seek information about our competitors and we don't use it in a campaign to further our own commercial interests. Quebecor newspapers insist they are, to quote them, "holding the public broadcaster to account". However, that's not what they call their series. They call it "Down the Drain", and the 66 stories they have run under that banner demonstrate that their motivation is to attack a competitor and to promote and benefit their own news channels.

• (1545)

[Translation]

For our part, as strong believers in accountability, we will keep improving our performance in handling access to information requests. But when others use that information to distort or misrepresent the facts about the public broadcaster, we will speak out.

I think I should also say a few words about the case between CBC/Radio-Canada and the information commissioner that is currently before the federal court. CBC/Radio-Canada is the only journalistic organization subject to access to information. Parliament recognized that our independence as a public broadcaster needed to be protected and, so, specifically excluded from the act information that relates to our journalistic, creative or programming activities.

[English]

The commissioner wants to be able to review material that is excluded from the legislation. We believe that only a judge should have the right to demand the disclosure of information that relates to our creative activities or is journalistic or program-related. It is important to clear up any confusion over the rules under which we operate.

Finally, a word about accountability. CBC/Radio-Canada is a \$1.7 billion corporation. Two-thirds of that comes from Canadian taxpayers in our parliamentary appropriation. I believe Canadians should be assured that such an investment delivers value to them, not just in terms of the services they can see and hear every day, but in the way we operate. That is why each year we report on operations to our minister, to the CRTC, and to Parliament. It is why the Auditor General reviews our books annually, with a special audit every 10 years; it is why we post on our website the travel and hospitality expenses of our senior executives; and it is also why we are subject to access to information.

We recently published our 2015 strategic plan, a road map for what Canadians can expect from their public broadcaster over the next five years. With this plan, which is on our website, comes specific metrics to measure and report on our progress twice a year.

It is through all of these measures, Mr. Chairman, that I believe Canadians will have confidence that their investment in CBC/Radio-Canada is a good one.

Maryse and I would be happy to take your questions.

The Chair: Thank you very much, Monsieur Lecroix.

We're now going to go to the first round—that's seven minutes each—and we're going to start with Mr. Easter.

Mr. Easter, you have seven minutes.

• (1550)

Hon. Wayne Easter (Malpeque, Lib.): Thank you, Mr. Chair.

And thank you, witnesses.

One of the concerns with some of the agencies, and not only your own, not only CBC, was that when the government applied access to information to them—the Canadian Wheat Board is another one.... There are certain people out there who really want to use access to information, I believe, to either find reasons to attack the CBC or the Canadian Wheat Board or find ways in which they might be able to gain commercial advantage. That happens with some agencies, and I think CBC is one and the Canadian Wheat Board is another.

In any event, you go into Quebecor somewhat.... You do say that you've received 1,340 requests for information under the act. How many of them would be from regular citizens and how many would be from Quebecor? Do you know?

Mr. Hubert T. Lacroix: Sir, as you know, the identity of the requester is something that is not made public. However, Quebecor representatives and people who are making these requests under the act have actually provided this information in interviews or have volunteered this information. Based on that, to the best of our knowledge, out of the first 430—some in the first couple of months, 400 came from the same source, Quebecor Media Inc. When we were up to about 1,100...about 800 of those requests also came from Quebecor Media Inc. So you can actually forecast this to about 1,340 and it gives you an idea of what the numbers would be. They actually said thousands, in some of their interviews, and they were very clear that they were pushing these requests on all sorts of subject matters in front of us.

Hon. Wayne Easter: Mr. Chair, I don't know where we can go on this type of thing. I'm a very strong supporter of access to information, but I'm not a supporter of access to information being used as a disruptive tool or a way of undermining an agency. As I said earlier, I think we will see that in other areas.

What this is, in my view, is probably an abuse of the system. The system was set up with the best of intentions, but this is an abuse of the system for somebody else's commercial interests or for a political agenda to get rid of or undermine our public broadcasting system, which I will admit I'm a strong supporter of. Do you have any idea how that can be handled?

On the other hand, I am concerned about the F rating for CBC, because, as the chair had mentioned earlier, we all use access to information, and in particular CBC journalists and reporters do, and they expect departments, the government, and others to abide by the rules. So an F rating isn't very good.

We're kind of caught in a quagmire here. We want to see the legislation abided by, but how do you prevent frivolous access requests or those for other political agendas from monkeying up the system?

Mr. Hubert T. Lacroix: I have a couple of comments, Mr. Chairman, on that question.

First off, Quebecor has all the rights of any other citizen in this country to make requests under the act. That's not the issue.

We are disappointed with the F rating. We are working at making this better. You heard that the numbers are better. The commissioner, in her remarks when she tabled her report, actually alluded to them. She alluded to them again today. We're not satisfied with that, and we're going forward. The law in its present state right now doesn't have anything that covers "frivolous" and who decides what frivolous is in terms of the requests that are made. We just want to make sure everybody understands the situation we're in and the environment under which we play.

• (1555)

Hon. Wayne Easter: In those areas that relate to your journalistic, creative, or programming activities that you talk about—and you got a dispute with the Access to Information Commissioner there—I don't know whether you can or not, but can you give me examples of areas, beyond those words, of what that applies to? One of the complaints we will have against the government is that national security will be used as a reason for not providing information or cabinet confidence. Sometimes these little silos are used to prevent legitimate information from coming forward. Can you expand that a little further?

Mr. Hubert T. Lacroix: Absolutely, sir.

As you read, the act provides for an exclusion on all of our journalistic, creative, and programming activities. Those words are not words that the legislator chose with no purpose. Those are the exact words that come out of the Broadcasting Act. So they've lifted that, and I assume, in the way the act was drafted, that they wanted to ensure the integrity of the activities of the national public broadcaster. That's very important.

I'll give you an example of one of our journalists, let's say in Quebec, doing an important probe on the construction industry, having a couple of journalistic sources, and these sources not being identified to even the management team at CBC/Radio-Canada. Under the Broadcasting Act, certain of the information that we have in our hands is not even available to our minister or the Minister of Finance, or is not disclosable because it's protected by these words. The example of our sources of information is, I think, the most obvious one.

Maryse, would you like to add something to that?

Ms. Maryse Bertrand (Vice-President, Real Estate, Legal Services and General Counsel, CBC/Radio-Canada): Thank you.

Actually, Hubert has described it very well. The greatest fear we have concerning the application of the act is with regard to the protection of our journalistic sources. As Hubert indicated, there's a system in Canada where even a court does not get access to that information unless a very specific test, a very rigorous test, is applied by the judge.

What essentially the litigation with the commissioner is over is whether we're going to have a two-speed system where, on the one hand, a court has to go through a rigorous process in order to see the names of our sources, and the commissioner does not.

The Chair: Thank you, Mr. Easter.

Madame Freeman, *sept minutes*.

[*Translation*]

Mrs. Carole Freeman (Châteauguay—Saint-Constant, BQ): Good afternoon.

I would first like to thank Ms. Legault and Mr. Lacroix for coming to testify today. I also want to point out the excellent work of CBC/Radio-Canada, which is most appreciated in Quebec as a source of culture and information. It is a considerable asset for Quebec society in all aspects.

Having said that, I would like to ask Ms. Legault a question.

When you did the performance evaluation, did you take into account CBC's unusual situation? By "unusual situation", I mean the incredible number of requests made to CBC in a very short period of time. It was understood later that it was a single requester who made most of those requests. Have you seen this kind of situation in other departments?

Ms. Suzanne Legault: The performance report card is quantitative for the most part. We evaluate whether the responses to the requests are provided on time. As part of our investigation into cases in the first year that CBC was subject to the access to information measures, we took it into account. In fact, the commitment dates had been negotiated with CBC to respond to the number of requests received in the first year. All the same, the commitment date covered a period of one year and it had been taken into account in the investigations.

You asked me if I have seen this type of situation in other departments. The answer is yes. In this year's annual report, I am going to discuss a similar situation involving another government institution. At this time, there are no provisions in the federal legislation that allow us to determine whether the requests are frivolous or vexatious. Other legislation allows this. Nor is there a provision like the one suggested two years ago by former commissioner Marleau as part of his recommendations to this committee. He suggested that there be a provision to make it possible to obtain an extension when a number of requests are submitted at the same time by the same requester. This does not exist in the current legislation.

Obviously, when we prepare a report as part of investigations relating to this type of situation or when we prepare a report on performance, we cannot really take this into consideration. We can only relate certain facts to explain the context, which is what we did in our report.

• (1600)

Mrs. Carole Freeman: If I understand correctly, Ms. Legault, you gave a score of "F" in accordance with the tools provided by the legislation and, in accordance with this legislation, you have to use a factual approach. With regard to Mr. Marleau's recommendation concerning frivolous or vexatious requests and extensions in the case of requests from a single requester, would you support those kinds of amendments?

Ms. Suzanne Legault: Yes, particularly if, as I heard recently, the government considers increasing the fees imposed on requesters. It would be a sort of user fee. I would not support it at all. The act needs to be amended and, in my opinion, certain examples are more appropriate than others.

Having said that, the frivolous and vexatious requests are very rare. I've been doing this job for about two years now, and I have not had to deal with that kind of situation. I am issuing a warning here, given that I am going to mention it in my annual report once we have completed certain investigations this year. It really must be a review mechanism. What is frivolous and vexatious to one person, may not necessarily be so for the commissioner, when the review is done.

Mrs. Carole Freeman: In the case we are looking at, the matter of the extension is much easier to evaluate, isn't it?

Ms. Suzanne Legault: Yes, it should really be a more objective procedure, based on the number of requests submitted by the same requester within a very limited period of time. Under those conditions, the institution would be able to get an extension.

Mrs. Carole Freeman: Ms. Legault, I am going to ask you one last question before asking Mr. Lacroix one.

Given what you've been able to observe, in other words, the percentage of deemed refusals going from 57.7% to 20%, the delay going from 185 days to 61 days, and there no longer being any complaints, we can imagine that, right now, the rating would not be an "F".

Ms. Suzanne Legault: I can't say that for certain. The information that we were provided, specifically the information in the performance report cards, focuses on the past fiscal year. I would like to clarify that, over the course of the past fiscal year, there were not 537 requests made by the same requester at the same time. There were a number of them.

Having said that, there really seems to have been improvements this year. It's clear in terms of the complaints. The information that I gave you will help you see that, now, the complaints end much more often in a refusal than a wait.

Mrs. Carole Freeman: Mr. Lacroix, the information commissioner made four recommendations for you: show more leadership in terms of access to information at CBC; submit a multi-year plan; provide training to employees; and bring the number of deemed refusals to zero.

Can you tell us if you have already begun to work on this and, if so, what progress you've made?

•(1605)

Mr. Hubert T. Lacroix: Absolutely. The service responsible for everything relating to access to information is run by Maryse. In a few moments, she'll give you some details about leadership and the resources that we have added to ensure, with the 22 information coordinators who provide liaison, that the processes are better.

Like everyone here today, I am not happy with the "F" rating that the commissioner gave us. There is no doubt about that. We are committed to improving the situation. We are working on this and we plan to meet Ms. Legault's expectations.

Maryse, would you like to talk about the additional resources?

Mrs. Maryse Bertrand: Yes, I'd be happy to.

As we mentioned, we initially had three and a bit resources. Now there are seven and a half resources. For the year starting April 1st, we added one and a half resources to the 22 coordinators working in our organization. These people help us do this work.

[English]

The Chair: Merci, Madame Freeman.

We're now going to go to Mr. Siksay for seven minutes.

Mr. Bill Siksay (Burnaby—Douglas, NDP): Thank you, Chair.

Thank you to the witnesses for being here today. It's very helpful that you're present.

I want to continue with what Madame Freeman was just asking Monsieur Lacroix and Madame Bertrand.

One of the recommendations of the commissioner in the report card dealt with the question of reducing the deemed refusal rate to zero. In the CBC's report, you say that a deemed refusal rate of less than 5% appears to be a realistic target. It concerns me a little that the CBC seems to be saying they're not going to get to zero, they're going to set another target, whereas I think complying with the law might require a zero target. Can you tell me why you're talking about 5%, instead of reducing to zero?

Mr. Hubert T. Lacroix: We have to deal in an environment that is constantly changing in terms of numbers of requests. We will raise that bar, Mr. Siksay, and the intention is to meet the commissioner's recommendations over time.

Mr. Bill Siksay: Has it changed since you responded to the original recommendation? Would you now say that your goal is to meet the zero target?

Mr. Hubert T. Lacroix: Our goal is to ensure that when Madame Legault puts out her next report or follows up on the recommendations she made to us, she will be pleased with what she sees.

Mr. Bill Siksay: Madame Legault, Madame Freeman was also asking you if a new grade was coming for the CBC, a mid-term grade. I know you said it wasn't possible to do that because I know you go through a very extensive process on your report cards, but could you give them a different grade at this point from what you've seen? Are the categories where improvement has been made significant enough to at least consider changing that grade to something else?

Ms. Suzanne Legault: I'm reluctant to change a grade without having seen a full year's analysis of data. I don't do that. I have noted improvements. I'm satisfied with the improvements. The reason I'm reluctant is that it has happened in the past that with the best of intentions people say in their responses to the report cards that they will follow up and that they will implement action plans, and they do not follow through. So we will see with the follow-up.

I'm pleased with the way our investigations are going with the CBC, with the cooperation we're getting with the CBC as part of these investigations. I'm pleased to see that the delay complaints have gone down significantly. We're now dealing with refusal complaints, which is where I always say all institutions should be.

As for deemed refusal, I agree with you. The law says no deemed refusal, and that should be everybody's goal.

Mr. Bill Siksay: I know you can't comment on the court case related to the exclusion issue, but I wonder if in other jurisdictions there is helpful guidance. Is the exclusion clause in our law different from what we find in other jurisdictions?

I know other public broadcasters are subject to the freedom of information laws of their countries. From your discussions at CBC/Radio-Canada with other public broadcasters, and commissioner, from your conversations with other commissioners who have roles similar to yours, are there improvements that need to be made in the Canadian law? Is the Canadian law different from that of other jurisdictions? Are there other jurisdictions that do it better? Have other public broadcasters had problems similar to those that CBC/Radio-Canada feels it has had?

•(1610)

Ms. Maryse Bertrand: I'll take that one, and Madame Legault can chime in.

We're going to be circumspect. We are in front of the court, and out of respect for that process we'll limit our remarks to the generalities.

As to the actual litigation with the commissioner, it's over a point of procedure, an important point of procedure. It's whether or not she can actually look over our shoulders, as it were, and see for herself what the information is about. I'm not aware that the process is the same in other jurisdictions. What we do have in common with the BBC is the infamous exclusion about programming and journalistic and creative activities. But in respect of the process, I'm not aware that their process is the same as ours.

Mr. Bill Siksay: Madame Legault.

Ms. Suzanne Legault: It's important to understand that the litigation is not about the meaning of journalistic source programming or created material. That is not what is before the court at this point. What is before the court is my right to review the records that are the subject of an access request where CBC alleges that section 68.1 should be applied. So it is about the right of independent review by my office of these records, to determine whether the institution has applied the exclusion appropriately. That's the subject of the litigation right now.

As to other jurisdictions, I asked my team to look at what's going on in Britain with the BBC. There was also litigation in the BBC. The definition is a little different over there. But that information is excluded from the purview of the act as well. It's different in the U.K. There's the Information Commissioner and there's an information tribunal, which has the right to review everything *de novo*. That same issue was before the court, the information tribunal, in the U.K. The information tribunal determined that it had the right of review and that the Information Commissioner had the right of review. I believe this is the case, but I'm not strong on that point. We could make sure that what I'm saying is accurate and provide that to the committee. I have asked my staff to review the matter.

Mr. Bill Siksay: I have one other question for CBC/Radio-Canada. Today the commissioner made some suggestions about how to prepare for the resolution of the court case. Work should be under way to prepare a response to what's outstanding, without any further delay. I'm wondering if these are suggestions that CBC/Radio-Canada is prepared to carry out.

Mr. Hubert T. Lacroix: We'll look at the words again, but I just want to make sure, Mr. Chairman and Mr. Siksay, in particular, that you understand that information is part of what we do every day. It's our mission. It's our *raison d'être*, and the last thing we're going to do is not comply with the law.

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

We're now going to go to Mr. Calandra. Mr. Calandra, you have seven minutes.

Mr. Paul Calandra (Oak Ridges—Markham, CPC): Thank you, Mr. Chair.

Thank you all for coming here. We've been waiting for some time. I know that we've been talking about open government for a bit. Your appearance was a bit delayed, but I appreciate it. I know that there's a lot going on.

I just wanted to ask you something, Madam Commissioner, just to be absolutely certain. We were told that the situation has been improving, but that at this point you haven't been reviewing anything that would allow you or lead you to change your grading at all in any way, shape, or form.

Ms. Suzanne Legault: I'm just saying that I don't have the full data set to give you another grade on the report card. There's a fairly lengthy questionnaire my office goes through with an institution. So I'm not prepared to do that. What I'm prepared to say is that there are significant signs of improvement.

Just as an example, Monsieur Lacroix stated that it now takes 61 days to process requests, whereas the information we have in the report card says 51 days. I'm a little bit puzzled by that.

What I'm saying in terms of giving another grade is that I don't have the data in front of me. What I have here in the report card relies on what the CBC has told us, as part of our questionnaire, and there are significant signs of improvement. There are also significant signs of improvement in relation to delay complaints in my office this year.

Yes, there are definite signs of improvement. They've accepted our recommendations. We shall see next year.

• (1615)

Mr. Paul Calandra: The act doesn't, I know, but does your office discount access to information requests? I guess this would be a question for both of you, including Mr. Lacroix. Do you discount information requests based on who's making the request, and does your office discount them as well? If an organization is behind or is deficient, as it would appear we are here, is it less important because of who the request is coming from, or is it just a failure of an organization to meet its legislated requirements?

Ms. Suzanne Legault: Under the legislation, the requester's identity is protected. We don't assign or look for motives in doing our investigations in terms of why the requests are made. However, when we have situations like the one we had at the CBC, when in the first year it became subject to the act and it was in the public domain and there was one requester who had a large number of requests, we try to deal with them together. We developed an investigative strategy with the requester and with the institution so that we could maximize efficiency in terms of the investigation. That's what we do.

Mr. Paul Calandra: Yes.

Mr. Hubert T. Lacroix: I have just one point on Madame Legault's 61 as compared to 51. The information we just gave you was at February 28. It constantly changes. One of the last requests we got was to look at 50,000 pages so that we could deliver an answer.

Those numbers fluctuate over time. So Madame Legault was right about the information she has and we have. Depending on when you ask the question, she can't validate, because she hasn't seen it. So I'm not surprised that we're not getting a mid-term grade, even though I would really like a mid-term grade, because based on the information I have, you wouldn't get an F right now.

That being said, let's go back to requests made. We understand that we have an obligation under the act. We deliver the information based on the request, based on the system we've developed with Madame Legault. If you want to make CBC/Radio-Canada look good, send us 500 requests related to the administration of CBC/Radio-Canada. You will get 500 clean answers. If you want to make us look really bad, send us 500 requests directly under activities of journalistic programming or creative activities. You're going to get 500 issues. They will either be redacted or will be simple refusals to follow the information, based on our interpretation of section 68.1. It's as simple as that.

Mr. Paul Calandra: Welcome to the world of having to respond to taxpayers, right?

You're in a difficult spot, because clearly, over \$1 billion is provided to the CBC each year. Canadian taxpayers will agree that they have a right to know how those dollars are being spent, for one. Second, the commission has clearly identified some problems within the system. There's been a refusal rate of 57.7. You'd agree, I imagine, that it's a very bad number.

Are you suggesting that the CBC be treated differently? Because it is a public broadcaster and because it gets over \$1 billion from the taxpayers, should it be treated differently than all of the other organizations, including Parliament, that are subject to access to information?

Mr. Hubert T. Lacroix: Not at all, sir. The \$1.1 billion that we get we're very grateful for. It allows us to do great things for Canadians. It allows us to, in two languages, deliver programming that basically goes from coast to coast to coast—six time zones—programming that we think resonates with Canadians. If you look at our market shares or what Canadians are doing with our programs, we've never been as popular. People go to our websites. So we're very happy with the results and very grateful for the \$1.1 billion that we get from government, allowing us to do things that no commercial broadcaster can do because there is no economic model to deliver some of the stuff we do.

Let's go back to whether we should be treated differently. Absolutely not. We're not happy with the F, as I told you.

Mr. Paul Calandra: Yes.

Mr. Hubert T. Lacroix: I also told you that the 57.7% is now down, according to our calculations, to about 20%, and we look to improve. That's where we're going.

• (1620)

Mr. Paul Calandra: Commissioner, one of the recommendations in the report is

...that the President of the Canadian Broadcasting Corporation demonstrate leadership in establishing access to information as an institutional priority without exception. Access to information is a mandatory program and its associated legislated duties within a federal institution must be paramount.

It has also been suggested in another submission that we had before the committee that CBC, because of its knowledge and its expertise in actually requesting or seeking access to information, should have been more prepared and should have potentially been a leader within government with respect to providing access to information. Do you think you were prepared? And do you think you lived up to the responsibility that you have to Canadians? And are you prepared to show the leadership that is required to make sure the F grade becomes an A?

Mr. Hubert T. Lacroix: You've heard from me the leadership involvement in access to information. I'm sitting here, and I told you that I wasn't happy and that we're working very hard to improve on our situation.

I want to go to the history—two seconds, it's very important—because yes, we knew access to information was going to affect CBC/Radio-Canada. So we went around and we did our due diligence. We went to the Treasury Board. We tried to find out from the Treasury Board what their experience was and what the experience of different organizations was. We went to the BBC. We asked the BBC, how are you dealing with this? Remember the BBC has 30,000 employees, three times more than we do. It serves about 75 million people, about two and a half times what we do. In 2005, when they started this process, they were getting about 80 requests per month. Based on the fact that they had 10 people inside their shop for 80 requests a month, we figured half, maybe, for a population of our size, and we staffed accordingly. No way in the

world could we have foreseen 434 requests. That was simply off the chart.

So we did our diligence. We thought that we had prepared accordingly. Obviously we didn't. We were surprised, and we have been trying to catch up ever since. And as you saw from the numbers I quoted to you, we're getting better, and we're still working on it.

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

That concludes the first round.

There are a few issues I want clarity on. First of all, exactly how many court cases are there between the two groups here? Is there just one, or is it more than one?

Ms. Suzanne Legault: There's one ongoing.

The Chair: Is there more than one out there?

Ms. Suzanne Legault: With the CBC, there's one with Federal Court of Appeal. There was another case that was brought on by a complainant directly in the first year in relation to these 300-and-some requests, and that has been decided in the Federal Court of Appeal. That had to do with the commitment dates negotiated with my office and so on. That's completed.

The Chair: Madame Legault, can you take us through a request here? There's a little bit of uncertainty or lack of clarity to this whole issue.

Some individual citizen, whether it's QMI or whatever, makes a request. I think most Canadians would agree that if it involves confidential sources in the construction industry, that would not be something that really should or would involve your office. But let's say in a hypothetical situation that the requester wanted the expense claims for a certain manager within CBC for the month of February, and CBC responded and said “No, that's programming, creative production, a journalistic thing, and we're not going to do that”. You don't have power to order... They just fold their hands and say “No, we're not going to do that”, and then they say “We're going to go to court”. Is that what happens here?

This is not rocket science. We as parliamentarians would like to see a very simplified version, whether it requires a legislative amendment or not. Don't forget, when you're in court the taxpayer is paying both sides of this situation, and I don't assume for a minute it's cheap. Why can't we adjudicate? If it's legitimate journalistic programming and creative, we as parliamentarians would like to have it adjudicated very quickly. There might have to be an appeal mechanism, but not to drag it on so you're dealing with situations from 2007. If it's legitimate—let's say the sources on a media thing—to me that would be a journalistic issue.

Can you clarify this issue and explain just what you see the problem to be?

• (1625)

Ms. Suzanne Legault: I'll try to answer that question.

First of all, I don't want to use any specific example. We do have a lot of complaints in our office in relation to the CBC, so I don't want to use your example, for instance, Mr. Chair, simply because I have to preserve my objectivity. But I can say the following.

When a requester makes an access request to a federal institution, any federal institution, the federal institution then has to collect all of the responsive records. Then they will go through the records and they will apply exemptions or exclusions that are provided for under the legislation. They make their own determination as to which exemptions or exclusions they think should apply under the circumstances, and they have to exercise their discretion in terms of the exemptions in deciding whether or not the information should be disclosed because it's in the public interest or it should not be disclosed. Then they send the redacted documents to the requester. If the requester is not satisfied with the response, they can then make a complaint to my office.

Now, when we do investigations, normally we obtain the documents, all of the documents, the unredacted documents, from the institution, and we review all of the exemptions or the exclusions that have been applied and we make an independent and objective assessment as to whether or not we agree with the institution under the circumstances. Then we make recommendations to the institution. As you know, I have no powers to order the disclosure of any documents; I can only recommend. Through this process we obtain the representations of the requester or the complainant at that time. If the institution disagrees with our recommendation, they can refuse to accept our recommendation—usually it's because they refuse to disclose information—and then two things can happen: I can take the matter to Federal Court, with the consent of the complainant, or the complainant can take the matter to court himself or herself. I have no powers to order disclosure of anything; I can only make recommendations.

That's how it works. The only exception to this rule is cabinet confidences, because there is a specific process in the Canada Evidence Act, as you know, under section 39, for the certification process. So that's a different process.

The Chair: Okay. Perhaps before we go to the second round, I'll go to you, Monsieur Lacroix.

A lot of these hundreds of ones that you're not given for this section 61...and I don't think we would argue that confidential sources should be disclosed or get right to the creativity or the program, but for most of that stuff, why don't you give it to the Information Commissioner, get it adjudicated upon, get the file closed, and move on, so that Canadians have more assurance that the law is being followed?

Mr. Hubert T. Lacroix: There are two pieces to your question, sir. For everything that is about journalistic programming or creative activities, as you heard, and as Madame Legault has referred to, we don't think she has a right to look at this because this is clearly, if you read the Access to Information Act, excluded from the legislation. Everything else is already posted and we make that material available. If you want my corporate expenses, they're on our website. If you want the chair's corporate expenses, they're on the website—all of our senior executive team. So everything that has to do, sir, with the administration of our corporation, there's no issue there, and it's fair game.

The Chair: Okay.

On the second round, Dr. Bennett for five minutes.

Hon. Carolyn Bennett (St. Paul's, Lib.): Thanks very much

Just carrying on from there, if you had access to the sources in the construction industry and it was sitting in your office, how would you protect that from being ATIP-able in your office?

Ms. Suzanne Legault: The provision that subjects us to access to information does not cover documents that we receive from institutions; it's only the documents that we create as part of our investigation, that my office creates as part of the investigation.

• (1630)

Hon. Carolyn Bennett: If we go back to what Commissioner Marleau's advice was...it seems that there is an ability to game this, as we saw with the gun registry. If you deposit 200 requests on one day in an office of seven people, you can make that office look bad. If you are a competitor, you have the ability to decide it's in your best interest to make your competitor look bad.

So you are saying that even in your term and even since Commissioner Marleau, there has been a request to the government to get this changed, such that there would be an extension if an unreasonable number of access requests went in from the same requester in a certain period of time; it would be viewed to be almost an obvious extension.

Ms. Suzanne Legault: I think it would be appropriate to have an extension that dealt with multiple requests in a very short period of time by the same party. At least it would allow the institutions to request an extension, and that would be provided for under the legislation.

Hon. Carolyn Bennett: In the audit counting of it, are the requests viewed as needing an exclusionary exemption deemed as a refusal in a certain way, or are they ones that end up having complaints come?

You've said there isn't anything for frivolous and vexatious kinds of access requests in the legislation as it is right now, whether it's a hairdresser somebody uses, what they've spent on their boat, or something that doesn't seem to have any relevance that the corporation doesn't have access to anyway—it looks like a refusal, but it's something they don't even have the documents for.

What is the provision for them to be able to say this isn't anything we have information on, without it looking like a refusal?

Ms. Suzanne Legault: They can just say they have no records that are responsive to their requests. That is currently done under the legislation. If the requester is not satisfied with this response, they can make a complaint to our office. We investigate whether, in our opinion, there are or aren't responsive records to the request.

Hon. Carolyn Bennett: Do you have the ability to look at the complaints you're getting to find out whether they seem to be unduly from competitors and people who continue to complain to you about things that quite clearly are not possible to deliver on? What is your power or your ability to deal with vexatious or frivolous complaints to your office about those kinds of things?

Ms. Suzanne Legault: There is no provision for anything that is frivolous and vexatious under the legislation. I would say that most if not all information commissioners before have not supported such an amendment. I'm not like that. I think that having "frivolous and vexatious" in the legislation would be appropriate. It would need to have proper safeguards. It should not be left to the determination of the institution only whether something is frivolous and vexatious. I think there has to be a review by my office.

There is also no discretion under the legislation on my part. The act says that once I receive a complaint I shall investigate. So I have no discretion to decide not to investigate certain things. As we discussed, there is no extension provided for multiple requests in one day.

So there is very little mechanism in the legislation to at least allow the Information Commissioner to make those kinds of determinations. I believe in Ontario the commissioner can actually say "I'm only going to investigate so many complaints by the same person".

In July of this year I received 237 complaints from one complainant. They certainly all came in one month against the same institution. So the CBC is not necessarily the only institution that faces similar challenges at times.

• (1635)

The Chair: Thank you, Dr. Bennett.

Mr. Abbott, you have five minutes.

Hon. Jim Abbott (Kootenay—Columbia, CPC): Mr. Lacroix, I think you would agree with me that you're comparing your ability to get the job done in terms of news gathering and news reporting. Being an institution funded by \$1.2 billion of taxpayers' money, you're comparing that with an institution like the *Sun* chain, which doesn't have \$1.1 billion and that kind of support.

It strikes me that some of your answers, with the greatest respect, have been that you should be treated on the same level, as far as access to information is concerned. In other words, you're saying "Why should we, in spite of this \$1.1 billion, not be seen as a news-gathering and news-reporting institution, exactly the same as any commercial enterprise?"

Mr. Hubert T. Lacroix: Mr. Abbott, I'm not sure I'm following your comment, because Quebecor, as you know, is not subject to access to information. We're the only journalistic organization that is. As I think I said a few minutes ago, we're very aware of the fact that they're entitled to make whatever request they want, and I don't want special status.

Hon. Jim Abbott: What I'm trying to say is you are a news-gathering and news-reporting institution. They are a news-gathering and news-reporting institution, and yet you have access to a pretty gigantic pot of money. For example, if I take a look at a report they did on March 24 last year, it points out that in the testimony of Mr. Rabinovitch they had asked for the briefing material for Mr. Rabinovitch, and fundamentally received a blank page.

You may be aware that the briefing books of cabinet ministers can't offer blank pages. Why do you think the ability of going through access to information with a cabinet minister should reveal a heck of a lot more than the CBC was prepared to reveal? You're telling us your executives are fair game. Apparently they're not,

because they're not treated the same as a cabinet minister. And yet your institution is claiming to be a crown corporation and therefore it should be treated differently under this access law. I'm finding this very confusing.

Mr. Hubert T. Lacroix: Mr. Abbott, we are not seeking special privileges. We are not happy with the F. We're improving, and we will continue to improve, so the next time Madame Legault shows up here she doesn't have to have me on her left trying to explain why we have an F and she's not a happy camper. That's the first point. We are improving and we are completely aware of the mark she gave us.

In no way do we, however, with the \$1.1 billion the government gives us to do things that no other commercial broadcaster can do... And I've said this many times in front of all sorts of parliamentary committees: there is no single broadcaster that would do the things we do, because there's no economic model for them. You can't cover the north as we do and have an economic model.

So let's go back to the journalistic integrity of what we do and why the act has an exclusion. The act says that the information that is related to our journalistic programming or creative activities is excluded from ATIP. As the person responsible for this crown corporation to which the government contributes \$1.1 billion a year, perhaps, Mr. Abbott, you would be the first one to say our job is to ensure that the responsibilities bestowed on us in that capacity are important, and that when we have rights under legislation we have the right to say that because this law excludes journalistic and programming creativities from the review of the commissioner we're entitled to so state.

• (1640)

Hon. Jim Abbott: How are briefing notes covered by that? In other words, if a cabinet minister sitting in the same place as you has to reveal the information in his or her briefing notes, and you're coming to us saying you are a crown corporation, I don't understand. Apparently, according to what was written here, the proposed answers to a list of possible questions you might face at committee were held back as "advice or recommendations developed by or for a government institution or a minister of the crown". Apparently your actions would say you have more privilege to withhold information than Jim Flaherty or Peter Kent or any of the other cabinet ministers. I don't understand that.

Mr. Hubert T. Lacroix: In the normal course of our dealings we've received some 1,348 requests so far, as you heard. I don't know exactly what you're referring to in terms of what that request does, what the comments were, what the question is, the context in which it was made, what the briefing book was all about. If the briefing book contained programming information, clearly it falls under the exception I referred to. It's extremely difficult for me to give you a clear and clean answer, Mr. Abbott, if I don't understand the context in which this request was made. That's why in the normal course of 1,348 requests, if you have a particular concern about this we'd be happy to look at it and tell you what it is.

Maryse, do you want to add something?

Ms. Maryse Bertrand: In terms of briefing books, what we have determined with other organizations is that the practice very much varies. Some briefing books are withheld and some briefing books are not. As Hubert has mentioned, if the briefing books pertained to information that had to do with the programming or journalistic activities of the CBC, they would have been withheld under that principle.

The Chair: I believe Madame Legault had a comment.

Ms. Suzanne Legault: I just want to clarify something that was said by Mr. Lacroix, that section 68.1 excludes the records from the review of the commissioner. I totally disagree with that interpretation of that section. Obviously it excludes the records that are for journalistic, creative, or programming material. The issue is, is there a right of independent review to ensure that the exclusion has been properly applied? At this point, as I said, I have 182 cases on hold because we have not been able to review those records, and that's the subject of the litigation. Again, the subject of the litigation is not to interpret what's journalistic, programming, or creative material; what's at dispute is my ability to compel the production of those records and to conduct an independent review to ensure that these journalistic, creative, or programming exclusions have been properly applied by the institution.

The Chair: Thank you, Madame Legault.

Madame Thi Lac, *cinq minutes*.

[Translation]

Mrs. Ève-Mary Thāi Thi Lac (Saint-Hyacinthe—Bagot, BQ): Ladies and gentlemen, thank you for coming here to speak to us today.

As you know, this committee has been conducting a study on open government over the past few weeks. I tell you that because I want to draw a parallel between access to information and open government.

As part of our study on open government, a number of witnesses told us that the number of ATI requests had dropped sharply because their department was being more open and disclosing more information to people.

I, myself, recently wrote to a department asking for a list of the government's legal service providers. The answer I got was that the government would not disclose the names of those suppliers.

To me, that is a flaw of an open government. I then made a request under the Access to Information Act. The person who had written to my office asking for the information initially also made the same request, as did our party's critic. So three requests for the same information were made. But had that information appeared on the Web site, there would have been three fewer requests.

I want to know whether you had worked on an action plan to help your organization become more open and to reduce the number of access to information requests. Or are you of the opinion that such an approach has no place at CBC?

•(1645)

Mr. Hubert T. Lacroix: I will ask Ms. Bertrand to explain what we have just done and what I meant in my opening statement when I

talked about proactive disclosure measures we had put in place at CBC/Radio-Canada.

Mrs. Maryse Bertrand: Ms. Thi Lac, in December 2010, we created a new page on our Web site, a completely redesigned page where we post information pertaining to the five most common types of access to information requests received since we first came under the act.

As Mr. Lacroix mentioned, that includes information on agendas, senior management expenses, audits and retreat expenses, and the list goes on. It includes all the requests—and we provide the translation into the other language—as well as all the information provided to the applicant further to their request.

This effort is a work in progress. We are currently trying to add other categories of information. We start with the most widely requested information so that it is available not just to the requester but also to the general public; we provide both the request and the organization's response.

Mrs. Ève-Mary Thāi Thi Lac: You just answered my second question as well. And you made those improvements based on your most popular requests. I imagine that was part of the reason why you had fewer requests this year.

In the past, numerous organizations have told the committee about the difficulty they have had finding and keeping staff. Do you have the same problem?

Mr. Hubert T. Lacroix: Yes, that is the case at every level.

Maryse, could you speak to our turnover and how difficult it is to keep good people?

Mrs. Maryse Bertrand: I would say things have levelled off. It was very tough in the beginning, though. Practically the entire team has turned over since the beginning. Right now—touch wood—it is going pretty smoothly.

Mrs. Ève-Mary Thāi Thi Lac: I am going to split my time with Ms. Freeman, because I know she had a question.

[English]

The Chair: You have only 20 seconds left.

[Translation]

Mrs. Ève-Mary Thāi Thi Lac: Great.

Ms. Legault, you mentioned that CBC's next report card would be available this year. You already said that the situation had improved dramatically over last year. Do you think that improvement was the result of the changes CBC introduced to be more open and to disclose more information to the public?

Ms. Suzanne Legault: I did not measure that, in other words, whether proactive disclosure had an impact on requests. I did not examine that at all.

[English]

The Chair: Merci, Madame Thi Lac.

We're now going to go to Mr. Poilievre for five minutes.

Mr. Pierre Poilievre (Nepean—Carleton, CPC): Thank you to the witnesses for coming.

Monsieur Lacroix, am I accurately summarizing your position by saying that you have pointed to section 68.1, which addresses the unique nature of your organization, as a potential cause of the challenges that your organization has had in implementing access to information?

Mr. Hubert T. Lacroix: Partly, but I hope that's not what you retain from my comment.

We were simply overwhelmed by the number of requests. This famous exclusion with respect to our activities, section 68.1, is simply part of the reason why some of the stats that you are seeing on refusal complaints have increased.

Mr. Pierre Poilievre: Thank you.

I think you had said that if all of the ATIP requests were outside the 68.1 exclusion, then responses would be returned on time and without complaint.

• (1650)

Mr. Hubert T. Lacroix: If you were to deliver thousands of requests outside of section 68.1, we would still have issues. I'm saying that we understand that there is the volume, and that is what has been the issue with CBC/Radio-Canada's ability to turn them around quickly.

Mr. Pierre Poilievre: Okay. Thank you.

Madame Legault, I want to understand the scope of the challenge around section 68.1. In your special report to Parliament you said that the number of requests carried over from 2008-09 is 108. Do you think that the large number of carry-overs from 2008-09 can be explained by the difficulties in implementing section 68.1 of the act?

Ms. Suzanne Legault: It's very difficult for me to make that kind of determination. It's a question that's better posed to the institution. I haven't seen any of the records, so I don't know.

Mr. Pierre Poilievre: Okay.

Would you suggest that the deemed refusal rate of 57.7% could be partly explained by challenges related to the use of section 68.1 of the act?

Ms. Suzanne Legault: Again, I'm very limited in that respect.

It seems to me that it's essentially a volume issue. That's my impression. My difficulty is in knowing how long the litigation will last. And we still haven't determined what journalistic programming and creative material mean.

Mr. Pierre Poilievre: And then on the average time to complete a request—158 days—I understand, according to your report, that only 39% of new requests were responded to within 30 days. Do you think section 68.1 might have been responsible for that?

Ms. Suzanne Legault: Again, I would have the same answer. My impression is that it's simply a volume issue, because they had so many requests in their first year, and then they carried over quite a large number of requests from year to year and still had to deal with their ongoing workload.

Mr. Pierre Poilievre: It sounds to me as if the source of the problem you identify is volume. Is that how you see it?

Ms. Suzanne Legault: Well, I mean, they've explained that they also had issues with qualified staff and retention of qualified staff. I'm not quite sure how the review and approval processes work. That wasn't clear to us, in terms of how many levels or reviews the records go through before they're actually released. That's something you might want to ask the CBC.

Mr. Pierre Poilievre: What process do you have when somebody makes an access request and CBC refuses on the grounds contained in section 68.1 and then you look at the request and say "No, I don't think this is covered by section 68.1"? How do the two sides resolve that disagreement? When you believe it is a legitimate request outside of the boundaries of section 68.1 and the institution says actually it can't be revealed because of the exclusion, how do we resolve that?

Ms. Suzanne Legault: Well, at this point, because of the position taken by the CBC in the litigation, we cannot resolve this. I cannot do the investigation because I cannot review the records. We would not make, and we never do make, a determination on an investigation only based on the wording of the requests. We do it on the basis of the review of the records that are responsive and the redactions that are applied by the institution, whether we agree or not.

The Chair: Thank you, Mr. Poilievre.

Mr. Siksay, you have five minutes.

Mr. Bill Siksay: Thank you, Chair.

I want to come back to the first two recommendations of the commissioner in the report card.

Monsieur Lacroix, I want to ask what role you've taken in ensuring an appreciation of the importance of access to information at CBC/Radio-Canada. We've seen, I think, over our work in other areas that commitment from the top down in an organization is crucial to compliance, to appreciation of the importance of access to information. I know that when you responded to the recommendations you indicated some of what that's been about, but can you tell us more about how you've implemented that commitment from your office through the organization?

Mr. Hubert T. Lacroix: Surely.

First off, it's something that's discussed, obviously, at the senior executive team level. It's something that will be part and is part of the key performance indicators on which the members of the team that works with me every day are evaluated. It's something that Maryse Bertrand, in her role as the top of the legal side of our organization, also evaluates. On the strategic direction, you can see some of the leadership through the initiatives that were taken and the proactive disclosure and the websites and the fact that nobody else in crowns or agencies is doing what we're doing. So you can be assured of the commitment we have—and I have—with respect to that.

• (1655)

Mr. Bill Siksay: Would average employees of the CBC be aware of your commitment on this issue? And how would they become aware of it, if they have, or if they're not aware of it?

Mr. Hubert T. Lacroix: We have processes by which, when a request is made, the people who monitor the request—follow the request and get the information—understand how important it is to meet the requirements. There have been training sessions with the 22 liaison officers.

Maryse, what would you want to add?

Ms. Maryse Bertrand: We're going to roll out a training program in the new year, which is part of our tri-annual plan, to explain better to people—and not just to the liaison agents but to other senior managers in the organization—what our duties are under the Access to Information Act and how we take our responsibilities very seriously. We've published a lot of information on that famous web page that I was alluding to earlier, and that's basically how we communicate with the employee base at large.

Mr. Bill Siksay: Now, I know one of the other concerns of the commissioner was the retrieval, review, and approval processes and the concern that across an organization as broad as the CBC there wasn't a good retrieval process in place to meet the requirements of access to information. I know you're talking about a multi-year plan.

Can you update us, from what you've said in the report card response to that recommendation? How is progress on that? Is progress being made there?

Ms. Maryse Bertrand: Certainly.

In terms of the retrieval process, I wasn't there at the very beginning, but I'm not aware that this was the issue as much as the processing of the sheer volume of information that needed to be processed in order to answer the request. I think our document retrieval processes, considering the size of our organization, are adequate. They probably could be improved, like anything else, but I don't think the issue is there. We have made some changes at the personnel level in terms of the ability to get the processing of the exclusion and of the records more streamlined. That we've done already.

Mr. Bill Siksay: Thank you, Chair.

The Chair: Thank you, Mr. Siksay.

Dr. Bennett, five minutes.

Hon. Carolyn Bennett: I was just asking maybe for a little bit of an explanation again about the difference in terms of what the BBC has compared to what we have here in the CBC, and also about the fact that you mentioned a tribunal as well as a commission.

Mr. Hubert T. Lacroix: The commissioner was the person who told you about the request that she made, I think coming from her staff, trying to find out what was going on at the BBC.

Is the question, Madame Bennett, to us or to Madame Legault?

Hon. Carolyn Bennett: It's to both of you in terms of what would be a process. Maybe the commissioner could start first in terms of what is the advantage of having both the commissioner and a tribunal. Why have they separated it?

Ms. Suzanne Legault: That's a good question for the British legislator in terms of why they separated it. It's a system that I'm not aware exists in other jurisdictions, in the sense that in the U.K. the commissioner has order-making powers, which is different from my office, obviously, but also the information tribunal reviews the case

completely *de novo*. Whether it works better or not I really couldn't comment on. It started in 2005. There's quite a lot of...

Hon. Carolyn Bennett: Is it if they feel they don't get satisfaction in terms of a complaint to the commissioner's office, there's an appeal process?

Ms. Suzanne Legault: Yes. It's a completely *de novo* appeal process with the information tribunal.

Hon. Carolyn Bennett: In your court case, you can't commission or ask for documents or order documents in any other area, but when it comes to the CBC is it a different approach you're asking for?

• (1700)

Ms. Suzanne Legault: No. There are two things in your question. I think it's important to clarify.

The Information Commissioner has very broad investigative powers under the legislation. We have the power to compel people to testify under oath, and we have the power to compel the production of records in order to conduct our investigation.

The position we're taking in the Federal Court case with the CBC is that this power to review the records applies to the CBC, notwithstanding section 68.1.

What I do not have the power to do—and that's also for all institutions—is I do not have the power to order disclosure at the end of an investigation. For instance, I do not have the power to order the disclosure of journalistic sources. The only thing I can do is to make recommendations to the institutions, and that's for all institutions. If the institution should disagree with my recommendation to disclose, the matter can then go to the Federal Court. Either I would take it to the Federal Court with the consent of the complainant, or the complainant can go directly to court at that point once my investigation is completed, and that case would be against the institution.

Hon. Carolyn Bennett: In section 68.1, in the application of it within the corporation, if the Information Commissioner is not able to do it, what is the accountability that everything you've said is excluded or exempted under section 68.1 is really to be an exemption? What do you see is the oversight?

It seems that you're saying just take our word for it. Is that...?

Ms. Maryse Bertrand: We're not saying you should take our word for it. Parliament has lumped together in the exclusion the programming, the journalistic, and the creative activities. Essentially, when it comes down to records that fall within these three categories, if there is a disagreement about whether something should or should not be excluded, the Federal Court is there and there are some fairly clear criteria on whether or not, for example, journalistic sources ought to be disclosed as part of a record. We want to follow the existing process that the Supreme Court of Canada has determined is applicable in that circumstance.

The Chair: Mr. Calandra.

Mr. Paul Calandra: That's even more confusing. It strikes me that section 68.1 is actually more powerful than a cabinet confidence. You have more ability to maintain things by using section 68.1 than the government has when they consider a cabinet confidence. If I were to put in an access to information request to the CBC asking what is the salary of Peter Mansbridge, would that be allowable or not under section 68.1? We've heard a lot about how the administration of the CBC is ten out of ten. I would suggest that we can't truly understand any of this unless we know all of the facts. So how would that request be handled?

Mr. Hubert T. Lacroix: Let's go back to something important you just said. I'd like to draw you to the Broadcasting Act, because that's where those words come from. You say that you have more or less ability according to what section 68.1 provides us. Those journalistic, programming, and creative activities exclusions that you see are the words in the Broadcasting Act. We are in a mixed-model funding environment. The government gives us \$1.1 billion but says, along with the CRTC, that we need to go out and raise dollars by ourselves in a competitive environment. So the journalistic, programming, and creative activities exclusion takes on a life of its own, because it is the continuation of the mandate we have under the Broadcasting Act found in section 68.1.

So on questions that have to do with our journalists, or our journalistic sources, aside from the fact that some of these might actually be protected by privacy laws and our ability to disclose the compensation of certain people, the journalistic, programming, and creative activities exclusion in section 68.1 goes to the heart of our ability to continue delivering on our mandate.

• (1705)

Mr. Paul Calandra: I'm still confused. If I put in that request, how would it be treated?

Mr. Hubert T. Lacroix: If you deal with Mr. Mansbridge directly, or with the compensation package, we'd have to look at the request. It would either be something that we could not provide you because it's protected by privacy issues—and I'm sure that you'll be the first one to applaud that this kind of information is not available—or, depending on how the question is phrased, it could be a programming request.

Mr. Paul Calandra: You, like me, and like everybody who works for the CBC, are paid in large part by the taxpayers. My salary is public. My expenses are public. You can go online and look at how much I make, how much I spend on all of these different categories. Ontario, for instance, has a sunshine law that everybody paid over \$100,000 who works for the Government of Ontario is subject to. Does privacy extend only to the point where the CBC starts?

Why would a journalist's salary, paid for by the people of Canada, not be open? Why would their privacy be more important than that of a member of this committee, than that of all the people who work for the Government of Canada? Why would that be considered under section 68.1? That strikes at the heart of everything. We can't truly understand whether the CBC is being administered properly if we can't get access to the information we require. This section 68.1 can be used as a tool to protect people and make sure that the CBC can compete, but it can also be used as a tool to prevent parliamentarians from effectively seeing the full scope of the organization.

I see you are taking the privacy route. I don't accept that. People who are paid by taxpayers relinquish privacy to a great extent. I want to know: has a request like that been made, and how has it been treated?

Ms. Maryse Bertrand: I don't know if a specific request regarding Mr. Mansbridge's salary has been made—

Mr. Paul Calandra: I mean any journalist, not just Mr. Mansbridge.

Ms. Maryse Bertrand: —or frankly regarding any other journalist, but I can tell you that we considered the specific information that you're talking about to definitely be part of our programming information.

The question of accountability to taxpayers to me is best answered by talking about the kind of information we have been asked for and that we have released—information, for example, on the salary ranges of the entirety of the organization. We have disclosed that. The fact that a particular individual's salary is not disclosed...that is certainly something I think we will jealously guard as part of our programming strategy.

In terms of accountability, by all means we provide, I think, all relevant information, but in a more generic fashion. Canadians can still make their judgment and determination based on that.

The Chair: Okay. Your time's up, Mr. Calandra.

That concludes the second round. Perhaps I'll give a couple of minutes to Madame Freeman, but I just want to clarify something again, and I'm going to follow up on Mr. Calandra's point.

I just want to ask a question of you, Mr. Lacroix. It seems to me, to summarize this thing, there are hundreds of requests out there, and they're being denied on this so-called journalistic, programming, and creative, which is legitimate. But CBC is self-adjudicating that. They're not allowing any records to be seen by the Information Commissioner.

You realize that if tomorrow or the next day some member of the public comes out with a request that's being denied on these grounds, and it's obviously really not a journalistic, programming, or creative issue, a lot of your testimony here will be discredited. You realize that, do you?

•(1710)

Mr. Hubert T. Lacroix: Mr. Chairman, section 68.1 refers to the three words and the three ranges of activities we've talked about: journalistic, programming, and creative activities. If a request is made that hits those, we will not release the information. If the person doesn't agree, there are recourses in the act allowing this person to challenge our position on this. That's why, as Maryse said in answer to Madame Bennett a few minutes ago, the court is there to make that judgment call. Everything else is information that we gladly provide to any Canadian making a request on the administration of CBC/Radio-Canada.

The Chair: So in other words, they'd have to go to court.

Mr. Hubert T. Lacroix: This is why section 68.1 exists. This exclusion, sir, exists for that purpose.

Actually, I'd like to remind you that this should not be a surprise, because when legislative committees were formed to study Bill C-2, for example, some people in this room were there. Very good questions were asked, and Mr. Reid, who was a predecessor to Madame Legault, actually said that if this were written in the way it is written now, he didn't think he could gain access to the documents that were under section 68.1.

So it's not as though the legislator, who chose to use the same kinds of words you find in the Broadcasting Act, did not know that this was a conclusion to which we would come and about which we would have a conversation. This is why we're in front of the court. These matters sir, also went to the Senate committee that reviewed this a couple of months later, with the same good questions and the same issues of substance.

The Chair: Okay.

Madame Freeman will have two minutes, then Mr. Albrecht will have two minutes.

Sorry, Madame Legault, do you have a comment?

Ms. Suzanne Legault: I just want to alert the committee that the last point made by Monsieur Lacroix is actually part of the arguments before the court. I certainly wouldn't want to comment on that specific point in terms of parliamentary debates and their evidentiary weight before the Federal Court of Appeal, because that is part of the argument.

The Chair: Okay.

Madame Freeman, you have two minutes, and then Mr. Albrecht will have two minutes.

[*Translation*]

Mrs. Carole Freeman: I have a quick question.

What really happens when you receive a request and it is denied? Who ultimately makes the decision to deem it a refusal? Is it the ATIP director?

Mrs. Maryse Bertrand: It is the access to information coordinator.

Mrs. Carole Freeman: Who is that exactly?

Mrs. Maryse Bertrand: My assistant counsel. She looks after media rights. She is my right arm.

Mrs. Carole Freeman: She does not consult you, she makes the decision.

Mrs. Maryse Bertrand: She makes the decision herself.

Mrs. Carole Freeman: You do not oversee the decision.

Mrs. Maryse Bertrand: No.

Mrs. Carole Freeman: Her decision is final.

I have a question for you, Ms. Legault. Did other institutions challenge the application of section 68.1 or section 69? Did anyone else challenge that?

Ms. Suzanne Legault: The other similar provision is the one that applies to Atomic Energy of Canada Limited. Section 69 is different, in my view, but it is also part of the argument made before the court. Atomic Energy of Canada Limited gives us the documents so we can conduct our investigations.

Mrs. Carole Freeman: Thank you.

[*English*]

The Chair: Mr. Albrecht.

Mr. Harold Albrecht (Kitchener—Conestoga, CPC): Thank you to the witnesses for being here today.

We were given a commentary by Michel Drapeau, who is an adjunct professor of law at the University of Ottawa. He made some significant comments here about his expectation as a professor of law dealing specifically with access to information issues. He made the points that he believes the CBC, being a media corporation, should have been particularly well prepared to anticipate the number of ATI requests. He said that they should have an ambidextrous capability to foresee what preparations, measures, arrangements, and so on were necessary. He also said that CBC would not want to risk its well-deserved reputation and pointed out it has the necessary financial assets.

He went on to say that not surprisingly, from the very start CBC complained of being swamped by ATI requests. To deal with the influx, CBC stalled the process by relying on being granted extensions. Further, he said that CBC continued to act surprised by the volume of access to information requests.

If I were responding to a report that was done in 2008 with a 57% refusal rate, I probably could accept that as a member of Parliament, but here we are four years into the process and we're still dealing with a 57% refusal rate. I guess I find that difficult to justify.

I have to take at face value your comment that this year is better. We don't have the actual evidence of that yet in a report, but how can we, as members of Parliament, be assured, after four years when we've only gotten to 57%, that in the next year we're going to get down to 20%? That's my concern.

•(1715)

Mr. Hubert T. Lacroix: There are a bunch of things. First, I'd be happy to comment on Mr. Drapeau's paper if we could get a copy of it. We were not fortunate enough to be copied on it, so I have no idea what this is all about.

As you know, there's a clear link between Monsieur Drapeau and Quebecor Media. He doesn't work for them, but he has as a client sometimes Quebecor Media Inc.

Yes, 20.17% is where we are right now. You're going to have to take my word for it until you see it in Madame Legault's report the next time she comes in.

On being prepared, I tried to address this a few minutes ago. Let me come back to that. When we became subject to access to information, we actually did our diligence. I told you that we talked to the Treasury Board Secretariat and tried to find out the numbers and what the federal government agencies and crowns were getting in terms of volume. We went to the BBC, because the closest thing to a broadcaster like ours that is subject to access to information is the BBC. We looked at the size and their number of requests. We actually got 434 requests in the first couple of months. If you look at their numbers, they got 80 requests for 70 million Brits, and their organization is three to five times bigger than ours is.

Yes, we prepared according to our due diligence. We were surprised and overwhelmed, and we're working on it.

The Chair: That concludes the questions.

On a point of order, Mr. Calandra.

Mr. Paul Calandra: I don't know if it is something that is in order, but I would seek unanimous consent to continue on for another 15 minutes, until 5:30, because we did wait three months for this.

The Chair: We still have the approval of the minutes from the steering committee and we have a motion, Mr. Calandra.

Does Mr. Calandra have unanimous consent to continue until 5:30?

An hon. member: No.

The Chair: There is not unanimous consent.

On behalf of all members of the committee, I want to thank you very much for your appearance here today. I want to thank you for the work you have put into it.

Before we adjourn this part of the meeting, I'm going to ask each of you, starting with you, Madame Legault, if you have any closing remarks you want to make to the committee. Then we'll come to Monsieur Lacroix.

Madame Legault.

Ms. Suzanne Legault: No, I don't have any comments other than to thank the committee for the follow-ups that the committee is doing on report cards. I think it is part and parcel of the accountability framework for institutions, and I really thank the committee for this work. I think it's very useful.

The Chair: As I said before, most likely we'll have you back with the Canada Post officials in the relatively near future.

Monsieur Lacroix.

Mr. Hubert T. Lacroix: Mr. Chairman, we're disappointed with the F. We are working on making this better. As president and CEO, I can tell you that you have a commitment from CBC/Radio-Canada.

The numbers are improving. You'll see that in the next report card Madame Legault presents in front of this committee.

Thank you.

The Chair: I want to thank you very much.

The committee has a few other minor matters to deal with.

The first item is the approval of the minutes of the steering committee meeting, which was held earlier today. There are only two items that require approval and discussion. The first is that the proposed committee business calendar be approved as presented. That calendar has been circulated. You all have a copy.

The second item is that the committee commence a study on the special report of the Information Commissioner, "Open Outlook, Open Access", and that we call before us both the commissioner and the president of Canada Post, Mr. Deepak Chopra. They would be invited to appear before the committee probably sometime in April, or the early part of May, depending on the schedules of witnesses.

The chair would entertain a mover for that motion.

It is so moved by Mr. Siksay.

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

The Chair: The last item is the motion from Madame Freeman.

I'll get Madame Freeman to read this and then perhaps speak to it, for up to two minutes. We'll entertain a few interventions, and then hopefully we can conclude.

Madame Freeman.

• (1720)

[*Translation*]

Mrs. Carole Freeman: Mr. Chair, my motion reads as follows:

That, in relation to Corinne Charette's (Chief Information Officer -Treasury Board Secretariat) appearance on February 9, 2011, at which she committed to providing the Committee, within 1 month, the Treasury Board's 5-point plan on open government/open data, a detailed summary on what has been accomplished to date and their of plan of action going forward in the coming months, and since this deadline of March 9, 2011, was not met, the Treasury Board Secretariat and Ms. Corinne Charette be ordered to provide these documents to the Committee, in both official languages, not later than Tuesday, March 22, 2011 at 3:00 p.m.

My motion has to do with the appearance of Ms. Charette, a public servant and the Chief Information Officer at Treasury Board Secretariat, before the committee. At that time, I asked her for the government's action plan on access to information and open data, and for information on what had been accomplished and what the government planned to do in the future. Today, Stockwell Day introduced a pilot project on open data focusing on three areas: open data, accessible information and open dialogue to drive economic opportunities. We are very grateful for Mr. Day's efforts. We are also grateful for the work done by the committee, whose repeated demands were so well-received that he wasted no time in bringing his project to us. However, it is still just a pilot project, which in itself does not discharge Ms. Charette of her duty to provide the information we asked her for. It is now March 21, and she was supposed to provide it by March 9. Ms. Charette should have to submit the documents in question to the committee by 3 o'clock tomorrow afternoon, as per my motion.

Thank you, Mr. Chair.

[*English*]

The Chair: Thank you, Madame Freeman.

Mr. Poilievre, do you have an intervention?

Mr. Pierre Poilievre: With the information that Minister Day has provided about the open data portal, I think there should be no problem with this motion.

The Chair: Mr. Siksay.

Mr. Bill Siksay: Thank you, Chair.

I want to say that I support Madam Freeman's motion. I think it's very important that we follow up on it before we hear from the minister. I don't think the pilot project goes anywhere close to meeting the demands for open government or open data. I'm disappointed that it's a pilot project and not a permanent project of the government. That's what it needs to be.

But pertaining to this motion, I think it's very important that we remind Madam Charette that this information is crucial to the work the committee is doing.

The Chair: Ms. Davidson.

Mrs. Patricia Davidson (Sarnia—Lambton, CPC): Mr. Chair, I want to point out that in the English copy I have there appears to be a typo. It says “detailed summary on what has been accomplished to date and their of...”. There's an extra “of” in there. I think it's a typo.

The Chair: Yes.

Okay, it looks like we're ready for the question.

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

The Chair: That concludes the business before this meeting.

As everyone is aware, we're having a special meeting tonight at seven o'clock. It's right here. We'll be back at seven o'clock.

Enjoy the next hour and a half.

The meeting is adjourned.

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