HOUSE OF COMMONS
CHAMBRE DES COMMUNES
CANADA

Standing Committee on Access to Information, Privacy and Ethics

ETHI • NUMBER 075 • 1st SESSION • 42nd PARLIAMENT

EVIDENCE

Wednesday, November 1, 2017

Chair

Mr. Bob Zimmer

Standing Committee on Access to Information, Privacy and Ethics

Wednesday, November 1, 2017

● (1530)

[*English*]

The Chair (Mr. Bob Zimmer (Prince George—Peace River—Northern Rockies, CPC)): I call the meeting to order.

Good afternoon, everybody. Welcome to the Standing Committee on Access to Information, Privacy and Ethics meeting number 75. Today we're speaking about Bill C-58, an act to amend the Access to Information Act and the Privacy Act and to make consequential amendments to other acts.

Today we have the Office of the Information Commissioner of Canada, Suzanne Legault. Just for information to the committee, the presentation is going to be a little bit longer than the 10 minutes; it's around 20 minutes. Also, I'll announce that we have some committee business at the end of the meeting. We only have one presenter today, so we may exit earlier than we planned.

Go ahead, Commissioner.

Ms. Suzanne Legault (Information Commissioner of Canada, Office of the Information Commissioner of Canada): Good afternoon.

Thank you, Mr. Chair.

[*Translation*]

Good afternoon, everyone.

Honourable members, thank you for inviting me to appear before you to discuss Bill C-58.

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. I have taken these into account for my submission today.

As you are aware, persistent calls to reform the Access to Information Act have been made ever since its adoption. In the 30-plus year history of the Office of the Information Commissioner of Canada, my predecessors and I have documented multiple challenges and deficiencies with the act.

In March 2015, I tabled a special report in Parliament where I proposed an in-depth reform of the Access to Information Act. Included in this report were 85 recommendations that would resolve recurring access to information issues and create a culture of openness.

During this committee's 2016 study of the act, I identified the recommendations from my special report that should be prioritized in the first phase of the government's reform.

My recommendations from that appearance are still the priorities I would recommend today to modernize the act. They are also recommendations the committee made in its final report.

First, we recommend extending the coverage of the act to include the Prime Minister's Office, and administrative institutions that support Parliament and the courts.

Second, we recommend legislating a duty to recommend the decision-making process in government.

We also recommend reducing delays.

Moreover, we recommend maximizing disclosure of government information by amending the advice and recommendations exemption and the exclusion for cabinet confidences.

In addition, we recommend strengthening the oversight powers of the information commissioner by adding to the act a true order-making model, with the certification of orders as if they were issued by the Federal Court.

Finally, we recommend including in the act a mandatory review of the Access to Information Act in 2018, and every five years thereafter.

● (1535)

[*English*]

Since then, I have also recommended to the Minister of Justice and to the President of Treasury Board, by letter dated October 8, 2017, that an amendment be made during the first phase of amendments to provide for a clear provision preserving the ability of the Information Commissioner to review records over which the exemption of solicitor-client privilege is claimed by government institutions. This recommendation followed the decision of the Supreme Court of Canada in Alberta (Information and Privacy Commissioner) v. University of Calgary.

Bill C-58 fulfills two of these seven priority recommendations: that is, the mandatory review of the act every five years, and the recommendations related to solicitor-client privilege.

[*Translation*]

On September 28, 2017, I tabled a report in Parliament entitled “Failing to Strike the Right Balance for Transparency”, which details my concerns over Bill C-58 and my recommendations to improve the bill.

I would be pleased to answer any questions you may have on that report, but for now, I will focus my remarks on some of the issues that have been raised during your study and that were not addressed in detail in my special report.

[*English*]

First, in relation to proactive disclosure and judicial independence, the committee has heard from a witness representing the Canadian Superior Courts Judges Association. This witness raised concerns that the proactive disclosure found in Bill C-58 with respect to judges could interfere with judicial independence or could compromise the security of the judges. The Canadian Bar Association, in its written submission, has also raised similar concerns.

When I tabled my report "Striking the Right Balance for Transparency" in 2015, suggesting amendments to modernize the act, I recommended extending coverage of the act to the bodies that provide administrative support to the courts, not to the judges themselves. I recognized that judicial independence is a cornerstone of our judicial system and that certain records should be excluded from the purview of the act.

Bill C-58 proposes to proactively disclose individualized information relating to incidental expenditures and representational, travel, and conference allowances, including the judges' names. This, according to the association that presented before this committee, could jeopardize the independence of judges and compromise their security.

In order to address these concerns, the association suggested that expense information according to the categories of reimbursable allowances set out in the Judges Act be published according to each court's expenditures.

In my view, this recommendation is reasonable and should seriously be considered by this committee. Currently the expenditures related to these categories of information are not available to the public.

As well, the association's recommendation that the decision of whether judicial independence could be undermined by the publication of the proactive disclosure documents could be made to reside with the chief justice of the court concerned, and should also, in my view, be considered by the committee.

The second aspect that I want to address—and I think you have to be patient with me and bear with me—is in relation to personal information. I thought, in preparing the remarks for today, that I would actually go into some detail—basically, to go back to basics in a way—to explain how the exemption for personal information is addressed under the Access to Information Act.

Based on the testimonies presented to the committee and committee members' questions, it is useful to clarify how the exemption for personal information is applied under the Access to Information Act.

The personal exemption is found at section 19 of the Access to Information Act. It is a mandatory exemption. It states that the head of a government institution shall refuse to disclose any record requested under the Access to Information Act that contains personal information.

Personal information is defined in section 3 of the Privacy Act and is incorporated into the access act by virtue of section 19. It states that "*personal information* means information about an identifiable individual that is recorded in any form including" such things as information related to race, religion, addresses, fingerprints, and so on.

Section 19 of the access act provides the following instances in which disclosure of personal information is authorized: the individual to whom the information relates consents to the disclosure, the information is publicly available, or the disclosure is in accordance with section 8 of the Privacy Act.

Section 8, in turn, contains a list of instances in which personal information can be disclosed. In particular, subparagraph 8(2)(m)(i) states that personal information may be disclosed for any purpose where, in the opinion of the head of the institution, the public interest in disclosure outweighs any invasion of privacy that could result from the disclosure.

The head of the government institution shall notify the Privacy Commissioner in writing of any disclosure of personal information prior to the disclosure, under paragraph 8(2)(m), and the Privacy Commissioner may, in turn, if he deems it appropriate, notify the individual to whom the information relates.

Paragraph 8(2)(m) was applied over 7,700 times by government institutions in 2015-16. This would have triggered mandatory disclosure requirements by institutions to the Privacy Commissioner.

Of the requests completed by government institutions in 2015-16, the exemption for personal information was applied by government officials to more than 28,000 requests. That's about 39% of the total number of requests. The exemption for personal information is the most frequently cited exemption by institutions.

These decisions on disclosure are made by government officials on a routine basis.

● (1540)

In terms of complaints to my office, this exemption was cited in over 300 complaints last year, and this is pretty consistent year over year. This makes up 52% of all the exemption complaints that my office reviews. It is important to recognize that the personal exemption is used almost invariably with other exemptions in any complaint to my office. However, most issues related to the personal exemption provision are resolved at the very early stages of our investigations and are very rarely contentious.

Indeed, since I have been commissioner, we have dealt with over 13,000 investigations. I have issued a formal recommendation to release personal information in seven cases.

During that time, there have been a total of 21 cases in court related to the personal information exemption under the access act. Of those, 19 were brought forward by third parties, not by the Information Commissioner, and two of those cases were brought forward by my office. Although the Privacy Commissioner can intervene in these cases, the current Privacy Commissioner has never done so.

Bill C-58 incorporates the Privacy Commissioner into the Information Commissioner's investigative process in two instances. First, if institutions notify the Privacy Commissioner of a complaint to my office, the Information Commissioner will have a positive legal obligation under Bill C-58 to seek representations from the Privacy Commissioner.

Will institutions feel compelled to notify the Privacy Commissioner? If so, there will be a positive legal obligation to involve the Privacy Commissioner in all of these investigations by the Information Commissioner. No timelines are provided for in this process. We know that this will affect over 300 investigations per year that not only deal with personal information but with many other investigative issues.

Second, the Information Commissioner may consult at her discretion—this is in Bill C-58—when she intends to issue an order that personal information be disclosed.

The Privacy Commissioner, in his submission, proposes to expand his role in access to information investigations further than Bill C-58 already does. He recommends making consultation with his office mandatory when the Information Commissioner intends to issue an order or a recommendation in all instances involving disclosure of personal information. He also recommends that the Privacy Commissioner be able to seek judicial redress when the Information Commissioner makes not just an order, but also a recommendation to disclose personal information.

My colleague argues that this involvement of the Privacy Commissioner in the Information Commissioner's investigations is necessary because Bill C-58 changes the balance between access and privacy rights. He argues that the Information Commissioner is a champion of one side of this balance, and therefore the Privacy Commissioner, whom he describes as the champion of privacy, must weigh in to ensure that balance is maintained. Respectfully, I disagree.

Bill C-58 does not alter the exemption for personal information that currently exists under the law. It does not significantly alter the definition of personal information. It maintains the test for public interest disclosure and the obligation for institutions to notify the Privacy Commissioner should they decide to disclose based on public interest.

It is true that the Information Commissioner is a champion for transparency in public policy debates. I am, however, first and foremost, a regulator. As such, in conducting the investigations under the legislation, I must apply the law as it is written. The law related to this exemption has not changed. My investigation will consider the same legislation that it has considered for the last 34 years.

● (1545)

The exceptions that allow disclosure are at the discretion of the head of the institution. When we conduct investigations in relation to this, our investigative work reviews whether the head of the institution has exercised their discretion in a reasonable manner. The Information Commissioner does not substitute her own exercise of discretion for that of the head of the institution.

As I have explained in my special report, given that Bill C-58 does not provide for an actual order-making power, the shift in balance advanced by both the government and the Privacy Commissioner is not grounded in the new provisions of Bill C-58 and is at best entirely speculative.

Any mandatory obligation to consult the Privacy Commissioner is, in my view, not required, and will hinder the efficient investigation of access to information complaints. Most importantly, it will impact the integrity of investigations under the Access to Information Act. This can occur in at least two circumstances.

First, since the Office of the Privacy Commissioner is also subject to the Access to Information Act and therefore subject to complaints to my office, a mandatory obligation to consult with his office would create a conflict of interest.

Second, it is common for requesters to seek information under both the Information Act and the Privacy Act. They use both acts to maximize the amount of disclosure they will obtain from government institutions. It would directly affect the integrity of the investigations under the Access to Information Act should the Information Commissioner be obligated to disclose information related to these investigations to the Office of the Privacy Commissioner.

In sum, for all the reasons above, I do not recommend that the Privacy Commissioner be involved in the investigation of access to information matters when the exemption for personal information is at play, given the existing safeguards that already exist in our respective legislation. The recommendations in my report in this regard should be followed.

However, should the committee consider it necessary to involve the Privacy Commissioner into the investigations of the Information Commissioner, I recommend, first, that consultation with the Privacy Commissioner should be at the discretion of the Information Commissioner, as is provided for already in Bill C-58 under proposed new section 36.2.

Second, I recommend that notice to the Privacy Commissioner be given when the report of an investigation sets out an order requiring the institution to disclose a record or a part of a record that the head of the institution refuses to disclose under section 19 of the Access to Information Act. In essence, I recommend maintaining proposed new subsection 37(2). Finally, new subsection 41(4) of Bill C-58 could be maintained to allow the Privacy Commissioner to apply to court for a review of orders of the Information Commissioner related to section 19.

● (1550)

[*Translation*]

Mr. Chair, I have been pleased to follow your work and to hear during the minister's appearance that the government is open to hearing amendments from this committee on Bill C-58. My report contains 28 recommendations to improve Bill C-58, and I encourage you to consider them in reviewing this bill.

Thank you for your study.

I am now ready to answer your questions.

The Chair: Thank you, Commissioner.

[*English*]

We'll start off with MP Saini, for seven minutes.

Mr. Raj Saini (Kitchener Centre, Lib.): Thank you, Madam Commissioner. It's always a pleasure to see you here.

There are some points of clarification that I would like to ask regarding the certification of orders. It's my understanding that the way the bill is drafted, an order from your office would carry the same weight and binding power as a court-certified order, without requiring any additional steps.

Is this the way you interpret the legislation?

Ms. Suzanne Legault: That is not my interpretation of the bill as it currently is drafted.

Essentially, if the government institution basically sat on the order and did not provide disclosure as was being ordered, I would have to take a mandamus application in the Federal Court, which is part of the Federal Court legislation. Mandamus applications usually take around 18 months. That's my concern, and that's why I'm recommending that there be an added provision that I would be allowed to get the order certified in the Federal Court. I'm told by my general counsel here that those contempt of court proceedings usually take four months.

Mr. Raj Saini: Okay.

Ms. Suzanne Legault: There is a distinction between a mandamus and a certified order, and that would be the main distinction.

Mr. Raj Saini: The other point I want clarification on is around the order-making power and the order-making model.

I think there is some concern that there may be departments lining up to take you to court. In Newfoundland, we have the order-making power. Do you find that's an issue in Newfoundland or that there are departments that are not complying with the order?

Ms. Suzanne Legault: I went to Newfoundland, by the way, and I met with the Newfoundland commissioner and with various stakeholders involved in the application of the new law. There hasn't been enough time to see if the Newfoundland model works or not and whether there's more judicial review being conducted in court in Newfoundland.

What I can say from my perspective is that under the current regime, we usually resolve most of our cases before going to a formal recommendation under the current section 37 of the act. When we get to those cases, there are less of them. There are around 15 cases a year that actually go to that level. Most of the cases are resolved before that.

When we get there, in most instances the government institutions agree with our recommendations. There are very few cases that end up going to court. That's under the current regime. I don't see that this is going to change under the regime being proposed by Bill C-58. That's why I don't see that there's going to be this shift in power, this shift in balance, that the minister spoke about—that there would be more reluctance from institutions to take the Information Commissioner to court—because that's the current situation. When we get to that final level, essentially there are two things: either the government is strenuously opposing the disclosure because it wants to delay the disclosure, or we have a disagreement on the interpretation of the law. Those are usually the cases in which we end up with those formal recommendations.

I really don't see that changing under Bill C-58. What would happen is that if the government institutions agreed to abide by my recommendation, then it would become an order after a longer period of time. I normally give them 15 business days. Now we're looking at a longer time period before the order becomes an actual deemed order. For me, the difference is really that Bill C-58 gives the government more time before it discloses information following my recommendation.

In terms of who takes whom to court, under the current regime, if the government refuses disclosure following my formal recommendation, I have the ability to take the matter to court with the complainant's consent. Under Bill C-58, it is the government that will take me to court—or, rather, the Information Commissioner. It won't take me personally, but the Information Commissioner.

● (1555)

Mr. Raj Saini: I hope not you personally.

Ms. Suzanne Legault: No.

Mr. Raj Saini: I have another point of clarification when it comes to frivolous and vexatious requests. One of the things we want to do is make sure that the system does not get bogged down by people making requests in bad faith. How do you see it functioning? What's the mechanism you see to make sure that doesn't happen?

Ms. Suzanne Legault: As I've proposed in my special report, I really don't have an issue with having a provision that would deal with frivolous and vexatious requests or requests made in bad faith. I do take issue with the various components of that and the various ways by which an institution can deny or can decide not to respond to an access request under Bill C-58. That's laid out in my report.

In terms of the provision for frivolous and vexatious requests, which is proposed paragraph 6.1(1)(d), I don't have any issues with that provision. When I issued my recommendations, I was making my recommendations under the basis of a true order-making model, and I recommended that this would be subject to an appeal to the Information Commissioner. Under the Bill C-58 model, which I do not consider to be a true order-making model, I would recommend that permission be sought from the Information Commissioner before an access request is denied on the grounds of being frivolous, vexatious, or in bad faith.

Mr. Raj Saini: Do I have more time?

The Chair: You have one minute.

Mr. Raj Saini: That's okay, then.

The Chair: Thank you, MP Saini.

Next up, for seven minutes, is MP Kent.

Hon. Peter Kent (Thornhill, CPC): Thank you very much, Chair.

Thank you, Commissioner, and to staff, for appearing before us today.

I must say, starting off, I've never seen in my previous years as a journalist covering Parliament and legislatures in Canada, or in the almost decade in government here, such a direct, specific, and unequivocally negative assessment of a piece of government legislation.

That said, when the President of the Treasury Board appeared before us, he was equally clear, although he said, as you said, that the government will be pleased to receive proposals from the committee. He made it clear they're not likely to be accepted, and he justified that by saying there was provision for a one-year ministerial review after the coming into force of the bill.

I will have some detailed questions later, but given that possibility, and in fact that probability, do you believe that Canadians would be better served by the status quo than what you have very clearly stated is a regression of existing rights?

● (1600)

Ms. Suzanne Legault: I think the public will be best served if amendments are made to Bill C-58 to address some of the deficiencies that I've highlighted in my report.

Hon. Peter Kent: You had 12 red-lined, two topics of neutrality, and one of concern.

The government seldom accepts all of the recommendations that come from either committees or from other areas—from commissioners, perhaps. If you were to recommend your top five, that would they be?

Ms. Suzanne Legault: I have my top 28.

Hon. Peter Kent: What's the most important?

Ms. Suzanne Legault: They're all important.

One of the things that the government promised was to have ministers' offices covered by the Access to Information Act. This piece of legislation does not do that. I have said that this was one of the priorities in the first phase of amendment. I have said publicly that at the very least the government should ensure that ministers' offices are covered under the access act. I would think that would certainly be a top priority.

With the proactive disclosure scheme that's being proposed under Bill C-58, although I fully support proactive disclosure, the concern I have with the current regime is that it results in an important regression of existing access rights in relation to ministers' offices. This is a real concern of mine. Proposed section 91 basically says that the Information Commissioner does not have jurisdiction over that part 2, which is all the proactive disclosure.

Everything that's in part 2 right now, all of this proactively disclosed information, is currently subject to the Access to Information Act. With regard to lists of briefing notes, QP preparation, briefings to heads of institutions, all of this material is currently subject to the Access to Information Act. If the government institution applies exemptions to that information, those exemptions can be reviewed by the Information Commissioner.

Under Bill C-58, if the government applies exemptions to the proactive disclosure documents, those exemptions cannot be reviewed by anyone. I think that's a very real concern. Those would be two of the most important points.

The third one that is really important are the criteria that have been embedded in Bill C-58 for anyone who wishes to make an access to information request. Aside from my own recommendation in that respect, you have heard from many requesters who are basically saying that this would be a major regression.

When I was preparing for this committee, I went back to the request that was made by Daniel Leblanc, the journalist who uncovered the sponsorship scandal. That request would not have met the new requirement under Bill C-58. That's a perfect example of how new section 6, as it is currently worded in Bill C-58, would amount to a massive regression. I have that request somewhere, but it essentially reads something along the lines of “all records related to the sponsorship budget from 1994 to the time of the request”, which was 2000. That would not meet the test under section 6. That would be denied. I think that's a huge problem.

The News Media association did a recent audit of the federal government to assess the government's performance. In doing this audit, it sent 29 requests to federal institutions. When I looked at those 29 requests, several of them would not have passed the test under the new section 6. Something like 41% of those requests would not have been valid requests.

Last night, before I left my office, one of my directors of investigation told me that an institution had refused to respond to a request, and we had a complaint because the subject matter of the request was not in the request. Allison here, who is the executive director of investigations, has completed an investigation in which an institution is already applying the criteria in Bill C-58, which are not even in force yet, to deny requests for information.

Those are only two that I have complaints about so far. That's the concern I have with the criteria in new section 6.

I'm going to take all your time if I continue, but there you go. I have only mentioned three.

● (1605)

The Chair: You have 30 seconds.

Hon. Peter Kent: I'll cede to the next questioner. Thank you.

The Chair: Next up, for seven minutes, is MP Cullen.

Mr. Nathan Cullen (Skeena—Bulkley Valley, NDP): Okay, I'll pick up where we left off from Mr. Kent's questioning.

Is it your testimony that government departments are already beginning to apply Bill C-58 in the denial of information to Canadians?

Ms. Suzanne Legault: Yes.

Mr. Nathan Cullen: We don't have to look to some imagined future to see what potential damage Bill C-58 could do in terms of access to information—

Ms. Suzanne Legault: No.

Mr. Nathan Cullen: —we have it already happening.

Did you say one or two departments?

Ms. Suzanne Legault: Allison is here.

This is just beginning. This is just the tip of the iceberg.

Mr. Nathan Cullen: We haven't even passed the law yet.

Ms. Suzanne Legault: Exactly. Allison investigated a case, and I mentioned it in my special report. There is already a documented case of the institution simply refusing to process the request because it didn't meet the criteria of the new section 6.

Mr. Nathan Cullen: Then the Canadian seeking this information has to file a formal complaint. Walk me through the process. They go to your office to complain, and they say, "Wait—they're tossing this out on a technicality that doesn't exist in law yet."

Ms. Suzanne Legault: It does not exist in law yet.

Mr. Nathan Cullen: Okay, the signal has been sent.

Ms. Suzanne Legault: We were able to report on this complaint because it's completed, and we provided the information in our special report. I was just informed that another one came in last night under the same reasons. I've now seen complaints, but I don't know if requests are being denied by institutions on the basis of that section and I just haven't seen the complaints yet.

Mr. Nathan Cullen: It's sort of like having a business. They say that the bits of grumpy feedback you get represent only one-tenth of the number of people who are actually upset, because most people won't complain. In your experience, most people won't file a complaint.

Ms. Suzanne Legault: That's true.

Mr. Nathan Cullen: They won't go through the process. The number of people who are potentially being denied information that they are lawfully entitled to, because they are not being specific enough, has to be larger than the one you're seeing, just by experience.

Ms. Suzanne Legault: I strongly suspect that it is, and I am very concerned about that.

Mr. Nathan Cullen: Here is something I'm confused by. I'm looking at Minister Brison's statement when they were bringing this bill forward. He said, "we are extending the Access to Information Act to ministers' offices and to the Prime Minister's Office for the first time ever".

Ms. Suzanne Legault: Bill C-58 does not do that.

Mr. Nathan Cullen: Oh, that's weird.

Ms. Suzanne Legault: I'll give you an example.

Mr. Nathan Cullen: Why would he say such a thing?

Ms. Suzanne Legault: You'll have to ask him that.

Mr. Nathan Cullen: We did.

What he is saying, and I want to pick up on that, is "Well, we're disclosing it. That's the same. We are going to disclose the briefing binders, the question period prep, and some of these other places. Isn't disclosure better than making it applicable? People don't have to go dig; we're just going to give it to them anyway."

Ms. Suzanne Legault: As I said, proactive disclosure in itself is fine. I have no issues with that. I have an issue if it's basically becoming an exclusion to the application of the Access to Information Act. I do not have oversight when the government actually applies exemptions to that proactively disclosed information.

Mr. Nathan Cullen: Therefore, if they apply exemptions to that briefing book—they redact it, or they just don't disclose it in the first place—under Bill C-58 you wouldn't be able to go in and say, "What did you exempt, and why? What is the information contained in there?" and then make a call for whether the public should have access to that information.

Ms. Suzanne Legault: Absolutely.

Mr. Nathan Cullen: The minister's office says, "We publicly disclosed. They exempted these important pieces that might be damaging or unhappy for the government", and that's the end of the story if Bill C-58 becomes law as it is.

Ms. Suzanne Legault: Absolutely.

Mr. Nathan Cullen: I'm sure the example of the sponsorship mess isn't the most happy one for my Liberal colleagues to use. We are trying to make this real for Canadians. Why does this matter? Many Canadians don't deal with the Access to Information Act; they don't file complaints.

There are other examples in which the information would not have come to the light of day if Bill C-58 had been law. We've had testimony at this committee about Afghan detainees, the F-35, or costs for the war in Afghanistan. Those types of things were garnered only because journalists, or other Canadians, used the Access to Information Act to get information from the government that, in those cases at least, it didn't want out, but because the law required it, it had to be revealed.

I would appreciate it if, either now or later, you could cast backwards and say, if access to information had been under this provision, this, this, and these stories could not have come to the light of day. Would you be able to do that for the committee?

● (1610)

Ms. Suzanne Legault: There are already a few examples provided in the special report. One only has to glean through the published access to information requests that exist, which are publicly available.

Any request that does not provide subject matter, type of record, and timeline would be denied under the Access to Information Act under the new provision in Bill C-58. The government has stated that it won't happen this way, that somehow there will be some good measure applied to the interpretation of these sections—

Mr. Nathan Cullen: They're saying they will give out the bad stuff with the good, the damaging stuff with the good.

Ms. Suzanne Legault: In any event, regardless of whether it is provided in good faith by some government institutions, in some instances what one really has to worry about is when it is not provided because the new provisions are being applied. As a regulator, I cannot recommend or order an institution to process an access request if the law allows them to deny that request.

Mr. Nathan Cullen: With the little bit of time I have—

Ms. Suzanne Legault: I cannot make up the law.

Mr. Nathan Cullen: Do you get requests from first nations organizations for access to information, things about settling treaties or residential schools? Are these typical?

We had some testimony from Peter Di Gangi in terms of his concerns about Bill C-58. They're opposed to the bill. You should find yourself in good company. We're still trying to find witnesses who like the bill, outside of the government.

Ms. Suzanne Legault: I've read Peter's submission.

Mr. Nathan Cullen: It will introduce, I'm quoting, "significant new barriers for First Nations and organizations trying to access information" about their claims, disputes, and grievances.

Would you agree with that testimony?

Ms. Suzanne Legault: I absolutely agree with the submission of Mr. Di Gangi and all of the supporters of that submission.

Mr. Nathan Cullen: In order to have reconciliation, in order to settle claims, in order to figure out things like residential schools and grievances, it all relies on information. Some information the government just doesn't want to let out, or has not for 100 years.

Ms. Suzanne Legault: As I said in my special report, I strongly recommend that these provisions be removed from section 6 of the act as provided in Bill C-58.

Mr. Nathan Cullen: Thank you.

The Chair: Thank you, MP Cullen.

Next up for seven minutes is MP Erskine-Smith,

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

Thank you, Commissioner, for coming today and for your work on this.

To pick up on something my colleague said, and just for clarification on section 6, on the idea that the government will be providing additional guidance through TBS and that it would resolve some of the concerns, you're simply saying that your interpretation of section 6 doesn't even give you the opportunity, through your order-making powers, to better this section at all.

Ms. Suzanne Legault: If the law as provided in Bill C-58 allows government institutions to refuse to process a request because it doesn't contain all of those requirements—not just one of them, all of them: subject matter, type of record, and timeline—then they have the legal ability to deny the request, and I can't do anything about it.

Mr. Nathaniel Erskine-Smith: We should just walk through section 6 in detail, because obviously we as a committee, as you know, recommended a wide variety of things in our report. The government considered that and opted not to proceed with any number of things. I think my overriding concern here is certainly to make sure that the legislation is not regressing, to use that word.

Maybe we can't apply the act to ministers' offices and be effective in doing so, but certainly we ought to be effective in making sure that we remove some of these additional hurdles that we didn't suggest and you didn't suggest.

Going through section 6, we could remove proposed paragraph 6.1(1)(a), which is "the request does not meet the requirements set out in section 6". I think that would resolve to a large degree the concerns you've raised.

What about if the person has already been given access to the record or may access the record by other means? You previously recommended a discretionary exemption that would allow institutions to refuse to disclose information that is reasonably available to the requester. If we use that language, is there a concern just in the difference in language here, and one is more restrictive?

● (1615)

Ms. Suzanne Legault: The reason I'm really not a proponent of having an ability to decline to process a request if the information is already available is based on experience at our office. There is a similar provision now. It's in section 68.1. Basically, if something is already published or is about to be published, the government can decline to process the request. It's an inclusion to the application of the act.

What we found in our investigations is that sometimes information is published on the Internet, or sometimes the information is published but is extremely difficult to find. We've had to urge institutions to disclose the information anyway. That's why, in that particular recommendation, I said that it should be at the discretion, because at least they can consider if the information is public but the actual requester cannot access it easily, it's just a question of assisting the requester.

Mr. Nathaniel Erskine-Smith: Okay.

Ms. Suzanne Legault: That could probably work.

Mr. Nathaniel Erskine-Smith: That would make it more consistent, presumably, with your previous recommendation.

On proposed paragraph 6.1(1)(c), you've indicated concerns about the large number of records. Do you think this would get resolved by your order-making powers? Is there a way? Ultimately, you would have the determination through publishing orders and the jurisprudence you would create to determine what a large number of records means.

Ms. Suzanne Legault: There is already a provision in the act for institutions to get an extension when there are a large number of records and providing the disclosure would unreasonably interfere with the operation of the institution. That already exists in the current legislation.

Mr. Nathaniel Erskine-Smith: That's extension rather than a refusal.

Ms. Suzanne Legault: It's an extension rather than a refusal.

You've heard testimony that some of these requests are bogging down the system, putting gum in the system—30 million pages. You have to look at the facts. We're doing evidence-based policy here.

If you look at last year, the average number of pages processed per request across the system, for all institutions, was about 200 pages. In terms of the two institutions that you've heard from, CIC and CBSA, the average number of records per request from CIC, or IRCC, was 53 pages, and for CBSA it was 75 pages.

It's true that there are a number of requests that are large, but that could be dealt with under the frivolous and vexatious and bad faith provisions.

Mr. Nathaniel Erskine-Smith: Well, that maybe answers my next question.

This fishing expedition that might take years of man-hours to deal with seems to be a legitimate problem and really burdens the system. Your suggestion on dealing with it through the "frivolous and vexatious" provisions would resolve that.

With respect to proactive disclosure and oversight, I'm trying to wrap my head around this aspect.

Right now, there is certain information that I can request under the Access to Information Act that is subject to proactive disclosure, but there are longer timelines and you don't have oversight. Wouldn't I have been better off going under the current act than proactive disclosure? We can fix that perhaps by setting more aggressive timelines and giving you oversight. Is that correct?

Ms. Suzanne Legault: That would fix it, yes.

Mr. Nathaniel Erskine-Smith: You raised concerns about publishing your orders and mediation.

Could you briefly expand on the importance of putting in writing, I guess in the act, that you would have this formal mediation authority and you would be able to publish your orders?

Ms. Suzanne Legault: The reason I'm recommending that there be a formal provision for mediation is that sometimes some complainants do not wish to participate in the mediation process. I think the mediation process is extremely helpful in resolving complaints in a more timely way. I think that would be helpful. It also puts focus on the mediation process with institutions as well.

The certification of orders for me, and the publication of my orders, would be helpful because if there is an order that is certified in the Federal Court, as I've explained, and the order is not followed, then it would be a contempt of court proceeding, which is faster. The publication of orders for me would be helpful because it would develop a body of decisions that could be used as precedents for institutions and give guidance. We wouldn't be reinvestigating the same issues over and over, because we would have this body of orders.

I think that would be a great benefit to all involved.

● (1620)

The Chair: Thank you, Mr. Erskine-Smith. We are at time.

The next round will be five minutes, starting off with MP Gourde.

[*Translation*]

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

Ms. Legault, thank you for being here.

Like many Canadians, I was shocked to see the new version of the Access to Information Act presented in Bill C-58. If it had existed in this form in the early 2000s, the sponsorship scandal could have never been exposed. To keep information in that great darkness is an attack on Canadian democracy. Some 15 years later, this bill contains provisions that will make it even more complicated for Canadians to find out what is happening in their government.

What should we do, Ms. Legault?

Ms. Suzanne Legault: That is why I have made recommendations to improve Bill C-58. I think that the recommendations truly focus on preventing some of the negative impacts of Bill C-58. I really hope that the committee will take them into consideration and that the government will consider all of the committee's recommendations to improve this bill.

Mr. Jacques Gourde: Could the exemptions that would enable some people to avoid the obligation to disclose information really impede access to information in the case of some files that people would want to mitigate or set aside?

Ms. Suzanne Legault: The provision that provides an exemption for personal information has existed and been interpreted for 30 years. After all, it is a mandatory exemption. It reflects the fact that personal information belongs to the individual and not to the government. So it is appropriate to have a mandatory exemption and notices provided to the privacy commissioner pursuant to section 8 of the Privacy Act.

What I take issue with is that Bill C-58 proposes requiring the information commissioner to consult the privacy commissioner in all cases where institutions have given notice to the privacy commissioner. I think that will make investigations conducted under the Access Information Act virtually impossible. As I explained, it will hurt not only the efficiency, but also the integrity of investigations. That is why I have a lot of difficulty with the proposals of Bill C-58.

Mr. Jacques Gourde: It would appear that commissioners—whether we are talking about you, the information commissioner, the privacy commissioner or the conflict of interest and ethics commissioner—are currently struggling to get answers about some files or individuals.

Are we really seeing an attack on all our institutions?

Ms. Suzanne Legault: I am here to testify on Bill C-58. I explained in my report my concerns with regard to this bill and I made recommendations. Anything beyond that is outside the scope of my testimony.

Mr. Jacques Gourde: With all those actions that, little by little, are hurting access to information, preventing individuals from disclosing information or blatantly disregarding the essence of our institutions, sooner or later, some of those institutions may fall apart if people are not careful. If those institutions are not respected by the whole machinery of government or even the lawmakers, we are headed toward anarchy.

Ms. Suzanne Legault: What exactly is your question?

Voices: Oh, oh!

Mr. Jacques Gourde: That was a bit of a philosophic speech. That said, care should still be taken when bills are drafted.

I want to congratulate you. You were really brave to sound the alarm on Bill C-58.

I hope that our committee will be able to make the recommendations needed to amend the bill. If that does not happen, you will understand that it's because our party does not have a majority.

Thank you.

Ms. Suzanne Legault: Thank you.

The Chair: Thank you, Mr. Gourde.

[*English*]

Next up, for five minutes, is MP Picard.

[*Translation*]

Mr. Michel Picard (Montarville, Lib.): Thank you, Mr. Chair.

Welcome, Commissioner.

What is your interpretation of judicial independence, in the simplest of terms?

Ms. Suzanne Legault: Judicial independence was explained very well by Pierre Bienvenu, when he appeared before the committee. Judicial independence is protected by the Constitution, and it protects not only judges' decisions, but also the whole administrative aspect.

My colleague could tell you more about the judicial aspect and judicial independence.

● (1625)

Mr. Michel Picard: That actually brings me to another question. Is the fact that the government pays the salaries of members of the judiciary an administrative element that jeopardizes judicial independence?

Ms. Nancy Bélanger (Deputy Commissioner, Legal Services and Public Affairs, Office of the Information Commissioner of Canada): I'm not an expert on constitutional law or on judicial independence. However, I can tell you that some of the information is already public. For example, salaries are provided under the Judges Act. Right now, total amounts are disclosed. In addition, under the Judges Act, judges' salaries are disclosed on an individual basis. For example, the salary of a superior court judge is already known.

What Bill C-58 proposes is to publish judges' names and the cost of their participation in conferences, their travel expenses, their hospitality expenses, and so on. What you heard from that witness is that very specific and individualized information on judges can undermine the independence of the chief justice's court administration. The chief justice is in charge of assigning judges to various places. In addition, according to the witness, publishing that information can compromise judges' personal safety.

I believe that the committee must take that seriously and do the work needed to see whether constitutionality and judicial independence are really at stake under the circumstances.

Mr. Michel Picard: Rest assured, ladies, that no one in this room is questioning the independence and integrity of the justice system. That said, everyone submits expense accounts. I have never put down an expense I was anticipating; they were always expenses I had already incurred. I say this with all due respect for the safety inherent to judges' work. Information about judges' expenses—whether for travel to attend a conference, for example, or for other purposes—is provided after the fact. I feel that this, in itself, somewhat undermines judges' safety. It provides accountability for expenses made using taxpayers' money.

Ms. Suzanne Legault: The other aspect of the proactive disclosure proposed in Bill C-58 can certainly support what you are saying. If issues threaten to jeopardize the safety of individuals or judicial independence, it would be appropriate to apply exemptions. The legislation provides for exemptions in cases where individuals' safety may be in jeopardy. I proposed that exemptions also be provided to protect judicial independence. However, since that is really a constitutional principle, I presume that judges could make revisions if they believed that judicial independence was at stake, even if that is not indicated in Bill C-58. This is really my opinion. Like my colleague, I am not an expert in this area.

In addition, when we were preparing for our appearance today, we did not have access to that witness's submission to the committee. We simply based our review on what he said before the committee, as well as the committee's reports. We did not have all the information, so we could not analyze it in detail.

That said, I wanted to discuss this issue before the committee because he is the only witness to have raised it. In my opinion, his arguments deserve the committee's attention. The recommendations he made—publishing total amounts per court rather than for each individual judge—are a happy medium. I think they are worthy of the committee's consideration.

Mr. Michel Picard: According to my understanding, your exceptions would open the door to a negotiation of compromise, a middle ground that would help reach the same goal. It would satisfy those asking for information, while taking into account safety and integrity.

Have I understood what you said?

Ms. Suzanne Legault: Yes, it's very possible, but as I mentioned, we didn't have the benefit of consulting the full brief. That said, I do think that Mr. Bienvenu's suggestion was a welcome one.

Mr. Michel Picard: Thank you.

● (1630)

[*English*]

The Chair: Next up is MP Kent, for another five minutes.

Hon. Peter Kent: Thank you very much, Chair.

I'd like to come back to the disclosure of personal information. I'm sure you saw the presentation from the Privacy Commissioner before us, and heard his arguments that Bill C-58 would disrupt a balance that he sees between your two offices. He invokes the quasi-constitutional nature of his office, which I assume you would counter with invoking the quasi-constitutional nature of your office and Canadians' right to access to information.

He recognizes your significant experience over the years, but his qualification, his reluctance, would not seem to offer a positive response to your suggestion of discretion. Do you think some mention of discretion in the application and your decision on his inclusion in the process would be a solution?

Ms. Suzanne Legault: I'm saying that if committee and Parliament decide that there really has to be some measure of involvement of the Privacy Commissioner under C-58, it should be first in terms of consulting the Privacy Commissioner during investigations under my legislation, so it should be at the discretion of the Information Commissioner. I say this because of what I highlighted in my remarks, which was that most cases are resolved at the very early stages of investigation.

The way Bill C-58 is currently drafted, it's basically open to a government institution to decide to notify the Privacy Commissioner as soon as they receive the notice of a complaint. If that occurs, then I "shall" consult with the Privacy Commissioner. In that respect, that would really impede the investigation and affect its integrity. If it is at the discretion of the Information Commissioner to consult, only in very few cases would there be contentious issues between the two offices. We really have a long history, over 34 years, of these two offices functioning together in the interpretation of that section. There have been very few instances of disagreement, so that's why.

Bill C-58 already provides that if there's going to be an order, during the time for the government to respond, or the time before the order becomes a deemed order, there has to be a notification to the Privacy Commissioner, and there is an opportunity for the Privacy Commissioner to bring the matter to court. That process is already provided for in C-58.

What the Privacy Commissioner recommends, if I understood correctly, is that even at the level of a recommendation, he would have to be notified. That's what we have now. We have that regime now. We make recommendations to institutions on a regular basis. Very few instances deal with recommendations to disclose personal information, and I have no obligation to consult with the Privacy Commissioner. That's been the case for 34 years.

Hon. Peter Kent: This comes back to your figures—the 13,000 cases and the seven personal requests. Can you characterize what those seven would represent?

Ms. Suzanne Legault: This is something we can provide to the committee, because we have them.

Hon. Peter Kent: Sure, but because they are exceptions, they would all fall into a similar set of considerations.

Ms. Suzanne Legault: Two cases went to court recently. One was dealing with a request to the Prime Minister's Office in relation to information regarding Senators Duffy, Brazeau, and Wallin. That was in the Federal Court. We recently had a decision, and that involved some information that the Prime Minister's Office considered to be personal information. I disputed that before the Federal Court. The issue was whether the information was a discretionary benefit or not. The court decided in accordance with what we proposed, for the most part. That decision is not entirely in the public domain, because it's under appeal.

That's one of the few examples, and the Privacy Commissioner could have intervened in that case. That ability to intervene in those cases exists under the current regime.

● (1635)

Hon. Peter Kent: I assume he didn't.

Ms. Suzanne Legault: No.

The Chair: Thank you, MP Kent.

We're going to have lots of time for questions after the round is done.

Up next, for five minutes, is MP Fortier.

Mrs. Mona Fortier (Ottawa—Vanier, Lib.): I would like to give my time to MP Baylis.

Mr. Frank Baylis (Pierrefonds—Dollard, Lib.): I want to come back to clause 6. It's asking for three things when you make a request: the subject, the type of record you are looking for, and the time period.

To me, that sounds exceedingly reasonable. I read also the intention of the clause. It's meant to provide an experienced employee—not even a new one, but an experienced employee of the institution—with help to identify the record with a reasonable effort. I find that part exceedingly reasonable.

We received testimony from Canada Border Services Agency and IRCC, and they welcome this clause because they believe it will make them more efficient in fulfilling the ATIPs, but you're against it. It seems reasonable to me, and the people who have to do the work see it as reasonable, but you're saying it's not reasonable.

Ms. Suzanne Legault: I am the Information Commissioner. I don't make the access to information requests. Requesters make the access to information requests. Governments have to respond to access to information requests—

Mr. Frank Baylis: In a timely fashion, no less.

Ms. Suzanne Legault: You can see that it's perfectly understandable for government institution representatives to say that these are good amendments, because it allows them not to process access requests that they are currently processing—

Mr. Frank Baylis: I disagree with that point. I don't think they are saying that they don't want to process them. In fact, if I look at the percentages, these two groups process 60% of all access to information requests.

I would take a completely different approach from the one you're taking, Ms. Legault. The people who do the majority of the work have asked for what seems to me an extremely reasonable thing: tell us what you're looking for, and the time frame, so we can be more efficient. You are presenting it as if they are just saying this so they can say no to everything. That doesn't jibe with me.

Ms. Suzanne Legault: What I am saying is that what is being proposed in the new section 6 in Bill C-58 is a regression of existing rights.

Under the current legislation, if I made an access request for all records related to "sponsorship budget", I would be able to have my access to information request processed. If I made an access to information request in relation to all records related to Afghan detainees, I would be able to get my access request responded to. Under Bill C-58, it would not be responded to.

Mr. Frank Baylis: Let's stay with the two that do the brunt of the work for our government, IRCC and CBSA. These do more than 50%; they do 60% of all requests. They have said that these very reasonable guidelines.... I understand you're saying it's a regression. We've also heard from many people that they want efficiency. The people who do the brunt of the work say that giving them this little bit of information would help them be more efficient. You say that this is a regression.

I don't agree with that assessment. I think that's progress. I think that's an attempt at being more efficient, and simply asking for this seems reasonable to me. I understand there might be the Afghan detainee one. We'll put that aside. Let's deal with the brunt of the business.

How is it a regression for the people at IRCC or CBSA? Why would they want to use that?

Ms. Suzanne Legault: I think you would have to ask them, because they—

Mr. Frank Baylis: We did ask them. They said it's good.

Ms. Suzanne Legault: Yes, so they don't see it as a regression, and I fully respect your perspective on this.

Mr. Frank Baylis: I don't have a perspective. I'm just trying to align what you're saying with what they are saying.

Ms. Suzanne Legault: What I am saying is that what I consider to be perfectly valid requests under the current regime would now be denied under this regime.

I think you've heard from Peter Di Gangi, and his submission is supported by a number of first nations. I think their concerns with this new section are entirely legitimate, because they don't necessarily know all of these three criteria.

● (1640)

Mr. Frank Baylis: You keep diverting it away from.... I've asked a specific question about Canada Border Services and IRCC. They do the brunt of the work. They say it's useful. Tell me why you don't want to listen to them—not about the others, about them.

Ms. Suzanne Legault: I am listening to them. In fact, if you really wanted to look at the types of requests they get at CIC and CBSA, that might not be a problem for them because, as they have testified, most of the requests at CIC are really about the status—

Mr. Frank Baylis: So it's not a bad idea for them.

Ms. Suzanne Legault: No. I'm saying that the bulk of the requests in those two institutions deal with very specific matters.

Mr. Frank Baylis: Are you saying that it's not a bad thing for them to have?

Ms. Suzanne Legault: I think it's a regression for access to information rights generally.

Mr. Frank Baylis: I'm not talking about general—

Ms. Suzanne Legault: I think it's important to recognize that these provisions would not apply only to one department. They apply across the system, to over 250 institutions.

Mr. Frank Baylis: The challenge—

The Chair: Time is up. Thank you, Mr. Baylis.

Next up is MP Cullen, for three minutes.

Mr. Nathan Cullen: I just heard the statement about putting aside the Afghan detainees situation, with which Canada may have violated the Geneva Convention.

It's now looking a bit more worrisome. The testimony we had from the two departments that came earlier raised the spectre of a request coming in that would elicit 10 million pages of documents coming forward. You testified today that the average is dramatically less than that, from those very departments.

I then raise a question over the veracity of the testimony that was given to us, because the spectre of these requests coming in and clogging the wheels of government is not what your experience has been with those specific departments. Is that fair to say?

Ms. Suzanne Legault: It's fair to say, yes.

The total number of pages provided to Canadians last year, according to government statistics, is a little under seven million.

Mr. Nathan Cullen: That's the total?

Ms. Suzanne Legault: That's the total for all institutions across the system.

Mr. Nathan Cullen: They said there was one request that would have cost them 10 million pages. Your testimony today, based on government facts—because it's good to have evidence-based decision-making—is that the total requests from all Canadians for all departments in the federal government was seven million?

Ms. Suzanne Legault: I have the exact number here for last year. It was 6,966,589.

Mr. Nathan Cullen: While I understand that it's inconvenient for governments sometimes to have to respond to these requests, we see that some requests from government take four years or more to answer.

Is it fair to make the statement, as it has been made by other witnesses, that access to information delayed is access to information denied?

You raised the Duffy-Wallin-Brazeau example that's still going on. It was an access to information request to the Prime Minister's Office that is still being contested back and forth for months—and in some cases now a couple of years—after the incident. The concern was first raised to Canadians three years ago.

You're nodding. I just want to make sure it's on the record as true.

Ms. Suzanne Legault: Yes, that's true.

Mr. Nathan Cullen: I want to go back to the question that preoccupies me, and committee members could forgive me.

I represent a constituency in northwest British Columbia with approximately 40% first nations people. Some of the treaties are still unresolved. One took 135 years to resolve. There's a great deal of hope and promise with the new government, because there was this commitment to reconcile—a word that has been so stretched in its application that I'm wondering about its meaning anymore—on specific things like issues around residential schools and the horrors that went on there, and around reconciling land disputes, which are at the heart of enfranchisement for first nations people.

If Bill C-58 were to become law, from your perspective as commissioner, would the ability to reconcile, to resolve, to settle cases, be enhanced or diminished based on the information first nations would be able to pull from the Government of Canada?

● (1645)

Ms. Suzanne Legault: I'm the Access to Information Commissioner. What I can say is that if Bill C-58 and proposed section 6 remain as they stand, it will be a lot more difficult for first nations to access the information they need to establish land claims and to establish some past events they might have been involved in and that they need to document in order to resolve.

Mr. Nathan Cullen: That should weigh on all of us as we consider amendments to this bill.

The Chair: We're going to continue. I assume there are still questions to be asked of the commissioner. We're now into open time, so you need to let Hugues know that you would like to ask a question. We'll keep the questions to five minutes, and we'll time out the clock until that 10 minutes at the end that we need for committee business.

Next up is MP Dubourg.

[*Translation*]

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

It is now my turn to greet you, Ms. Legault, and the people accompanying you.

I have two quick questions.

The first is about the Conservatives' election platform, where they raised a number of points:

[*English*]

“Give the Information Commissioner the power to order the release of information. Expand the coverage of the Act to all Crown Corporations”, etc., etc.

[*Translation*]

However, we know that nothing has been done in 10 years.

I would also like to talk about an article published in the *Canadian Press*, where the following is stated:

[*English*]

“The information commissioner of Canada has found evidence of 'systemic interference' with access to information requests by three Conservative staff members”, etc., etc.

[*Translation*]

Do you think the amendments you have proposed will make that kind of interference in access to information requests impossible?

Ms. Suzanne Legault: As I don't have the newspaper article you are referencing on hand, or the date, or the particular file, it is difficult for me to answer the question intelligently.

At first glance, nothing in Bill C-58 focuses on political interference.

We have conducted a few investigations in those circumstances. Since then, I have not heard of anything like that happening in government institutions.

Mr. Emmanuel Dubourg: I apologize, as I may have used the wrong term. I was talking about systemic interference rather than political interference.

You submitted a two-part special report entitled “Interference with Access to Information”. I am talking about systemic interference because I want to ask you whether any measures prevent people from submitting a significant number of unfounded requests in order to overload the system and make it operate poorly.

Ms. Suzanne Legault: Unless I am mistaken, Mr. Dubourg, your question is about requests that are frivolous, vexatious or made in bad faith.

Mr. Emmanuel Dubourg: Yes, among others.

Ms. Suzanne Legault: I have been the information commissioner for eight years and, to my knowledge, there have been very few such cases. That is really on the margin of the access to information system.

That said, I want to come back to what Mr. Baylis was trying to convince me of earlier. It is true that there are very rare cases where the access to information system may be abused. The only provision in Bill C-58 that addresses requests that are frivolous, vexatious or made in bad faith is proposed subclause 6.1(1)(d). In an early phase of amendments to the Access to Information Act, that provision is certainly appropriate under the circumstances, as it enables institutions and the information commissioner to deal with these issues.

Mr. Emmanuel Dubourg: Okay, thank you.

We all know that, as members of Parliament, in accordance with the bylaws, we have to make proper use of the funds and goods Parliament allocates to us.

When I was elected in 2013, NDP members took action—and are still taking action—to enable them to send out householders and ten percenters, and to have satellite offices. Granted, proactive disclosure didn't exist. Now that proactive disclosure has been implemented and ministers' mandate letters are published, could parliamentarians' overuse of Parliament funds be prevented?

● (1650)

Ms. Suzanne Legault: You will understand that it is not really appropriate for me to comment on the way parliamentarians are using funds.

As I said earlier, any proactive disclosure is entirely welcome and appropriate, provided that cases where exemptions are applied are subject to oversight by the information commissioner.

Mr. Emmanuel Dubourg: I have one last question.

[*English*]

The Chair: You're out of time.

[*Translation*]

Mr. Emmanuel Dubourg: Okay, thank you.

[*English*]

The Chair: The next five-minute round will go to MP Cullen.

Mr. Nathan Cullen: I have a question about this whole notion of "vexatious" or "too many documents". What is too many?

You mentioned "a large number" in your submission. Who determines what "a large number" is? Your office has about 1000 pages as a benchmark; above that is considered large, and below that, not, but I notice that Treasury Board thinks it's 500.

What worries me in Bill C-58 are these subjective terms. The application of "vexatious", "too large", or "inconvenient" to government is defined by whom? Can you help us out there?

Ms. Suzanne Legault: Yes, I have a lot of concern with regard to that provision that would allow institutions to refuse to process requests when there is such a large number of records.

I think that the provisions that exist now are sufficient. There is a duty to assist that exists. The request has to be sufficiently detailed so that a reasonable employee in an institution can assess what it is.

Mr. Nathan Cullen: Let me go there just for a second. The government has portrayed this as an attempt to help people get to the right information by forcing them to state the subject matter. If somebody writes and submits a general request, the duty to assist within that department means that someone is going to correspond with the requester and say, "I would like to help you out. Narrow your request so that I can get you the information you want."

That exists right now?

Ms. Suzanne Legault: Yes.

Mr. Nathan Cullen: However, if it's required in law and if it's not there up front, then the request can be denied under Bill C-58.

Ms. Suzanne Legault: Yes.

Mr. Nathan Cullen: That's less helpful.

The current practice is that if somebody writes in and is not specific, but asks a very broad thing, then the Department of Justice or Transport says that this request is very broad and corresponds with them through the access to information department to find out whether the requester wants information on this part of the rail service or that part. The requester can then have correspondence and get the information that he or she wants, to avoid the department having to spend millions of dollars or whatever the scenario is. Is that the current practice?

Ms. Suzanne Legault: The current practice is to try to assess what the requesters are looking for and to assist them in formulating their requests in a way that is appropriate.

Mr. Nathan Cullen: Canadian don't always know what the Access to Information Act applies to. They don't know the internal workings of the departments. They are just trying to find out about, for example, noise from trains going through Canadian towns and what the regulations are. They are not going to know specifically where, when, and what. The department should help them find that out.

Ms. Suzanne Legault: Yes.

There is another issue here. There are instances of requesters not wanting to provide all of those three requirements when they make a request.

Mr. Nathan Cullen: Why not?

Ms. Suzanne Legault: The requester might be an investigative journalist like Daniel Leblanc. In 2000, he wanted to have a broad spectrum to basically see the records that would be—

Mr. Nathan Cullen: How the program was working—

Ms. Suzanne Legault: —related to the sponsorship budget.

One other issue that was mentioned by some of your witnesses from institutions is that of people requesting subject headers. The requesters sometimes request a list of subject headers because then they only ask specifically for certain emails or certain information. We've had complaints related to that, so I fully understand that practice.

● (1655)

Mr. Nathan Cullen: I'm imagining I'm in the department of defence, and somebody has made a request about the transfer of detainees in Afghanistan, which is a pretty sensitive topic. If I were to deem that as vexatious, that this is somebody who is just looking to attack the Canadian military unfairly and put us in the news, with no other definition, could that request then be denied under terms of vexatiousness?

Ms. Suzanne Legault: It could, potentially—

Mr. Nathan Cullen: I'm not saying would it have been—

Ms. Suzanne Legault: Based on what C-58 does, yes, it could be denied, because it could generate a large number of requests. It could be denied because it's not specific enough and doesn't meet the criteria of section 6.

Mr. Nathan Cullen: It would have to specify which detainee to which prison on which date.

Ms. Suzanne Legault: It could be even if you were just to say, "all records in relation to Afghan detainees".

Mr. Nathan Cullen: That would be too broad and would be denied.

Ms. Suzanne Legault: Of course.

Mr. Nathan Cullen: Okay.

The point of this is to hold government to account. That's the whole point of the act and the whole point of your office.

I have a request in to the Pacific Pilotage Authority that I've used in this committee as an example. It is over 300 pages, most of it redacted. It was about an incident that happened in my riding. I asked so that I could relate it back to the people I represent, to tell them what happened. I can't tell them what happened. Even under the current rules, I have to appeal this.

We just heard the Prime Minister talk in the House of Commons during question period about how much he respects you—not you specifically, but all the office-holders, including the Ethics Commissioner. Your recommendations for this act to do its job are very specific. If it is not amended, Bill C-58 does not follow the principle of "do no harm" under legislation, that you shouldn't introduce bills that make things worse. Your broad assessment is that this bill is broadly regressive, broadly unhelpful to Canadians trying to get information that they deserve and need. Is that right?

Ms. Suzanne Legault: I would agree with you that if Bill C-58 is not amended in a significant manner, I would much prefer to keep the status quo.

The Chair: Your time is up, MP Cullen.

You have five minutes, MP Kent.

Hon. Peter Kent: Thank you again, Chair.

I'd like to come back briefly to the matter of fees. You reminded us that in 2015-16, the government collected a total of under $400,000 in fees, which certainly meant the expenditure of considerably more than that in collecting and processing. You also say in your statement that Bill C-58 not only reintroduces fees but leaves the door open for a variety of ways to increase fees. I wonder if you could speak to that.

Ms. Nancy Bélanger: Certainly.

Currently the Access to Information Act stipulates very specifically when fees can be incurred, and the government, back in May of 2016, if I'm not wrong, issued an interim directive for no fees at all, and that was very welcome to requesters.

The current proposal in Bill C-58 introduces fees without explaining in the act what kinds of fees are intended. It says that an application fee could go up to $25. I believe that Minister Brison has said that for now it will stay at $5, but the act will allow bringing it up to $25, and any other fees that could be imposed would be done by regulation. We do not know what will be in those regulations.

Of course, it's a lot easier to pass regulations than to make amendments to the act, as we all know, and therefore, that's the risk. At the end of the day, as the Commissioner's report says, is it worth it? Really, given the quasi-constitutional right of access and that this is information that belongs to Canadians, should there be fees at all? That's the worry.

Hon. Peter Kent: Thank you.

Of your 12 red lines, it would not be a make-or-break matter should the government ignore that recommendation. It would not be in the top rank of red lines that you addressed at the beginning of the session.

● (1700)

Ms. Suzanne Legault: I will say that fees have been the bane of this Information Commissioner's existence.

Hon. Peter Kent: Really?

Ms. Suzanne Legault: It is in the sense that I profoundly disagree with the charging of fees.

In the experience I've had with the charging of fees under the access act over the years, I've seen a whole bunch of stuff. I've seen abuses by government institutions using large fee assessments in order to not process access requests, and that leads to complaints. We have to do the investigations, but until all of this is done, no information is even disclosed.

It's not a cost-recovery system. If you were going to make it a cost-recovery system, you'd have to charge around $900 per access to information request, because that's roughly the estimate of the cost that the government is putting forward. It's not a cost-recovery system.

I think the government has to decide, as it does with the implementation of the Official Languages Act, that this is a value that we have in our democratic society, that this is part and parcel of the work that public servants and public institutions give to Canadians, and that it is how we respect our quasi-constitutional rights. Really, in this day and age, with this whole movement of open government, when we basically say we're going to provide open data for free and we've signed a charter basically stating that we're going to provide open data for free, let's just give Canadians their information for free, shall we?

Hon. Peter Kent: Finally, to get your specific characterization, you said that Bill C-58 is a regression of existing rights. How would you characterize it with regard to open government? I take from what you just said that it would be an affront to the concept of open government.

Ms. Suzanne Legault: I just don't think it's going to help the government's public policy objective of fostering open government.

This committee has done an extensive study on the amendments that should be made. I certainly have done an extensive study on amendments that should be made. These are meant to foster and develop a culture of openness within government institutions. The bill that's before us, Bill C-58, addresses some of the concerns that access to information professionals have in responding to access requests within government institutions. That's really evident. However, does it address a requester's desire to access easily and in a timely manner government information? It doesn't. It doesn't address any of the recommendations that both this committee and I have made in relation to exemptions, in relation to timeliness, in relation to full coverage, or in relation to full order-making power. It doesn't do that.

The government is stating that this is the first phase. My hope—and it is my most sincere hope—is that the work of this committee and Parliament will ensure that this first phase moves the yardsticks forward in matters of access to information. Even if it's just a little bit forward, forward is a positive result. If it goes backwards, then that's regression.

The Chair: Next up is MP Erskine-Smith.

Mr. Nathaniel Erskine-Smith: That comment is a perfect lead-in to what we want to accomplish as well.

I have a few small questions. One has to do with your recommendation that all complaints be subject to the same process. It makes sense that we ought to defer to your office in respect of order-making powers, whether it's you or your successor. Does it make any sense to have this dual-track system of order-making powers in relation to one set and the current state of affairs in relation to the second set? Would that complicate things in your office?

Ms. Suzanne Legault: It definitely would complicate things in my office. The transition period, in my view, would have been required if any changes had been made to the actual exemptions. That would have created a difference in terms of the transition period —

Mr. Nathaniel Erskine-Smith: That would not be so much the case with order-making.

Ms. Suzanne Legault: —but there are no changes to the exemption regime, so I don't see any problem with doing all the investigations under a new regime.

Mr. Nathaniel Erskine-Smith: This is a small question, but we've heard some testimony about Info Source and the removal of it. One possible solution—and I open the floor to you—would be keeping section 5 but encouraging a digitized version of Info Source. This would be in keeping with the original intent when it was first enacted.

● (1705)

Ms. Suzanne Legault: I think so, and I think that Info Source needs to be modernized. There's no doubt about it, even if it's in component form. Be wary of providing something only in digital format, however, because sometimes when we do that, we actually limit access for certain people who do not have access to digital environments.

Mr. Nathaniel Erskine-Smith: One thing we haven't heard much about is the extension of the timeline for tabling of the departmental reports and their compliance with the Access to Information Act. Perhaps you could speak briefly to whether that extension makes sense and the rationale for it and what this committee ought to do.

Ms. Suzanne Legault: The extension of the timeline is, to me, not a very positive thing. I've been recommending for some time now that the government produce the information, the statistical data, on a quarterly basis in an open and reusable format.

I use these statistics quite a lot, and they assist everyone in holding the government to account in its performance. What happens now is that in the spring we usually get these statistics trickling in, and this typically continues until September. September is also the projected extension of the timeline, which is very late in the day, because that's performance reporting on the previous year.

Mr. Nathaniel Erskine-Smith: The last question I have is in relation to proactive disclosure.

If you had oversight powers of proactive disclosure and there was something blacked out—this is my understanding—the exemptions would still apply in the act. If something was blacked out in an appropriate way because it related to advice and recommendations, you could review it to say it was properly blacked out. There is an exemption related to cabinet confidences, which I understand you would not be able to review because of an exclusion. Any other exemption, however, you would review and say it was properly blacked out.

Ought the government to have any worries about this? You already have that power under the Access to Information Act, right?

Ms. Suzanne Legault: Correct.

Mr. Nathaniel Erskine-Smith: You mentioned a culture of openness, and we heard a lot of testimony about a culture of delay in our original study. It's funny to listen to some of the colleagues on the other side insist on a culture of openness, given that a culture of delay was fostered under Stephen Harper for 10 years.

Mr. Nathan Cullen: That wasn't me.

Mr. Nathaniel Erskine-Smith: No, I wasn't speaking of the whole side.

I take it that some of this worry, because of that culture of delay, has solidified in some ways, in that we can't give additional powers to say no. Your worry is expressed in certain ways in your recommendations.

If we were looking to fix section 6 to the extent we're able to do so, it would be giving you oversight on proactive disclosure, insisting on a timeline for the mandate letter and on improved timelines, insisting on publication and mediation, making all complaints subject to the same process, and addressing Info Source and the government reports of compliance with the act. All this, you said, would be a small step forward, but you also said your sincere hope was that it would at least be progress.

With those changes in hand, would you say that these would be positive steps in amending this act?

Ms. Suzanne Legault: What about certification of orders?

Mr. Nathaniel Erskine-Smith: Yes, let's add certification of orders.

Ms. Suzanne Legault: “Frivolous and vexatious” should limited to proposed paragraph 6.1(1)(d) and not the other components.

Mr. Nathaniel Erskine-Smith: Okay.

Ms. Suzanne Legault: That's way too broad, especially in the first phase. Having the frivolous and vexatious element reviewed, getting permission from the Information Commission...what I'm looking for is essentially all of the recommendations.

Mr. Nathaniel Erskine-Smith: Okay. Thanks very much.

The Chair: You're under time. Thank you, Mr. Erskine-Smith.

The last name I have on the list is MP Baylis.

If you still want to ask a question, please let us know.

MP Baylis, you have five minutes.

Mr. Frank Baylis: Thank you.

There's another area where you don't seem to agree, which is with the commissioner of privacy. I'd like to understand a bit more about that issue. You gave some statistics, which I tried to write down, but you didn't provide a written document of your testimony.

Ms. Suzanne Legault: We will. I apologize for that.

Mr. Frank Baylis: I'd like access to that information, but....

Ms. Suzanne Legault: We will provide it. We just didn't have time to translate it.

Mr. Frank Baylis: I hope it's under 73 pages, or whatever—53.

The most frequently cited complaint you have is that there is a denial because there is a question about access to private information. Is that right?

Ms. Suzanne Legault: Yes.

Mr. Frank Baylis: You said that there are 300 complaints a year, approximately?

Ms. Suzanne Legault: Yes.

Mr. Frank Baylis: Okay.

You said 52% of all exemption complaints are related to this, so whenever someone says, "No, I can't give it to you", 52% of the time it's because it's related to privacy. Is that right?

Then people might turn around and complain, so you got 300 complaints.

Ms. Suzanne Legault: No.

What I mean is that, of those 300 complaints in my office—

Mr. Frank Baylis: Of those, 52% were....

● (1710)

Ms. Suzanne Legault: That represents 300 complaints where the personal information exemption was applied, which represents about half of all the exemption complaints that we have.

Mr. Frank Baylis: Okay.

Ms. Suzanne Legault: Exemption complaints dealing with national security, investigations....

Mr. Frank Baylis: You get a little under 600 complaints, of which 52%, or 300, are to do with access to information.

Ms. Suzanne Legault: They contain a personal exemption application.

Mr. Frank Baylis: Yes.

Ms. Suzanne Legault: They would have other exemptions, but they would have that one.

Mr. Frank Baylis: That would be about half of them.

Then you said.... I got lost in your testimony. Then you said that there were 13,000 instances of what?

Ms. Nancy Bélanger: There were 13,000 investigations that you've completed since you started.

Ms. Suzanne Legault: Since I've been commissioner, we've had 13,000 investigations overall. Over the years that I've been commissioner, the office has completed slightly over 13,000 cases.

Mr. Frank Baylis: Do you mean investigations of denials, investigations of...?

Ms. Suzanne Legault: That's writ large. That includes all types of investigations.

Mr. Frank Baylis: Okay. Then you had seven cases that you brought back to personal information. You said there were seven cases that went to court. Is that...?

Ms. Suzanne Legault: No. There were seven cases in which we made formal recommendations. That means at the last level.

These are cases where we did not resolve the investigations. The point I'm making is that of all the cases that involve a personal information exemption, there are very few in which we go to the ultimate step of making a formal recommendation to the government for disclosure .

Mr. Frank Baylis: Seven times you were not able to resolve it.

Ms. Suzanne Legault: Correct.

Actually, five of those were eventually resolved. Only two went to court.

Mr. Frank Baylis: The Privacy Commissioner, in his testimony, made the argument that he creates a balance. You want to put information out. All else being equal, you want to put it out. He wants to hold it back. There's a natural balance.

He believes—

Ms. Suzanne Legault: I disagree with that statement from the Privacy Commissioner.

The Information Commissioner and the Privacy Commissioner are regulators. We have to apply the law, as I stated. The personal exemption in the Access to Information Act is a law. It's a provision in a law that is very well defined. It's actually—

Mr. Frank Baylis: However, if I understand him, he wants to apply what he thinks is his purview, which is privacy, and you're saying, "No, don't bother; I'll do it."

Ms. Suzanne Legault: But we always do it. That's the point—

Mr. Frank Baylis: Yeah, okay—

Ms. Suzanne Legault: We have to do it under the current legislation—

Mr. Frank Baylis: If we always do it, then I don't need to be sitting here, because what the heck, we always did it that way.

That's not a good answer to me. He's trying to—

Ms. Suzanne Legault: But that is the legal answer, sir. It's the legal answer. When I apply the exemption for personal information, I have to apply the definition of personal information. I have to respect what the personal information exemption—

Mr. Frank Baylis: Okay, so I should explain—

Ms. Suzanne Legault: —states in the act. I can't just supersede that.

Mr. Frank Baylis: I have to go back to the Privacy Commissioner and explain to him that it's the law and that he's wrong. Is that what I have to do?

Ms. Suzanne Legault: I disagree with his comments that the current Bill C-58 changes the interpretation of the personal information exemption or changes the balance between access to information and the privacy of information.

Mr. Frank Baylis: Where does he want to insert himself in the process, between this 13,000, the 300, the seven? At what point does he say, “I need to insert myself”?

You disagree with him; I get that. He says he has a job to do. You say, “Don't worry; it's always been this way. It can stay this way. It's my job. I'll do your job”, or his job or....

Where does he want to insert himself into the process?

Ms. Suzanne Legault: I think you should ask him that.

The Chair: We're at time.

We have another question from MP Cullen. He assures me that it's going to be less than five minutes.

Mr. Nathan Cullen: Yes, sir.

The Chair: We have about five minutes left, so go ahead.

Mr. Nathan Cullen: That's helpful. You can just cut me off. I'm getting used to running overtime.

The Chair: I can do it again.

Mr. Nathan Cullen: It's true.

Let's just pick up where Mr. Baylis was going.

This idea of the personal information exemption sits in Canadian statute law, which you are by law required to apply.

Ms. Suzanne Legault: Exactly.

Mr. Nathan Cullen: Give me the exact moment, or the specific disagreement again, that you have with the Privacy Commissioner's interpretation.

● (1715)

Ms. Suzanne Legault: Under the way things are right now, the Privacy Commissioner is not involved in our investigations at all.

Mr. Nathan Cullen: Right.

Ms. Suzanne Legault: The information commissioners, over the last 34 years, have interpreted, applied, and made recommendations in relation to the application of the personal exemption contained in the Access to Information Act.

Mr. Nathan Cullen: Let me ask about that. Have you or previous commissioners been found in court to have applied that incorrectly? Have you allowed too much personal information out that and contravened the personal information exemption?

Ms. Suzanne Legault: There is one case....

Ms. Nancy Bélanger: There is one case in which the commissioner recommended that personal information be disclosed. It went to court, and the judge did find that it was personal information that shouldn't have been released. There's been one.

Mr. Nathan Cullen: There's been one case in 34 years in which you wanted to release information. It was uncertain whether that was too much, and a judge said it went too far and you couldn't give that information out.

Ms. Suzanne Legault: I have to qualify that. There is a reason that I decided to take that case to court. It's because we had several cases with the same complainant in relation to the same information with several institutions, and we were unable to resolve the matter until we got a determination from the court on the interpretation of that information.

Mr. Nathan Cullen: That was one case in 34 years in which the Information Commissioner's office took this question that Mr. Baylis is—

Ms. Suzanne Legault: That's under my mandate, the one that I know.

Mr. Nathan Cullen: Let's stay with the last eight years, then.

Ms. Suzanne Legault: That's the one that I know.

Mr. Nathan Cullen: We can go back and you can provide us with any other cases—

Ms. Suzanne Legault: We can provide that information, for sure.

Mr. Nathan Cullen: The concern Mr. Baylis is raising is that perhaps the Information Commissioner, in your desire to make as much information available as possible, is not curtailed enough by the laws as they are, or the interpretation of the law. You've told us that in the last eight years, the one time that you had to go to court to resolve such a concern was to find out where the limits actually were, which you did, and then moved on.

Ms. Suzanne Legault: The Privacy Commissioner could have intervened in that case under the current regime.

Mr. Nathan Cullen: He chose not to.

Ms. Suzanne Legault: Exactly.

Mr. Nathan Cullen: Going ahead, that would remain the case under the amendments that you've suggested to us. If the Privacy Commissioner had concerns of the kind Mr. Baylis has suggested, he could intervene at that point and say, “I think there's too much information that's about to be divulged. I disagree. I'm going to argue on behalf....”

Ms. Suzanne Legault: Correct. Bill C-58 does provide for the Information Commissioner to be notified if there is to be a recommendation that will become an order. It gives them time to actually decide whether or not to challenge the decision in the Federal Court, which is exactly the same regime that we have now, which has worked for 34 years.

Mr. Nathan Cullen: Okay, and you'd agree sunlight is the best disinfectant.

Ms. Suzanne Legault: Of course.

Mr. Nathan Cullen: That's it.

The Chair: Thank you, Mr. Cullen.

As chair, I have one question for the commissioner.

We've heard from different people around our committee and from the Privacy Commissioner as well about the struggle between your two offices. We've heard about that several times.

I just wanted to ask you one question. In your opinion, what is a higher priority for you, the preservation of information or the preservation of privacy?

Ms. Suzanne Legault: The greater consideration for me as a regulator is to ensure that when I make a determination on an issue, I apply the provision that is provided for in the act as it has been interpreted by the case law over the last 34 years.

The Chair: You didn't answer the question.

Ms. Suzanne Legault: That is the actual answer. That is the actual answer, Mr. Chair.

The Chair: But given the two options, you chose a different answer.

Can I ask you the question just one more time? What is the higher priority for your office, the preservation of information or the preservation of privacy?

Ms. Suzanne Legault: It's the same. What I'm saying is that I am a regulator who has to apply the law. In the law.... For instance, if you asked me the same question in relation to national security, asking me which is my greatest consideration, the disclosure of information related to national security or the preservation of national security interests, my response would be that I have to apply section 15 in the Access to Information Act and apply the existing case law that pertains to this national security exemption. My job as a regulator is to ensure that my recommendations or my orders in relation to that provision are compliant with the law; that's what I have to do.

Those are the bases on which my recommendations are based. I always have to weigh both the interests of transparency and the interests of secrecy. That is exactly what I do. Whether it's personal information, national security, investigations of law enforcement bodies, or commercially sensitive information, my job is always to weigh and balance those interests that are embedded in the Access to Information Act.

● (1720)

The Chair: Thank you, Madam Commissioner, and thank you for appearing before our committee today.

I will briefly suspend, and we will go in camera to discuss committee business for the next eight minutes.

Thank you.

Ms. Suzanne Legault: Thank you.

The Chair: We are suspended.

[*Proceedings continue in camera*]