



THE CLERK
LA GREFFIERE

October 28, 2013

Hon. Christopher Finlayson, QC
Chairperson
Privileges Committee
Parliament Buildings
Private Bag 18041
Wellington 6160
NEW ZEALAND

Dear Mr. Finlayson:

I am writing in reply to your letter of September 20, 2013, in which you requested information regarding the House of Commons' experience of the exercise of intrusive powers within the parliamentary precinct.

In the Canadian context, the House of Commons and its Members enjoy certain constitutional rights and immunities which are collectively referred to as parliamentary privilege (or simply "privilege"). The privileges are vital to the proper functioning of Parliament. These privileges are entrenched in the *Constitution Act, 1867*, s.18, and in the *Parliament of Canada Act*, s. 4. Like all legislatures, the privileges enjoyed by the House of Commons allow it to carry out its functions without interference from the Courts or the Executive.

The principle of parliamentary privilege continues to be essential to the ability of the House of Commons and its Members to discharge their functions and duties. Whether or not access to and release of information from parliamentary information and security systems would be covered by privilege would depend on the circumstances, and each situation or question of privilege that is raised is examined carefully on a case-by-case basis.

With these considerations in mind, I will respond to each of your questions separately.

1) How should information and security protection principles intended to safeguard data apply in a parliamentary context?

The House of Commons provides a secure, stable and confidential information system for the use of Members of Parliament, their staff and House administration staff. Internal policies on acceptable use of House of Commons resources and the security of



information are in place. These policies detail the suitable use of House of Commons resources, such as PCs, mobile devices, and fax machines by authorized users.

The House of Commons applies all the accepted norms and standards applied by governments and large institutions with sensitive information. Considerable information and data is stored, processed and transmitted through the use of House of Commons resources every day. It is incumbent upon all users to safeguard the information technologies now in use in offices across the House of Commons.

In addition, those responsible for administering the information systems are aware that much of the information stored is protected by parliamentary privilege. As a result, any decisions relating to the release or use of the information outside the House of Commons must always consider the possible application of privilege and the continued protection of the information in that context.

As a general rule, in the application of parliamentary privilege, the House of Commons makes no distinction between information and data held in electronic form and information that would have been, and continues to be held, in paper-based formats.

2) Are the information and personal privacy principles set out in applicable legislation (such as the *Privacy Act*, the *Official Information Act*, and the *Evidence Act*) relevant to the committee's inquiry in the context of parliamentary privilege? If so, which principles are relevant?

The *Access to Information Act*, R.S.C. 1985, c. A-1 and the *Privacy Act*, R.S.C. 1985, c. P-21 govern the right of access by the public to information in records under the control of the federal government and the protection of personal information of individuals held by the federal government, respectively. The House of Commons and its committees, Members of Parliament and the House of Commons Administration are not subject to these statutes.

However, the House of Commons does receive notices from the federal government under the *Access to Information Act* regarding records in the government's possession that relate to parliamentary proceedings and are thus covered by parliamentary privilege. While the *Access to Information Act* and the *Privacy Act* do not specifically apply to the House of Commons and its proceedings, from time to time in the course of their work, House of Commons committees are confronted with issues that require them to consider the application of the principles contained in those Acts. For example, personal information relating to an individual's health records could be found in documents being studied during proceedings on health policy, or informants' names or identifying

information could be contained in documents relating to policing or national security. In such cases, the committee will often seek the advice of committee clerks or of the Law Clerk and Parliamentary Counsel, and measures will be put in place to protect the information through redactions of information or by proceeding *in camera*. However, the decision is that of the committee. It is protected by privilege and is not reviewable by the Executive or the courts.

3) Should the collection and release of metadata information be treated differently from information which contains substantive content?

No, it is not our practice to make any distinction on how the principles of parliamentary privilege are applied when determining whether or not to release any type of content.

4) Are there particular sets of information held on parliamentary information and security systems that should be treated differently from other information?

Even though the House of Commons and its committees, Members of Parliament and the House of Commons Administration are not subject to the *Access to Information Act* and the *Privacy Act*, there are circumstances under which information on the parliamentary precinct network may be released to legal authorities. The most common example is when a search warrant, or a production order for information held by a third party, is issued under the *Criminal Code*.

The House of Commons has developed a particular process to be followed when legal authorities wish to execute a search warrant in the parliamentary precinct. In 1990, the Third Report of the Special Committee on the Review of the *Parliament of Canada Act* established the following principles regarding the execution of search warrants in the parliamentary precinct:

1. Well-established parliamentary tradition provides that search warrants may only be executed within the precinct of Parliament with the consent of the Speaker.
2. The Speaker may withhold or postpone giving his or her consent if it is determined that the execution of the search warrant will violate the collective and individual privileges, rights, immunities and powers of the House of Commons and its Members by interfering with the proper functioning of the House of Commons.

3. A search warrant must be executed in the presence of a representative of the Speaker who ensures that a copy of it is given to any Member whose affairs are subject of the search, at the time of the search or as soon as practicable thereafter.

As a result of the various privileges enjoyed by the House of Commons, including the privilege to exclude strangers, the police will not enter the parliamentary precinct without the permission of the Speaker, as this could amount to a breach of privilege and possibly contempt of the House of Commons. Before obtaining the permission of the Speaker, the Clerk, the Sergeant-at-Arms and the Law Clerk and Parliamentary Counsel are notified that the police wish to execute a warrant. The Law Clerk and Parliamentary Counsel works with the police to ensure that the search warrant is in order and that it meets the requirements of the law. Once the Law Clerk and Parliamentary Counsel is satisfied that the warrant is in order and lawful, arrangements are made for the police to meet with the Speaker, who will then decide whether or not to allow the execution of the search warrant. If the execution is allowed, a representative from the Office of the Law Clerk and Parliamentary Counsel will be present during the search to ensure that the terms of the warrant are followed and that no document or electronic data containing information covered by parliamentary privilege is seized.

5) **What is the status (including ownership) of the different types of information held on parliamentary security and information systems (including information relating to proceedings of the House, and information relating to members, Ministers, journalist, staff and others)?**

Parliamentary privilege makes no specific distinction between different types of information held on parliamentary security and information systems.

As elaborated upon further in the response to question 7, information related to the House of Commons Administration (e.g., employee records, financial information on procurement, etc.) is under the purview of the Clerk of the House of Commons as the office responsible for the administration of House of Commons. Where the information relates to the business of the House, its proceedings or its Members, parliamentary privilege dictates that it is up to the House to consider how it wishes its privileges to be exercised.

In the general parliamentary context, certain information is *de facto* confidential, such as transcripts related to *in camera* committee meetings or draft reports of the committee. If either of these types of information were leaked, the committee could report to the House that privileges have been breached and, if found *prima facie* by the Speaker, the House

could consider a question of privilege.

An example of this occurred in the fall of 2010. The Standing Committee on Finance reported a potential breach of privilege to the House of Commons, resulting from a Member's assistant faxing a confidential draft report on pre-budget consultations to lobbyists. The Member apologized to the House and her employee's contract was terminated. As the Speaker determined the ability of members of the committee to proceed with their work had been impeded, he invited the Member who raised the question to move a motion to refer the matter to the Standing Committee on Procedure and House Affairs. (Speaker's ruling, *Debates*, November 29, 2010, p. 6560-1). The Committee held hearings and heard witnesses, but Parliament was dissolved before it could report back to the House.

There are also specific statutory requirements that apply to investigations involving the alleged misuse of parliamentary resources by Members of Parliament. The *Parliament of Canada Act*, ss. 52.6 to 52.9, requires that any legal process must be issued by a judge and not a justice of the peace (which is the normal process in Canada). In addition, a peace officer or investigating body may request from the Board of Internal Economy (which is composed of Members of Parliament and is responsible for regulating all financial and administrative matters of Members), or the Board on its own initiative may issue, an opinion on whether any expense or use of resources by a Member was proper. Any such opinion must be provided to and considered by the judge asked to issue any process (which includes warrants, wiretaps, etc.).

6) How should the collection and release of information relating to specific groups with roles within the parliamentary context (such as Ministerial staff, members' staff, parliamentary staff, or journalists) be treated?

As noted above, Members of Parliament, their offices and the House of Commons administration are not subject to the *Access to Information Act* and the *Privacy Act*, whereas Ministerial offices are subject to those acts. However, the collection, use and disclosure of information by Ministerial offices are subject to certain exemptions and exclusions from public disclosure under those statutes. Furthermore, under the *Canada Evidence Act*, R.S.C. 1985, c. C-5, a minister of the Crown or the Clerk of the Privy Council cannot be compelled to disclose information relating to "confidences of the Queen's Privy Council for Canada" before a court or other judicial or quasi-judicial body.

Recently, the House of Commons has considered the collection and release of information held by the House itself and its committees. Notwithstanding the exclusion

of the House of Commons from the *Access to Information Act*, as noted earlier, the House receives notices from the federal government under that Act regarding records in the government's possession that relate to parliamentary proceedings and are thus covered by parliamentary privilege. In that context, the Standing Committee on Procedure and House Affairs undertook a study in 2012 in relation to parliamentary privilege and access to information requests.

The Standing Committee on Procedure and House Affairs tabled its report in the House on March 7, 2013.

<http://www.parl.gc.ca/HousePublications/Publication.aspx?DocId=5792777&Language=E&Mode=I&Parl=41&Ses=1>

The report suggested a process for dealing with such access to information requests, and although the report has not yet been adopted by the House, the Government Response to the report was presented to the House on July 17, 2013.

<http://www.parl.gc.ca/HousePublications/Publication.aspx?DocId=6250156&Language=E&Mode=I&Parl=41&Ses=1>

7) Who should have authority over the release of information and how should that oversight be exercised?

The question of who decides how information is to be released depends on the purpose for which the information is held. If the information relates to the House of Commons Administration, for example, employee records, financial information on procurement, etc., the decision is made by the Clerk of the House of Commons as the office responsible for the administration of House of Commons.

If the information relates to the business of the House, its proceedings or its Members, it is important to consider the application of parliamentary privilege. Since the privileges in question are those of the House, it is up to the House to consider how it wishes its privileges to be exercised.

The House determines how it exercises its privileges and if it wants to assert these privileges or not. There have been instances where the House has been asked to waive, in particular, its privilege of freedom of speech to allow its proceedings and transcripts of proceedings to be examined in courts or elsewhere.

(House of Commons Procedure and Practice, 2nd Edition, 2009, p. 100)

In a recent and rare example, in September 2012, the House adopted a motion waiving its privileges concerning correspondence between the Auditor General and several Standing Committees. The Leader of the Government in the House of Commons sought and obtained the unanimous consent of the House to move the following motion, "That having considered the nature of a request made of the Auditor General under the Access to Information Act, the House of Commons waives its privileges relating to all emails pertaining to the Auditor General appearing before parliamentary committees from January 17 to April 17, 2012; and that the Speaker be authorized to communicate to the Auditor General this resolution". The motion was agreed to.

Following the adoption of the motion, the Speaker made a statement to clarify the circumstances under which the House had been asked to waive its privileges. He explained the particularities of the situation, and indicated that the adoption of this motion should not be viewed as precedent setting. He also encouraged a thorough review of the question by the Standing Committee on Procedure and House Affairs. The Speaker's ruling can be found at p. 10,006 of the Debates of September 17, 2012. <http://www.parl.gc.ca/content/hoc/House/411/Debates/146/HAN146-E.PDF>

As mentioned in the response to question 6 above, the Standing Committee on Procedure and House Affairs studied the relationship between parliamentary privilege and access to information requests and proposed a new process for the House of Commons' committees to deal with such requests, including taking into account the nature of the document that is the subject of the access to information request.

Outside the context of access to information requests, from a committee's perspective, each committee decides how it will handle its own information, be it deciding on holding public or *in camera* meetings, or circulating draft documents or transcripts of *in camera* committee meetings among committee members and staff, among other examples.

On occasion, a committee may decide to hold an *in camera* meeting to deal with administrative matters, to consider a draft report or to receive a briefing. Subcommittees on Agenda and Procedure usually meet *in camera*. Committees also meet *in camera* to deal with documents or matters requiring confidentiality, such as national security. Depending on the needs, a committee may conduct one part of a meeting in public and the other part *in camera*.

The committee decides, either on a case-by-case basis or as a routine motion, whether a transcript of *in camera* proceedings is to be kept. Minutes of *in camera* meetings are publicly available, but certain information usually found in the minutes of committee meetings is not included. (*House of Commons Procedure and Practice*, 2nd Edition, 2009, pp. 1076-1077)

During a study by the Standing Committee on Procedure and House Affairs in regard to a question of privilege relating to a premature disclosure of a confidential report on the pre-budget consultations of the Standing Committee on Finance, the Clerk and the Chief Information Officer of the House of Commons were invited to testify before the committee on February 10, 2011. In essence, the Members were interested in how information systems work in the parliamentary precinct in an effort to determine ways of preventing confidential committee information from being released in the future. As various methods for securing documents are already available, committees must ultimately decide what levels of security they should use for various types of documents they produce. The discussion can be found at the following link:
<http://www.parl.gc.ca/content/hoc/Committee/403/PROC/Evidence/EV4946829/PROCEV43-E.PDF>

8) What thresholds or principles should apply to releasing this information, including where a security issue is cited?

As mentioned in the responses to previous questions, including particularly the responses to questions 4 and 5 above, information related to the House of Commons Administration is under the purview of the Clerk of the House of Commons as the office responsible for the administration of House of Commons. The House is the sole authority when it is considering how it wishes its privileges to be exercised.

In some cases, as with the execution of a search warrant, clear procedures are in place. In other instances, access to and release of information from parliamentary information and security systems would be covered by privilege. As previously mentioned, each situation or question of privilege that is raised is examined carefully on a case-by-case basis.

I trust that I have addressed the questions raised in your letter. I look forward to reading your report and recommendations on this issue and wish you all the best.

Yours sincerely,



Audrey O'Brien