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Chair

Mr. Blaine Calkins

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• (0850)

[English]

The Chair (Mr. Blaine Calkins (Red Deer—Lacombe, CPC)): Good morning, colleagues. We are now at meeting 16 of our esteemed committee on information, privacy and ethics. We're wrapping up our study on the access to information legislative review. This is the final day that we've set aside for ourselves to hear testimony, and we're pleased to have back, as our final witness, our initial witness Commissioner. Madame Legault. We welcome you back to the committee.

Colleagues, my understanding is Madame Legault has reviewed the testimony and wants to provide us with a little more of her opinions on where things could or should go, depending on what the committee deems appropriate. She's asked for a little more than 10 minutes, and I'm assuming that we'll let her speak until she's done.

We'll have enough time to go for the full round, which is about 50 minutes for questions and answers, and that will still give us plenty of time at the end to provide instruction to the analysts, should our committee go the full two hours.

Without further ado, Madame Legault, the floor is yours.

[Translation]

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

I would like to thank the committee members for inviting me to speak this morning as part of the committee's study of the Access to Information Act.

I have closely followed your work, I have reviewed the testimony of the various witnesses, and I have read the submissions you have received during your study. In a short amount of time, you have gathered a significant amount of information that will guide your reflections.

I am also mindful of the fact that the government has announced recently a two-phase approach for improving the access to information regime. The first phase would seek to introduce a bill to Parliament consistent with the mandate letter of the President of Treasury Board with a few minor additions. The government is currently consulting Canadians on a number of proposals in relation to the first phase. The second phase would involve a more comprehensive review of the act, set to start in 2018, with legislative reviews every five years.

Mr. Chair, I understand the government's desire to deliver quickly on its specific promises. I also understand that, if Parliament decided to pass access to information legislation with an order-making model, a specific period of time must be set aside for the implementation of this regime. However, I must say that I am disappointed with this two-phased approach. Our Access to Information Act is clearly outdated and severely outranked nationally and internationally. It fails to strike the right balance between the public's right to know and the government's need to protect information.

The implementation of the recommendations in my special report would recalibrate this essential balance. They would bring Canada to the forefront of leaders in access to information legislation. The recommendations in my report are anchored on the highest standards and best practices for access to information legislation contained in laws of other jurisdictions, model laws, and guides, as well as in high-level reports on access reform.

However, in order to be of assistance to the committee as it prepares to issue its report on the review of the act, I have identified recommendations that, in my view, should be prioritized. These priorities have been identified for their greatest impact on transparency. I will address these priorities in turn: extended coverage, duty to document, timeliness, maximizing disclosure, order-making model, and mandatory periodic review.

[English]

Extending the scope of the act to ministers' offices and institutions that support Parliament and the court is a strong step in the right direction to ensuring greater accountability and transparency.

Ministers and their parliamentary secretaries, ministers of state, and the Prime Minister are public office holders who make decisions that impact Canadians. These decisions also impact how tax dollars are spent. Ministers and their staff need to be accountable in disclosing information relating to the administration of their departments or other responsibilities.

Parliament is also not covered by the act, but the combined budget of the House of Commons, the Senate, and the Library of Parliament was more than \$500 million in 2014-15.

It's a similar situation for the courts' administrative support bodies. In 2014-15, the combined budget of the Supreme Court of Canada, the office of the registrar of the Supreme Court of Canada, the courts administration service, the office of the commissioner for federal judicial affairs, and the Canadian Judicial Council was more than \$600 million.

In order to ensure the accountability and transparency of these institutions, the act must apply to them. I therefore recommend that the committee prioritize extending the scope of the act to ministers' offices and institutions that support Parliament and the courts.

Access to information relies on good record-keeping and information management practices. Without records, rights under the act are denied. A legislated duty to document, with adequate sanctions for non-compliance, is an essential amendment to protecting the right of access. A legal obligation to document the decision-making process protects access to information rights by creating official records, facilitating better governance, increasing accountability, and ensuring the historical legacy of government decisions.

Without a legislated duty, there is a real risk, and we have seen that in our investigations, that not all information related to the decision-making process is being recorded or appropriately preserved.

My provincial and territorial colleagues and I issued a number of joint resolutions calling upon our respective governments to create a statutory duty to document. I therefore recommend a comprehensive legal duty to document, with appropriate sanctions for non-compliance.

• (0855)

[Translation]

Timely access to information is a pillar of any access to information regime. Timeliness has been a long-standing struggle of our access to information regime. Delays are a frequent subject of complaints by requesters. Investigations of these complaints have revealed a culture of delay across the access to information system.

In chapter 3 of my modernization report, I make several recommendations to reverse a culture of delay that has depleted the right of access. These include limiting time extensions to what is strictly necessary based on a rigorous, logical, and supportable calculation, up to a maximum of 60 days. Longer extensions would require the permission of my office. The recommendations also seek to limit delays stemming from consultations with other institutions, other jurisdictions, and third parties.

Addressing timelines is a win-win-win. Requesters will receive relevant and useful information; institutions will be less burdened to respond to complaints that are time-consuming and constantly competing with processing requests; and, my cohort of investigators can focus their efforts on remedying refusal complaints.

About 40% of my office's workload deals with administrative complaints related to delays. The vast majority of these complaints are well founded. I therefore recommend addressing delays by implementing the series of recommendations found in my report.

[English]

The act provides that government information should be available to the public subject to limited and specific exceptions, and that decisions on disclosure should be reviewed independently of government.

However, under the act, many exemptions are not sufficiently limited and specific. As well, the act provides for exclusions, shielding their application from independent review. As a priority, the committee needs to address the exemption for advice and recommendations, the so-called "Mack truck" of exemptions under our Access to Information Act, and the exclusion for cabinet confidences.

By the way, Mr. Chair, there is a Supreme Court of Canada decision that has interpreted a very similar provision in Ontario, such that unless there is a legislative change for this provision, it will not lead to more disclosure unless there is a legislative amendment.

Policy and decision-making is at the heart of government. Although there is a public interest in ensuring the protection of full, free, and frank advice by public officials, there is an equally important public interest in providing citizens with the information they need to be engaged in public policy and decision-making processes. This information is necessary to have a meaningful dialogue with government and to hold government to account for its decision. This is particularly important in 2016, in the context of our open government initiatives.

Under the current exemption for advice and recommendations, information about priorities, policies, and decisions is broadly protected from disclosure. In order to limit its application to protect only the interest that is at stake, the provision of the advice, this exemption must be limited so it applies only where disclosure would result in injury. The scope and duration of this exemption should also be limited. I therefore recommend amending this exemption as a priority, if the government is to give effect to its accountability and transparency agenda.

With regard to cabinet confidences, cabinet is responsible for setting the policies and priorities of the Government of Canada. Ministers must be able to discuss issues within cabinet privately. Therefore, the need to protect the cabinet decision-making or the deliberative process is well established and recognized.

However, at present, cabinet confidences are excluded from the right of access under the act, subject to very limited exceptions. The exclusion that is written in the act is overly broad and goes way beyond what is necessary to actually protect cabinet's deliberative process.

I therefore recommend that the cabinet confidences exclusion be repealed and replaced with a mandatory exemption that is limited to when disclosure would reveal the substance of deliberations of cabinet. This would allow the commissioner to exercise an independent review function.

A public interest override allows for the competing interest of the public's right to know to be balanced against the interest the exemption protects. Considering the public's interest should be an automatic reflex when determining if non-disclosure is appropriate and necessary. I recommend in the report a list of factors to consider in weighing the public interest in disclosure. These include the government's commitments on open government, as well as environmental, health, and public safety implications or human rights violations. This list is non-exhaustive and actually could include other important factors, such as the rights of indigenous people.

It is paramount that this omission in the act be corrected to ensure the proper balance between competing interests. I therefore recommend as a priority that a public interest override be included in the act.

I have made a number of recommendations to strengthen oversight of the right of access. In my view, the most effective model is the order-making model, with orders subject to judicial review by the Federal Court. This model would include mediation, strong investigative powers, the discretion to adjudicate, and certification of orders as if they were orders of the Federal Court. The benefits of this model are clear and indisputable.

Orders from the commissioner would create a body of precedents that increases over time. Requesters and institutions would then have clear direction as to the commissioner's position on institutions' obligations under the act. The body of precedents would also reduce the likelihood that the commissioner would have to review issues that have already been adjudicated. It gives a clear incentive to institutions to apply exemptions only where there is sufficient evidence to support non-disclosure and then put this evidence before the adjudicator, as judicial review before the court is based only on the record that was before the adjudicator. The grounds on which the order can be set aside are limited, and the institution cannot introduce new evidence or rely on new exemptions.

This, Mr. Chair, is actually a situation that is currently making its way before the Federal Court in two cases where the parties are adducing new evidence of exemptions just as the matters are proceeding to court. This is not unusual in the current system.

An order-making model with a judicial review process would actually avoid these situations, because in that context it is the adjudicator's decision, not the institution's, that is under review before the court. It avoids the redundancy of having two levels of review of the same decision and could result in more timely access to information. The burden to seek a judicial review before the court is on the institution—not on the requesters, as it is in the current system—if the institution wishes to oppose a disclosure ordered by an adjudicator. It provides finality for requesters because orders of the adjudicator are binding unless reviewed by the court. In short, this model improves timeliness, instills discipline, and creates predictability.

The oversight model employed in the act needs to be complemented by additional powers to maximize its effectiveness. These powers include the ability to audit institutions' compliance with the act; to initiate investigations; to carry out education activities; to conduct or fund research; and, to advise on legislation,

programs, and activities that impact on access to information rights. These powers are very similar to those included in the B.C. legislation, for instance, right here in Canada.

● (0900)

I therefore recommend a comprehensive order-making model, which would place Canada at the forefront of leaders in access to information legislation.

[*Translation*]

Should Parliament decide to follow a two-step approach to reform the Access to Information Act, the first-phase legislation must include a mandatory review in 2018 and every five years thereafter. This will ensure that a comprehensive review does in fact occur in 2018.

Mr. Chair, I wish to reiterate that the act has fallen behind modern standards. The result is that Canadians' information rights are not adequately protected. In my view, a comprehensive reform of the act is long overdue and should be undertaken promptly to meet the information realities of the 21st century.

Over the last 30 years and even longer, there have been extensive studies, debates, consultations, and reviews conducted with regard to this legislation. What is required now are policy decisions to reform the act.

● (0905)

[*English*]

We must make policy decisions at this point. The studies have been extremely numerous. The issues have been put forward and debated many, many, many times over the last 30 years.

[*Translation*]

Mr. Chair, as I have stated before, the act does not strike the right balance between the public's right to know and the government's need to protect information. Now is the time to take bold action to ensure that Canadians' access rights are protected.

I am looking forward to answering the committee members' questions.

[*English*]

The Chair: Thank you very much, Commissioner, for a very articulate summary. We appreciate your being here to once again bounce some questions and ideas off of.

We'll proceed to our initial seven-minute round.

Mr. Erskine-Smith, please.

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

Thanks very much, Commissioner.

I want to start by asking about just the operation and the mechanism of exemptions. You've proposed that we repeal all exclusions and move to an exemptions-based model.

Just so I'm clear, where an exemption is claimed, your office would review whether that exemption is in fact valid. Once you make a determination, you would, if you also have order-making powers, order disclosure, which would then be subject to judicial review. In your view, it would always be subject to a court that would be making this determination at the end of the day.

Ms. Suzanne Legault: At the end of the day, there is a process of judicial review that always provides a second level of review, which I think is appropriate. The main difference, really, between the ombudsman's model... When we get to the court level, under the current model, it is what we call a *de novo* proceeding, so everything is back on the table. What we find, as I was saying before, is that institutions will put forward new exemptions. We have two cases before the Federal Court now. These have not been investigated. It's very problematic.

The other thing we find is that in situations where the government is actually very reluctant to disclose the information, we're not provided with very detailed representations. Then we get to court and there's a whole new set of more detailed representations.

Mr. Nathaniel Erskine-Smith: You mentioned that the exemption for advice and recommendations was the Mack truck of exemptions. I would assume that cabinet confidences are excluded—a significant amount of information that would otherwise be disclosed and that is requested.

Of the total number of requests received, how often is the government relying upon the exemption for advice and recommendations for the cabinet confidences exclusion?

Ms. Suzanne Legault: It's actually in the report. We do have some information about the number of requests. It's at page 55.

In 2013-14, the data for that date—I can see if we have more updated data for that, but it would be along the same lines—show that 6,500 times section 21 was applied. At that time, we had about 60,000 requests overall in the system.

The reason it's the Mack truck is that advice and recommendations make up the meat of what's going on in policy decision, program development, service development, and these key decisions in terms of accountability. That's where they lie in those records.

Mr. Nathaniel Erskine-Smith: You recommend, in your recommendation 4.21, “adding a reasonable expectation of injury test to the exemption for advice and recommendations”. Would the list of factors or interests to consider with respect to injury be the same as subsection 4(1), the public interest override, or do you imagine these factors being delineated in advance or being developed over time? How do you see this happening?

Ms. Suzanne Legault: It would be very much a case-by-case situation. For example, if you are receiving advice in relation to measures to be taken in the aftermath of the Lac-Mégantic incident, and there are recommendations being made and advice being given to a minister or to senior officials, then you would have to assess those particular records and that particular advice to see if there would be harm in disclosing that information at that time, as well as whether there would be an overriding public interest in the disclosure of that information, at that time.

It is very case-specific.

●(0910)

Mr. Nathaniel Erskine-Smith: With respect to your recommendation 4.22, which is the explicit removal of “factual materials, public opinion polls”, and other non-contentious...“statistical surveys, appraisals, economic forecasts”, you are suggesting that they be removed from the scope of the exemption entirely.

My question is, if we weren't to do that, if it is still subject to injury test, aren't these materials going to be disclosed anyway?

Ms. Suzanne Legault: The reason why this is specifically mentioned in there is that it has been a recurring issue over the last 30 years. All the recommendations we have in terms of the exemptions are very specific to the experience we have had investigating these matters.

Even in the next annual report that we are going to publish, you are going to see that the issue of survey data has come up again, even though it was previously investigated by Commissioner Grace.

This is really to clarify that this exemption does not apply to these things. It is a matter of clarifying in the legislation something that is recurrently applied and excluded from disclosure.

Mr. Nathaniel Erskine-Smith: Understood.

In recommendation 4.23, you recommend that there be a time limit for the exemption. One recommendation is five years, but the other is “once a decision has been made”. Wouldn't we also want to have “once a decision has been made” subject to an injury test? Once the decision has been made, whether it is a year after or...there may still be some injury to the government, in certain cases, in disclosing that information. Would that be subject to an injury test as well?

Ms. Suzanne Legault: It would be an in—[*Technical difficulty—Editor*].

Mr. Nathaniel Erskine-Smith: Excellent.

Moving to cabinet confidences, you first recommended that the exclusion go and that it be based on exemptions.

If we turned to recommendation 4.27, I wonder if you could walk us through. You have five bullet points here as to where the cabinet confidences exemption should not apply. The first two strike me as... Those would be “advice and recommendations”. The same principles—that information should not be subject to advice and recommendations—would apply here; “analyses of problems and policy options” would be subject to the injury test, the advice and recommendations.

Could you speak to the other bullet points, as to why you believe they should not be part of the cabinet confidences exemption?

Ms. Suzanne Legault: The 15-year timeline... We have put that forward as a benchmark so that you would have disclosure after a certain number of years, where a consent is obtained to disclose the information from the government.

Another bullet point is “to information in a record of a decision made by Cabinet or any of its committees on an appeal under an Act”. An appeal under the act would be under an order-making model; that is why we are using that, but basically the information of a decision.

Mr. Nathaniel Erskine-Smith: I have only 15 seconds left, so really quickly....

The second bullet point is “to analyses of problems and policy options to Cabinet’s consideration”. In your view, that would be excluded from the exemption for cabinet confidences. Presumably that would be under “advice and recommendations” and subject to an injury test. Is that right?

Ms. Suzanne Legault: What we are seeing in cabinet confidences is that the definition, as it exists right now in the act, is so broad that it potentially includes all of these things. Under the previous administration, we had dates and locations of cabinet meetings excluded under cabinet confidences.

The exemption is so broad that it allows for all these things. Yes, the portions of a memorandum to cabinet include background, analysis, and all these other portions, which could be included in the cabinet document but should not really be covered by a cabinet exemption, because this has nothing to do with the deliberative process.

That is why it is like that.

Mr. Nathaniel Erskine-Smith: Understood.

Thanks very much.

The Chair: We now move to Mr. Barlow for up to seven minutes, please.

Mr. John Barlow (Foothills, CPC): Thank you very much, Mr. Chair.

Ms. Legault, thank you very much for coming. I apologize if some of these questions have been asked as we have gone through. I am just stepping in today to fill in for a colleague who is going to his daughter's graduation back home.

I appreciate the opportunity to be here.

One of the things you mentioned during your presentation was that timeliness is a problem. Looking through some of the material from previous witnesses.... There are no penalties in place now for non-disclosure. It seems to be—some of the witnesses said—that non-disclosure is almost a culture within the system. I know you touched on...that there may have to be some sort of penalties imposed.

Can you elaborate on that a bit? What do you have in mind?

Ms. Suzanne Legault: In terms of timeliness, I may not necessarily be in agreement with some requesters who may have appeared before the committee. My position is that if we had a proper discipline system within the legislation in terms of timeliness, it would address the situation much better.

We had a loosey-goosey provision in our act. There really are no strict timelines. There is no proper discipline. For instance, there are provisions on consultations where we may seek the consent of

another institution, but if the institution doesn't respond, then the institution that's seized with the request just sits on it and waits. We've had many investigations that reveal that.

The problem is that if the other institution consulted doesn't respond, if a third party that's being consulted doesn't respond, then there should be a decision, and that should be provided for in the act, so that all the actors are actually aware that they must respond. They must indicate whether they consent or not to this disclosure by a certain time. It's just a question of providing specific timelines and the proper discipline in terms of timeliness in the act. This too has been discussed many times over the last 30 years.

• (0915)

Mr. John Barlow: Is it a matter of the legislation just being too vague? Do we need to tighten up timelines? What would be the penalties or the ramifications? How would you be able to enforce these timelines?

Ms. Suzanne Legault: In particular, in an order-making model, we find that in other jurisdictions these issues of timeliness do not create a big problem within the system. If there is a complaint, the commissioner can simply issue an order for the disclosure quite quickly. That's what we see happening in Ontario and B.C. If the institutions are in default and there is a complaint, they know that an order can be made very quickly on these kinds of matters. These matters are dealt with very quickly in order-making models. The fact that the commissioner has the ability to order the disclosure really puts a lot of discipline in that part of the equation as well. I think that proper discipline in the legislated timelines and an order-making model would deal with the delay problems in the system.

Mr. John Barlow: Thank you.

You also mentioned that there was some discussion regarding consent to disclose be granted if Canada has consulted with a foreign government, and the same is not objected to within 60 days.

Is this an international standard? Is this something that other countries are doing? I know you mentioned that we're falling behind the international standards. Could you elaborate on that?

Ms. Suzanne Legault: What we find in these kinds of cases are two things. When there are issues dealing with other levels of government at the national level there's also an ability to seek consent. What we often find is that consent is just not provided. It could be a municipal government. It could be a police force. It could be any other kind of provincial entity. We find that it prevents disclosure because they're mandatory exemptions. Oftentimes it is Library and Archives Canada dealing with those cases. Oftentimes they are dealing with historical records. Unless there is consent, the institution can't disclose them because they can't get consent. We're basically saying that for anything that happens at the national level, because it's possible to get the consent within a certain period of time, it should be provided for.

Internationally, it should be done when it's reasonable to do so. It depends if you're seeking consent from the U.S., or if you're seeking consent from a country where we don't have diplomatic ties anymore, where we have severed diplomatic ties, or where we cannot obtain the consent. It would not be reasonable to do so.

That's why we've made that distinction in that context. The international standard is that you are careful to protect your international relations. That's why we're saying that you should seek consent when it's reasonable to do so. We recognize that in some instances it's not even possible or reasonable to do so. That's not clear in the act in the way it's written right now.

This is also very much anchored in our investigative experience. It really is based on the 30 or so years of experience, and on what we're hearing in terms of the difficulty in these cases to make a distinction between the national and the international jurisdictions.

Mr. John Barlow: It wasn't in your report, but in some of the other testimony during the study there was some discussion about possibly opening it up to requests from non-Canadian citizens or places outside of Canada. That concerned me a little bit. You already discussed timeliness as an issue. Wouldn't this increase the workload on the department? Is this something you would support? Would there be some sort of structure in place such that concerns or requests from Canadians citizens would be a higher priority? I know that might be kind of difficult to do, but is that something you would agree we should be looking at? How would that work if it was something that we looked at?

• (0920)

Ms. Suzanne Legault: My position is that it should be aligned with progressive norms in terms of access to information, which is that it's essentially open to all. That's the standard in other jurisdictions, the standard of model laws, and that's what we think should be there.

Whether this would result in a massive increase in the level of access to information requests in Canada, it has not been the experience in other jurisdictions, although most of the newer jurisdictions don't have a before and after to compare it with, as we have. For instance, Mexico went open to all, and U.K. went open to all. These jurisdictions went straight to that level right away. In Canada, we would have a before and after.

The situation that's happening now is we do know that about 70% of their requests, if I remember correctly, are done through intermediaries in Canada, but they're actually requests from foreign countries and foreign individuals. I think the people from Citizenship and Immigration Canada testified to that when they appeared before the committee.

My sense of the system, from the requests, the complaints, that I see, is that this is currently how foreign entities or individuals in other countries are accessing their information. It is through information brokers or businesses and lawyers in Canada, mostly dealing with immigration, refugee, and visa status issues. I don't think there would be a significant increase, but if that's a concern of the government, and if Parliament decides that they don't want to go there, again, that is a policy decision.

We have the model laws. We have the international norms. We have our current situation. We know that we are already being accessed through intermediaries. The rest is an unknown. All we know is that in other jurisdictions, it has not created a massive problem.

The Chair: Thank you.

We've gone well past, Mr. Barlow. I apologize.

Mr. Blaikie, for up to seven minutes, please.

Mr. Daniel Blaikie (Elmwood—Transcona, NDP): Thank you very much.

There was an interim directive issued by the President of the Treasury Board. At that time, he also stated that it was his intention to confer some kind of order-making power on the Information Commissioner in the short term. Since then, there's been some talk about the government perhaps having a ministerial override for that order-making power.

In your view, what would be the justification for such a ministerial override, if any?

Ms. Suzanne Legault: I don't know what the government's justification would be for a ministerial veto. We do know that there is some experience with a ministerial veto in the U.K., for instance. In the U.K., there is an information commissioner who has order-making power. Those decisions can be reviewed by the courts in the U.K., and then there could be a ministerial veto either after the commissioner's order or after the court's order.

There has been a very recent U.K. Supreme Court decision. The court has considered that the ministerial veto was unconstitutional because the minister actually reviewed a decision of the court. The court decided it was not appropriate for the executive to override a decision made by the judiciary. That's the current situation. It was on the famous "black spider" letters by Prince Charles in the U.K. Some of you may have heard about that.

In my view, if the government were to decide to provide the commissioner with an order-making model and to then say they are going to have a ministerial veto at the end, I think for taxpayers' sake, they should just scrap the entire independent oversight model and make their political decision. Ultimately, what's the point of having an entire investigation, an entire adjudication, a potential judicial review, and then a ministerial veto, when the whole process in between would have decided that the information should be disclosed?

It then creates an oversight model that is actually a mirage and we're back into complete political decision about disclosure. I would definitely not be in favour of such a thing. If that were the direction of the government, I think we should stick to the ombudsman's model, because at least we have an independent process with an independent court review process. For political reasons, it's actually very odd to make a decision and then have it reviewed and then override that whole review process.

I will be submitting my position on that as part of the consultation process. This is something that we were not expecting, and we have just started to do our research. We will provide our representations on that as part of the consultation process to the government.

• (0925)

Mr. Daniel Blaikie: Thank you very much.

We've seen the government bring some legislation to the House already. Some of it has been moving through the House pretty quickly, some on important issues, whether it's Bill C-10 on the aerospace industry in Canada or Bill C-14 on medical assistance in dying. Those are issues that I think are quite worthy of study, and yet the legislation has been passing quickly.

We've heard from the President of the Treasury Board that when it comes to access, they need to do more study and they need to have a two-step process whereby they bring in a few changes and see how those go, and then there will be a more robust review process and, ultimately, maybe something looking like a final draft of the legislation in 2018.

In your opinion—I think you started to speak to this but maybe you can just elaborate—if the government wanted to sit down tomorrow and begin drafting legislation, is there sufficient information out there to start in the fall with a comprehensive reform of the Access to Information Act, or is this something that really needs more study? What do you think the government could gain in its two-step process, and how do the reforms they are talking about making in the immediate term really speak to anything that would come later in the more robust reform they are proposing for 2018?

Ms. Suzanne Legault: Mr. Chair, it's not my place to comment on how the government decides to proceed with legislation and so on. As Information Commissioner, I do believe that the act is ripe for reform. The calls for reform started in the early 1980s, as soon as the act came into effect. Most of the issues have been significantly reviewed, as I've said before.

There are some new issues. Duty to document is new. I'm certainly the first commissioner who is fully supporting an order-making model, and there are complex issues relating to coverage, which some of the honourable members of the committee have asked about. Those are complex. The full spectrum of areas that are excluded in schedule II of the act includes some 66 pieces of legislation. Those areas, in my view, would need more time, but decisions about advice and recommendations, decisions about cabinet confidences, decisions about an order-making model, decisions about timeliness can all be made in a legislative package fairly quickly because they have been studied many times.

Mr. Daniel Blaikie: On the duty to document, are you concerned that if that gets kicked to phase two of this two-step process there may well be significant information lost in the meantime while there is no legislated duty to document?

Ms. Suzanne Legault: The duty to document has become a huge concern, not just for me but for all the information and privacy commissioners across Canada. We have issued, I believe, two joint resolutions on the issue. There have been cases in Ontario and cases in B.C. We had our PIN-to-PIN investigations. We have very serious concerns that unless we have something very strong in our legislation to ensure that records are actually created, access rights are really being denied.

The B.C. legislature has just issued its report. They are recommending a legal duty to document. This is the new provision. This is what's new in our discussion in terms of reforming the act. This is an issue that is arising because of technology. We want to encourage our public service to use technology. We want them to

have smartphones and so on, but the information is flowing so quickly that we need to anchor a legislative duty to document, and we need to thwart behaviour such as "Let's not take any notes at this meeting". This behaviour has to become an illegal behaviour.

• (0930)

The Chair: Thank you very much, Mr. Blaikie. We've eclipsed the seven-minute mark.

Mr. Saini, go ahead, please.

Mr. Raj Saini (Kitchener Centre, Lib.): Good morning, Madam Legault. Thank you very much for coming.

We've heard a lot of testimony from other information commissioners across the country and from other places. One issue that has come up is the Newfoundland model. Even from your initial testimony you have said that the order-making model is something that you prefer, and you have advocated for it very clearly in your report.

I'm trying to understand the differences you see between your proposal and the Newfoundland proposal. If there are deficiencies in the Newfoundland model, could you just highlight those for the committee so that going forward we'll have a better perception of what we should recommend?

Ms. Suzanne Legault: Oversight models have to be adapted to the reality of the jurisdiction. That's the first point I would make. At the federal level we are receiving close to 70,000 requests per year. We're dealing with national security issues. We're dealing with very complex Revenue Canada Agency issues, and RCMP investigations, and these are very, very complex files. Library and Archives files are oftentimes thousands and thousands of pages, as are CRA files, and we receive on average about 1800 complaints a year.

In Newfoundland they are dealing with 700 requests province-wide, and I believe the commissioner testified that he receives about a hundred complaints a year. It's a very small office, and when they testified before the panel, they highlighted the fact that they were too small to actually put in place an adjudicative model in their office.

There are the real distinctions between the two models. The Newfoundland model remains an ombudsman's model with recommendations. It remains such. If there is an appeal to the court, it is a *de novo* process, exactly what I am suggesting we need to avoid in the federal context. That's a key distinction.

The other key problem that I see in terms of that particular model in Newfoundland, in my understanding, is that they make recommendations, and the institution must abide by the recommendations. If they don't want to abide by the recommendations, then they have to apply to court. It's a *de novo* process.

That could work very well if I'm dealing with a simple case but if I'm dealing with thousands of pages of record and there are multiple recommendations for disclosure in there, which is oftentimes what we have at the federal level, I do not anticipate that I would have full agreement on all of the recommendations for disclosure on the file. I would see that leading to a lot more cases going to court on the Newfoundland model, imported if you wish, in the federal context.

Now my colleague the Privacy Commissioner testified that he favours a Newfoundland model under the Privacy Act, and that's his position on that. I really do not believe that the situation is the same under the access to information regime. Again, you have to look at the types of cases. Under the Privacy Act, people request their own personal information located within government institutions. It is not the same thing as people asking for the dealings of National Defence in relation to Afghan detainees. It is not the same as looking at the amount of money spent on the Saudi arms deals or the considerations around that. They're not the same files, so I stand very firmly on my recommendation on that.

• (0935)

Mr. Raj Saini: Thank you very much.

I have another question. Could you give me some sort of procedural way forward? Because I'm a pharmacist, I like to think in terms of cases. Let's say there's a case, a national security case. We talked about cabinet confidences, so are you proposing that, if somebody has an access to information request about a national security case that's discussed in cabinet, the Information Commissioner would have the ability to review that request or to review those cabinet documents?

The reason I ask that is because, if it's a national security matter, that means whoever the Information Commissioner is would require a national security clearance, and on top of that, if it's a question about something that involves something international or some other domestic priority maybe, then you may want to call in an adviser to give you some commentary or advice about that specific matter. That would mean that person would have to have a national security clearance. I'm just wondering how that would play out.

Ms. Suzanne Legault: We currently have the ability to review national security documents under the legislation as it exists now. Actually, it is probably the one area where the Canadian access law is more progressive than anywhere else in the world.

Mr. Raj Saini: Do you have national security clearance now?

Ms. Suzanne Legault: I do.

The way that it works under the legislation—and I can tell you operationally as well, since you're interested in that—is that the act provides that there are some specially delegated individuals who have the right to see those records. They have the proper security clearance. With regard to the top, top-secret documents, these are small cases that we actually review. These are a small amount of cases.

In fact, most of the time we do not even get these records. We go and review them on site. In order to protect the information to its maximum, we basically review them on site. We have a few delegated individuals, and they do have the proper security clearances.

Actually, for the cabinet confidence exemption, I'm recommending the same process, that we have specially delegated investigators. It would be a small number who would be properly security cleared, and they would protect the information dissemination of that.

Mr. Raj Saini: On that point, I appreciate the fact that you have those delegated people to come in.

The only thing I'm a bit cautious about, and maybe you can relieve that caution, is the fact that when you're dealing with a national security matter, you're dealing with a domestic agenda, with an international agenda, and you may be dealing with other governments. How do you believe that those specially delegated people would be able to absorb all of the decision-making, the sort of forward-looking things, that a government would have to look at? There would have to be a political decision. There might have to be an international diplomatic decision. There might have to be a domestic decision.

How do you believe that one person, who doesn't come from that background but is looking at the information objectively, can provide the best analysis of that material?

Ms. Suzanne Legault: We do develop the expertise.

The Information Commissioner's Office, as an office, has reviewed those records for over 30 years and made decisions on these records. As I said, the really highly sensitive information, for instance, the Communications Security Establishment cases, are very few and far between. We have a lot of national security files that deal with archival files. I once had a national security exemption applied to a briefing note on pandas. The reason that it's very useful for us to review those records is because those exemptions are actually applied quite broadly to a variety of cases.

We just had a recent case on the no-fly list, and we disagreed with the Ministry of Transport on the disclosure of the information. The Federal Court sided in part with the government and in part with our office, in the sense that it said the disclosure was actually covered by national security but the discretion was not applied properly. It has been sent back....

It actually has worked, Mr. Saini, for 30-some years.

The Chair: We're actually past the nine-minute mark, but that's okay.

Commissioner, did I hear you say that you had some top-secret clearance on issues pertaining to pandas? Is that what I heard you say?

Ms. Suzanne Legault: It wasn't top secret; it was a national security exemption, and a—

• (0940)

The Chair: Well, they do know kung fu, so I guess it's okay.

Some hon. members: Oh, oh!

The Chair: Ms. Harder, for up to five minutes, please.

Ms. Rachael Harder (Lethbridge, CPC): Is that a conservative five minutes or a liberal five minutes?

The Chair: Yes.

Ms. Rachael Harder: Okay, I'll stick to a conservative five minutes.

Thank you so much for coming.

I'm just wondering if you can tell me what the threshold is for "partially funded" to be covered under the act. Would first nations be included in this?

Does that make sense?

Ms. Suzanne Legault: Partially funded?

Ms. Rachael Harder: Yes.

What is the threshold for partially funded and to be covered under the act for "entities", and would first nations be included?

Ms. Suzanne Legault: We have provided a submission to the committee with the details of those representations.

This submission provided more details in terms of how we could go about dealing with these issues of coverage and partially funded. What we looked at is whether there was a percentage that was provided by the public, whether there was a percentage in excess of \$5 million that the organization received.

In terms of indigenous groups, in my view, we would have to deal with specific consultations with indigenous groups because of section 35 of the Constitution. I would say that would be a very separate matter, in terms of how that would come about.

Ms. Rachael Harder: Thank you.

Maybe you can talk a bit about the \$5 fee for this process. I'm wondering what your thoughts are on that.

Instead of charging people after a certain number of hours, we just charge this \$5 fee as a flat rate. That's my understanding, and you will have to forgive me, as I am stepping in today so I'm trying to catch up as we go.

I'm wondering what your thoughts are on this. Again, in Newfoundland, they charge after four hours. However, it's my understanding that if a person is seeking their own information, there is no fee at all. I'm wondering if you feel that this would help to eliminate perhaps frivolous requests.

Ms. Suzanne Legault: I don't believe that the \$5 fee has any influence on frivolous or vexatious requests or on abuse of the right of access. I'm a proponent for no fees.

I looked at this again last night. The last stats show that the total amount of fees collected was \$367,000 overall.

I just do not see the actual efficiency in doing that. It's consistent with open government and with the open data charter that we wouldn't charge for information. It is, after all, Canadians' information. The public service is being paid to work for Canadians.

I am really not a proponent of the \$5 fee. I have said this many, many times. We don't charge it in my office. We stopped charging it in 2010, and we have seen no difference in terms of the requests we get, or the number of requests, or the requesters. It has made no difference at all.

Ms. Rachael Harder: Thank you.

You mentioned that there are already public servants who are able to do this, but in February there was a similar question asked by the colleague I'm sitting in for. In my understanding, he asked what the implications were for your office when it began to expand and do ATIP requests. His question was:

What was the implication, then, on your office at that time? Did you have to expand your office? Did crown corporations then have to hire additional staff dedicated to these ATIP requests?

In your answer, you said yes, there were some extensions that needed to be made, and you also referenced the CBC and Canada Post. I think more what my colleague was hoping to gain from you—and I'm hoping to get the answer today—is about those organizations that perhaps are not entirely publicly funded and therefore don't already have the existing infrastructure to do this. What about those organizations? How do we make sense of that for them?

• (0945)

Ms. Suzanne Legault: In terms of being able to respond to access to information requests? Is that what you're asking?

Ms. Rachael Harder: Well, my question is, would the government then pay for those corporations to be able to set up the infrastructure to do this well? Or would they be responsible for covering those costs on their own?

Ms. Suzanne Legault: I don't know what the decision of the government would be in terms of funding these institutions or not. That's a process that would have to be analyzed through Treasury Board submissions if necessary, and so on and so forth.

There is a cost to responding to access to information requests. You do need an infrastructure. You do need to have some software. When we're speaking about the administration of Parliament being covered by the Access to Information Act, I think certainly at the beginning there would be a need for an appropriate infrastructure to actually respond to requests.

It is somewhat difficult to predict. The way to go about it would be, at that time, for the administration of Parliament to go to the U. K., for instance, to see what happened when parliamentarians there became covered or when the administration of Parliament there became covered. We would have to look at comparatives, and analyses of costs would have to be done, and so on and so forth, but yes, there is a cost to providing this service to Canadians, as there is a cost for any service we provide Canadians.

Ms. Rachael Harder: Thank you.

The Chair: Thank you very much, Ms. Harder. You had a liberal five minutes there.

Ms. Rachael Harder: No way. That was a conservative five minutes.

Some hon. members: Oh, oh!

The Chair: We'll go now to Mr. Lightbound.

[Translation]

Mr. Joël Lightbound (Louis-Hébert, Lib.): Thank you for being here with us, Ms. Legault. We greatly appreciate it.

My first question is along those lines. In recommendation 1.4, you ask that we extend the coverage of the act to the Board of Internal Economy, in particular. However, during the discussions we have had here, people have brought up the fact that the Board of Internal Economy is a place where parliamentarians are able to speak freely.

I was wondering how you intend for the act to be enforced in that case.

Ms. Suzanne Legault: First, we would have to consult the people who work here in Parliament. They are the experts when it comes to developing a provision that would cover these institutions.

The Board of Internal Economy is also subject to the Parliament of Canada Act. There are measures or provisions on confidentiality that also need to be addressed. We also suggested that there be a provision or specific exemption regarding parliamentary privilege. That would be absolutely essential if the administration of Parliament is to be covered.

The advantage of this would be that all of the other provisions of the Access to Information Act would apply, including solicitor-client privilege, the protection of personal information, the protection of advice and recommendations, and so on. With regard to exemptions, all of the other provisions would apply. That is the advantage of these institutions being covered by the current legislation. The exemption regime provides for the protection of these things, with the exception of parliamentary privilege, which is not currently covered.

Mr. Joël Lightbound: Do you have an idea of how parliamentary privilege could be defined? If not, is there a specific body that we could turn to in order to come up with the best definition possible?

Ms. Suzanne Legault: If I remember correctly, in the report, we looked to the example of Great Britain. I did not do any legislative drafting in my report. I made suggestions regarding strategic decisions and policy decisions, but I'm not a legislative drafter. We would need to pay special attention to the issue that you are raising. We drew on the British model because it is a Westminster model. These people are covered and have experience in this regard, and that is what we put in the report.

Mr. Joël Lightbound: Okay.

If you were granted the power to issue orders, you would have the power to investigate and the power to adjudicate access to information cases. How would these two roles be kept separate within your office?

Ms. Suzanne Legault: British Columbia and Ontario use this sort of practice and it works very well. They have quasi-judicial tribunals. There is a legislative framework that makes that possible. This system works very well in British Columbia. These people have the power to investigate, mediate, adjudicate, educate, and research. They give advice to Parliament.

There will definitely need to be an internal reorganization at the Office of the Information Commissioner so that the adjudication function can be kept separate from the rest of the investigations and mediation, for example. In Ontario, mediation is a very independent process in that whatever is discussed and negotiated during mediation is kept completely separate from the adjudication process.

This sort of system also exists in different formats in other quasi-judicial tribunals in Canada.

Right now, when we engage in mediation as part of our investigations, the same investigators make the recommendations at the end of the process. We are having a problem keeping that function separate right now. In the adjudication model, where there is legislation in that regard, those two functions can really be kept separate. Such a system could work very well.

Will we need additional funding? Yes, because my office already has insufficient resources. Will we need a lot more resources if we use the adjudication model? I don't know. We haven't done any detailed calculations. I'm waiting to see what legislative proposals are made and what legal framework we will be asked to work within. Right now, we're unable to do a practical evaluation of the impact.

• (0950)

Mr. Joël Lightbound: If the government gives the commissioner the power to issue orders in its reform of the Access to Information Act, how would that work? Have you thought about what type of administrative tribunal you would set up within your office?

Ms. Suzanne Legault: Yes. As I said, the model that is being used in British Columbia and Ontario is already well established.

Mr. Joël Lightbound: It would be similar.

Ms. Suzanne Legault: Ontario has a type of registrar like we do. That position already exists. Complaints are filed and decisions are made really quickly. We discussed timeliness earlier. In Ontario, there is a group that takes care of delay-related complaints and that group resolves those problems almost immediately, without the need for adjudication. It is extremely rare for such cases to require adjudication.

[English]

Mr. Joël Lightbound: Right.

[Translation]

Ms. Suzanne Legault: Then, a mediation group resolves most of the cases. In British Columbia, 99% of cases are resolved before adjudication. In Ontario, I believe it is between 80% and 85%. Adjudicators then hear the facts related to cases that were not resolved through mediation. However, when a case gets to that point, there is a lot less work to do because much of it has been done already. Adjudication is used for the remaining, more contentious cases. This last stage of the process is also more effective because a lot of the work has already been done. The focus is really on any remaining issues that need to be worked out.

[English]

Mr. Joël Lightbound: It was indeed a liberal five minutes.

The Chair: Indeed it was, Mr. Lightbound.

Colleagues, the next round goes to the official opposition, but I'm asking if it is okay if I take that five-minute spot. Is everybody okay with that?

Mr. Nathaniel Erskine-Smith: You are the only permanent member of the committee here.

The Chair: Okay.

Madam Commissioner, I have a few questions for you.

Back when the Access to Information Act was first adopted, it was adopted at the very same time as the Privacy Act. Would you agree with that statement?

Ms. Suzanne Legault: Yes.

The Chair: When that happened, there was likely very healthy debate to make sure the right balance was struck between protecting personal privacy and allowing Canadians to have access to the information to which they are entitled. Would you also agree with that assertion?

Ms. Suzanne Legault: Yes.

The Chair: In light of the fact that this committee right now is only reviewing—and I'm not saying that in any pejorative way—the Access to Information Act, and we'll be moving to the Privacy Act after this, insofar as what our committee will be recommending to the government goes, and based on what we've heard already from the President of the Treasury Board regarding the government's plans and intentions going forward, I am mildly concerned that we might be making decisions without taking into consideration the full context of the balance with the Privacy Act.

My question for you is on the changing of the definition of personal information. If the Privacy Commissioner were here, I would suggest that the Privacy Commissioner would be very concerned and would want to have these kinds of questions answered. Can you edify this committee on any of the changes you want to make concerning the definition of personal information? Do you believe any of the changes that you make would affect the interplay between the Privacy Act and the Access to Information Act?

• (0955)

Ms. Suzanne Legault: The area where the two acts intersect is in the definition of personal information. Section 19 of the Access to Information Act is an exemption to disclosure for personal information under the access to information regime. In that section, it refers to the definition of personal information in the Privacy Act. That's most of how the two acts intersect.

The recommendations we're making with regard to section 19 are also anchored on the experiences we have had in relation to our investigations over the last 30 years. In our report we mentioned that the personal information exemption under the access regime was applied in 20,000 out of 60,000 requests at the time, so that's a lot, one out of three. We're recommending changes to clarify what happens in our investigations. The Privacy Commissioner is not in agreement with those changes.

One of the changes we're suggesting is that there should be an invasion of privacy test. This occurs to us in our investigations when we have requests for disclosure of personal information and people are deceased; parents are trying to obtain information on their deceased children. The Ashley Smith case comes to mind. There are other cases where people have died in difficult circumstances in jail, and parents are trying to obtain information from incarceration authorities or police authorities about what happened to their children. The exemption for personal information is used, and we're basically suggesting that there should be a test for invasion of privacy, because in those situations there could be disclosure on compassionate grounds. We're already working with police forces in

order to get that kind of disclosure. These are extremely difficult situations for the relatives of these people.

The other aspect we are recommending really has to do with when to seek or not to seek consent. This is really merely a clarification in terms of our investigation because this is something we encounter quite a lot. We're not proposing any significant changes to the definitions otherwise.

The Chair: Thank you very much for that clarification.

Could I also then assume—and edify this committee if I'm wrong—that areas of public interest already override personal information? Are you satisfied with the current public interest override measures, or do those need to be changed as well?

Ms. Suzanne Legault: I am proposing that there would be a general public interest override across, say, a reformed Access to Information Act. The public interest override in relation to personal information is what we're working with in terms of getting the kind of disclosure I was discussing, such as disclosure on compassionate grounds. It's very difficult to get that from institutions under the current regime.

That's why we're basically saying that the progressive norm is to have a general public interest override applied across the entire act, so that one would no longer be necessary.

The Chair: Would you want, as Commissioner, to have the ability with your order-making power, should you get it, to use that order-making power for the purpose of bypassing or circumventing personal information clauses that are in the Privacy Act, or as the definitions apply in the legislation?

Ms. Suzanne Legault: Yes. I saw that my colleague sent a letter to the committee yesterday indicating that, should my office get order-making power, we should not get order-making power for the exemption dealing with personal information under the Access to Information Act. I am very surprised by this position and I think it would be completely unworkable.

We did a quick look last night in terms of our cases. What happens is that the exemption for personal information under the Access to Information Act has been interpreted by the Information Commissioner for over 30 years. These investigations are conducted in private, and recommendations are made in private. There has not been an issue with that. Waiting until 2018 to make a decision about that is not going to change the reality that the Information Commissioner is allowed to interpret the legislation under the Access to Information Act.

It's as if we said that the Information Commissioner cannot interpret the exemption on national security; that the Information Commissioner cannot interpret the exclusion under the Income Tax Act that excludes the application of the act, that—it's endless if we go there.

As I said, my colleague has had a five-minute conversation with me about this. I think it would create an unworkable regime where you would have order-making power for a case, but if there is a case with several exemptions being applied, including section 19, you would have an order-making model for the rest of the exemptions but not for section 19. You would have a recommendation model, so one would be an adjudication, it would go to the Federal Court on appeal as a judicial review, and the other one would go to the Federal Court on a *de novo* process. This is in a context where I think we had 2,000 cases in our history where there was a mix of exemption, including section 19.

I think what my colleague is proposing is that the Office of the Information Commissioner should not have order-making power, and that we should wait until 2018 even though he has stated before this committee that he does not wish to have order-making power for himself, so I am terribly confused about this position.

•(1000)

The Chair: Thank you very much, Madam Commissioner.

I well eclipsed the five-minute mark and I appreciate your patience, colleagues. I was going to cut myself off and then I was worried I was going to point of order myself, so I appreciate that.

We'll now move to Mr. Long for five minutes, more or less. Thank you.

Mr. Wayne Long (Saint John—Rothsay, Lib.): Thank you, Chair.

Thank you, Commissioner, for coming again today. How many times is that? Is it four times now, or three?

Ms. Suzanne Legault: Who's counting?

Voices: Oh, oh!

Mr. Wayne Long: We'll be on a first-name basis here next time.

Commissioner, I just want to talk again about chapter 3 and timeliness, and certainly a prevailing theme we've seen through all the witnesses is the culture of delay, that government is a laggard.

I've said it several times in this committee—and I don't think you were here at that point—but to me, you can't just throw money at culture, and you can't just throw policies and procedures at culture. Culture is something that evolves over time and is very hard to change. I liken it to when I was in the hockey business. Initially we had a culture of defeat, and it took us time to change from that culture of defeat to a culture of winning. It took us many years and it really came from the top.

I appreciate that you've been here several times and have talked about it, but can you just talk a little bit more about that culture of delay and how, once and for all, we can really change that and make it better?

Ms. Suzanne Legault: Hmm: once and for all, change it and make it better...

Mr. Wayne Long: Try.

Ms. Suzanne Legault: My experience has been that it really does make a difference what the messages are from the top of each organization. We will issue our annual report at the end of, probably

mid-June. There is a case in point in there where we had an institution that had incredible delays in responding to the access requests. We had been in there a couple of times. I had assurances from the head of the organization, and yet the situation remained the same. Recently there was a change in leadership and the person immediately took action. I'm very confident that in the entire organization there will be a complete turnaround. So it makes a huge difference.

In my office, people are really not allowed to go on deemed refusal, as you can imagine, in answering access to information requests. Our average time for responding to access requests is something along 16 days, and yes, sometimes we do take extensions. People have very clear marching orders. That makes a huge difference.

That said, if you have a legislative framework that has been in existence for over 30 years and is very lax in its provisions, then it perpetuates the ability to have delays within institutions. There are no consequences whatsoever, really. You need a legislative framework that is also providing the discipline necessary, a framework within which people will function.

But yes, ultimately it really comes from the leadership at the top.

•(1005)

Mr. Wayne Long: Just as an example, I'll go back to one of my businesses. This is a little bit different. We used to invoice our customers. On our invoices we put "net 30 days", so everybody would pay us in 30 days. We made a subtle change on our invoice to "net 15 days", and we were shocked at how many people would pay us in 15 days simply because we changed that part.

This is what your website states: "Both Acts allow for a legal response time of 30 calendar days from the date of receipt of an official request." Is there any merit in thinking that if it were less, people would be quicker to respond? I mean, knowing that you have 30 days is somewhat self-fulfilling. I know you just said 16 days, but what if the website said 15 days? Would things be quicker?

Ms. Suzanne Legault: If the law says 15 days initially, I think it would be pretty difficult for institutions, generally speaking, in terms of the whole of government. Where we have the most problem is the extension after the 30 days. It's really that portion where there is no time limit. There is no time limit, in that it only says an extension that's reasonable under the circumstances—and that has been, as you know, all the way to the Federal Court of Appeal on extensions over 1,000 days.

To me, the main problem is not the 30 days but really the part after—when you can take an extension, under what circumstances, for how long. Have a specific time limit on that so that if you extend it, then you need the permission of the Information Commissioner. That's what I think would be useful.

Mr. Wayne Long: I was going to share my time with Mr. Bratina.

The Chair: Mr. Bratina, do you have one quick question?

Mr. Bob Bratina (Hamilton East—Stoney Creek, Lib.): It shouldn't take long.

You have such an important job, and I know, judging by your testimony, you take your job very seriously. I try to put myself in your position, and the stumbling block for me comes with “clearly of public interest”. I've actually surveyed public interest, and one definition is that it has to do with human rights, health, finance, and so many other things.

Do you have a clear perception in your mind, in terms of what you do, of what is clearly in the public interest?

Ms. Suzanne Legault: We've provided some factors to be considered in terms of public interest because of what you're saying. It's not defined, and in fact I don't recall that there is another jurisdiction where that is defined. So we decided to put some of the issues that are of public interest in the context of disclosure.

We put in open government because this has to become now a matter of consideration in considering when we should be disclosing, because our governments are saying we want to promote open government and open government includes open dialogue. If you want to have open dialogue you have to be able to share some information with citizens. That's why we put that in there.

We've put in the more standard ones, health, safety, and environmental considerations, because those are things that are already in some provisions of our legislation.

We added the human rights violations because we do not think about that very often in Canada in terms of disclosure of access to information but we have had cases, like the Maher Arar case for instance, where there were clear issues of human rights, and they should be taken into consideration in terms of when we should or should not disclose information.

I have put in before you today the issue of indigenous rights. The reason why I have put that forward for consideration is because I have recently met with land claims researchers and they have sometimes quite a lot of difficulties in accessing information. I think this is something that should be considered in terms of disclosure, particularly in light of this government's agenda. We have had cases in the past in the Federal Court in terms of disclosure of information in relation to indigenous rights.

I think that is also something that could be added to the public interest, but I don't think it should be an exhaustive list because in all of these cases you have to weigh the injury and the public interest, but as I explained before in the Lac-Mégantic setting, the public interest is a case-by-case analysis as well depending on what the circumstances related to the documents are.

•(1010)

The Chair: Thank you very much, Madame Commissioner.

That was the most liberal five minutes we've had so far.

To bring us home we have Mr. Blaikie for somewhere between three and 12 minutes.

Three minutes if you could, sir.

Mr. Daniel Blaikie: I just want to follow up on this question of access to information when it comes to indigenous governments.

Maybe just to get some clarity, is it your position that with respect to those organizations and first nations governments essentially, or bands, they should be treated in the way that you would treat provincial governments? Or do you believe that they don't really fall under the same jurisdiction or is the claim that because they receive federal funding they ought to be treated as an entity of the federal government with respect to access?

Can you give a little more clarity on what you mean and what you think the implications for understanding the relationship between the federal government and first nations governments are?

Ms. Suzanne Legault: In three minutes?

Understanding the relationship between the federal government and indigenous peoples of Canada?

Mr. Daniel Blaikie: Or twelve. I think I get up to twelve minutes, so....

Ms. Suzanne Legault: Even I cannot do that.

First of all, there are specific provisions in the act, they're very specific with various first nations, various indigenous governments, and this is a very complex area.

We did have a case in the past in the Federal Court of Appeal involving a land claims researcher for an indigenous group who was trying to obtain information from Statistics Canada...specific exemption there, specific application of the definition of personal information, exemption for indigenous rights. This is an area that's complex.

However, it is an area where we do have access to information requests in terms of all sorts of issues related to indigenous rights and there is no real analysis in terms of how we would assess the harm in disclosure and the public interest in disclosure. I think it is an area that would definitely benefit from further study with appropriate indigenous groups.

I did decide to put it on the table because I have had these representations in the last two weeks. I think it's something of interest and that could definitely be part of a 2018 analysis because that has not been clearly and carefully studied in the past.

Mr. Daniel Blaikie: Thank you.

I will take a conservative three minutes.

The Chair: You most certainly did.

I believe there is only one member of the committee who hasn't had an opportunity to ask questions. If that member would like to ask a question now, I would open up the floor.

Mr. Erskine-Smith, go ahead.

Mr. Nathaniel Erskine-Smith: You mentioned exclusions—moving away from exclusions to exemptions, and cabinet, in particular, as an example of that. First, are there other exclusions you would want to get rid of? Perhaps you could speak to those exclusions as well.

Ms. Suzanne Legault: That is the one I am most concerned about.

Mr. Nathaniel Erskine-Smith: On cabinet confidences, just as comfort for this committee.... We obviously want an open government, but there are deliberations that are necessarily private. Those deliberations are also subject to injury tests. You mentioned it is a mandatory exemption. Perhaps you can explain to this committee and Canadians the difference there, and what that means.

Ms. Suzanne Legault: Yes. There is always a misunderstanding when we say “an exclusion” or “an exemption”. When you have an exclusion, what happens is that I cannot see the records. That is the consequence, so there is no independent oversight when the government says something is a cabinet confidence.

In a mandatory exemption, what you have is that, if it fits the definition of “cabinet confidence”, then it is exempted, so the review is limited to whether or not the documents—because we would be able to see the documents—fit within the definition. What I am suggesting is that the definition, as it exists, is too broad. It needs to be narrowed. I am recommending a mandatory exemption.

What would apply—and that is a policy decision—is whether or not the public interest override would apply in that circumstance. I think that is something for the committee to consider.

• (1015)

Mr. Nathaniel Erskine-Smith: Thanks very much.

The Chair: Colleagues, thank you very much. We had an excellent discussion today.

Commissioner, we thank you very much for your continued patience. I truly and sincerely believe that the committee is seized with this, and I have every hope that we will have you back in the not-too-distant future as we go through the legislative review process. I am very hopeful that we will get there in this particular Parliament. I will do my best, and I know that there is goodwill at this committee to do so.

We thank you very much for your time. We know that you will always make yourself available, should we need to call upon you again.

Ms. Suzanne Legault: Thank you.

The Chair: Colleagues, we are going to suspend and return in camera to give consideration to our analysts for the drafting of the committee's report, if that's okay.

We will suspend for a few minutes.

[Proceedings continue in camera]

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