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# Funding Officers of Parliament

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by Kristen Douglas and Nancy Holmes

*The Standing Committee on Access to Information, Privacy and Ethics began hearings in the fall of 2004 on the Estimates of the three Officers of Parliament who fall within its mandate – the Information and Privacy Commissioners of Canada, and the Ethics Commissioner. The Committee’s mandate includes matters related to the reports of these three Commissioners (the Ethics Commissioner primarily with respect to his responsibilities under the Parliament of Canada Act relating to public office holders) and to reports tabled pursuant to the Lobbyists Registration Act. The details of its mandate are set out in section 108(3)(h) of the Standing Orders of the House of Commons. This article looks at the background to the issue of funding Officers of Parliament, the views of several parliamentary officers and others who appeared before the Committee, various funding models that were considered, the recommendations of the Committee in its report tabled in May 2005 and some reaction to that report.*

In the course of its first meetings with the three Commissioners, the Committee was alerted to funding concerns that were shared by the Information and Privacy Commissioners. John Reid, Information Commissioner of Canada, described his office as being in a “financial crisis”. He reported to the Committee that he was hindered in meeting his statutory obligations by inadequate resources, and indicated that both the investigatory and non-investigatory staff groups in his Office are significantly understaffed, resulting in a growing backlog of cases. Also, his Office has had to give up its public affairs, research, education and training capacities. Despite repeated pleading with Treasury Board, his Office had received only emergency and partial funding.<sup>1</sup>

The Privacy Commissioner, Jennifer Stoddart, explained that since the adoption of the *Personal Information Protection and Electronic Documents Act* (PIPEDA), her Of-

fice has relied on two streams of funding, one under the Main Estimates, providing the Office with funding for its operations under the *Privacy Act*, and another relating to its responsibilities under PIPEDA. She expressed concern about the way in which these two streams of funding would be reconciled to ensure that the Office’s long-term financial needs are met. This concern has been the subject of ongoing negotiations between her Office and the Treasury Board Secretariat. Ms. Stoddart indicated that her Office would make a submission to the Treasury Board Secretariat for long-term permanent funding in 2005. In this case, the funding concern was not about adequacy of funds, but the nature of the mechanism by which her Office is funded.<sup>2</sup>

Both Commissioners sought a new funding mechanism that would ensure their Offices’ independence from government. Their functions as ombudsmen, or oversight agencies scrutinizing government performance in important areas, necessitate an appropriate degree of independence. This argument was reinforced throughout the Committee’s hearings on the subject of funding of Officers of Parliament, and ultimately convinced Members to issue a report and recommend

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change. A summary of the content of that report, its recommendations, and some reaction to it follows below.<sup>3</sup>

The Committee was not the first to deal with concerns about the funding mechanism for Officers of Parliament. In June 2003, in its report on the Radwanski affair<sup>4</sup>, the House of Commons Standing Committee on Government Operations and Estimates identified a need for a comprehensive review of the structure and functions of Officer of Parliament positions, including the accountability regime that governs their relationships with both the government and Parliament.<sup>5</sup> That Committee recommended that a House of Commons committee study and report back on the role and functions of Officers of Parliament, their independence, the Estimates process, and “other items in their accountability to Parliament.”

In addition, concerns about funding for the operations of the Office of the Auditor General, and related matters, motivated the House Standing Committee on Public Accounts to look into this matter as well.<sup>6</sup> At that time, the Public Accounts Committee reported that it had been aware of issues regarding funding for the Auditor General’s Office for four years. Its Report notes that discussions between the Auditor General and the Treasury Board Secretariat regarding a new funding mechanism had been prolonged far beyond what could be considered a reasonable time limit. The Committee recommended that, prior to the end of October 2005, a new funding mechanism be established for the Office of the Auditor General that “safeguards the independence of the Office and ensures that it will be able to meet the expectations of Parliament.”

The Standing Senate Committee on National Finance has also issued a report on Officers of Parliament.<sup>7</sup> After reviewing the Estimates of various Officers of Parliament, the Senate Committee identified budget determination as a common concern. As part of its Estimates hearings, the Senate Committee met with the President of the Treasury Board, Reg Alcock, who advised that the Treasury Board intends to test some alternative processes this year in order to move toward a solution to the problem. The Senate Committee recommended that the processes of determining the budgets of Officers of Parliament involve Parliamentarians, through the Speakers of each House and an administrative committee, before the budgets are submitted to the Treasury Board for inclusion in the Estimates.

### **Who are the Officers of Parliament?**

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One of the first questions the House Committee considered was the meaning of the term “Officers of Parliament.” The term has been used in different contexts to mean different things. It is not a term of art, nor has it

been legally defined. For the purposes of its report, the Committee referred to the three Commissioners within its mandate as Officers of Parliament and applied the term to the Auditor General, the Commissioner of Official Languages, and the Chief Electoral Officer.

The significance of the term became apparent to the Committee over the course of its study. Officers of Parliament are responsible directly to Parliament rather than to the federal government or to an individual minister. This emphasizes their independence from the government of the day. They carry out duties assigned by statute, and report to one or both of the Senate and House of Commons, usually through the Speaker(s). The appointment of such Officers usually – although not necessarily – involves the House of Commons and/or the Senate.<sup>8</sup>

While for the most part their independence is safeguarded by reporting and removal procedures, fixed terms of appointment and general control over the operations of their offices, it has been argued that the current budget determination process may not be the best method for ensuring the independence and functional integrity of these offices. Indeed, because of their accountability and reporting structures, the Officers of Parliament, for the most part, feel that the current funding mechanism raises the possibility of a conflict of interest between them and the government, or at least the appearance of one.<sup>9</sup> Auditor General Sheila Fraser, in her testimony, repeated several times that her concern was not for sufficiency of funds, but that she sought a more rigorous, independent budget challenge that would make her Office more accountable to Parliament.<sup>10</sup>

Although the Committee and most of the witnesses who testified as part of this study referred to them as Officers of Parliament, these officials are referred to by the Privy Council Office and within the public service as “Agents” of Parliament. Calling them “agents” emphasizes that they carry out work for Parliament and are responsible to Parliament. Moreover, the term is used as a means of distinguishing them from other parliamentary officers, such as the Speaker or the Clerk of either House, the Sergeant-at-Arms, the Law Clerk and Parliamentary Counsel. Whereas the latter group are part of, and assist, Parliament in procedural and administrative matters, the former group perform a “watchdog” function or check on government that supports Parliament in its accountability and scrutiny function.

Other bodies, such as the Canadian Human Rights Commission and the Public Service Commission, are occasionally considered in the same category as Officers of Parliament because they have a degree of independence and perform a similar “watchdog” function, and in some cases, their members are also appointed or ratified by

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Parliament. The Committee did not include these bodies in its study.

### The Testimony

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The evidence of the Officers of Parliament, at least those seeking a new budget determination method, was that they should be independent of government and more fully managed by Parliament. These Officers believe that it is inappropriate for those who scrutinize government's performance to have to seek approval for budgets from the very government which they investigate. They would prefer that their budget determination process more actively involve Parliamentarians.

The Offices of the Information and Privacy Commissioners are currently funded in the same manner as are government departments. They submit annual budget projections to the Treasury Board Secretariat, and only to the extent approved by the Treasury Board do their Estimates proceed to the House of Commons, and then to the Committee for review. The Ethics Commissioner, Bernard Shapiro, whose Office is in its first year of operation, is funded under a different mechanism, making his funding more independent of government.

The funding procedure for the Ethics Commissioner and his Office is provided for under section 72.04 of the *Parliament of Canada Act*. It specifically excludes any involvement of the Treasury Board Secretariat in the development of the budget proposal.

72.04(8). The estimate referred to in subsection (7) shall be considered by the Speaker of the House of Commons and then transmitted to the President of the Treasury Board, who shall lay it before the House of Commons with the estimates of the government for the fiscal year.

The Chief Electoral Officer is also in a somewhat different funding position than the other Officers of Parliament. This Office receives most of its funding by statutory authority, under parameters set out in strict detail by the *Canada Elections Act*. Only the salaries for permanent staff are paid from an annual appropriation vote through the Estimates process.

Unlike most other Officers of Parliament, the Chief Electoral Officer is not an ombudsman. His Office must deliver two fundamental democratic rights: the right to vote, and the right to be a candidate in an election. In accordance with this unique role, the independence of his Office from political influence is safeguarded in a number of ways, including the funding mechanism, but more importantly, the appointment and removal processes.

The need for a more independent funding mechanism for Officers of Parliament was supported by Professors Craig Forcese of the University of Ottawa and Paul

Thomas of the University of Manitoba. Professor Forcese argued that the Commissioners'<sup>11</sup> quasi-judicial powers, such as their power to punish for contempt, legally necessitate their independence from government.<sup>12</sup> Professor Thomas argued that the budget-setting process for Officers of Parliament should reflect the primacy of their relationship with Parliament, but he cautioned that such agencies should not be sheltered from government-wide financial realities of the day, either, and that they must be held accountable for the "economy, efficiency and effectiveness of their spending."<sup>13</sup>

### Funding Models

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In seeking to fashion a new budget determination process that was more independent of government, the Committee considered a number of proposals submitted by its witnesses. The Information Commissioner was a strong proponent of a simple, transparent parliamentary budget determination process similar to that of the Ethics Commissioner. Budgets of parliamentary Officers would be considered by the Speakers of the House and the Senate who would transmit them to the President of the Treasury Board for tabling along with the government Estimates for that fiscal year. In this way, these budgets would not be vetted by the Treasury Board Secretariat or subject to approval by the Treasury Board.

Officials from the Treasury Board Secretariat raised some concerns about the lack of government input (appropriate given the government's responsibility for sound stewardship of public resources) that would be present in the Ethics Commissioner model. They also felt that it would be difficult to apply this simple process to Officers with broad mandates and large budgets, such as the Privacy Commissioner and the Auditor General. The Officials therefore suggested a modified version of the Ethics Commissioner model whereby budget proposals of Officers of Parliament would be examined through the management machinery of Parliament (more specifically, through the Internal Economy review mechanisms of the House of Commons and the Senate) with input from appropriate parliamentary committees and the Treasury Board Secretariat.<sup>14</sup> In another variation on this model, the budgets of Officers of Parliament could be combined in a larger Parliamentary Envelope similar to the process currently employed by the House of Commons, Senate and the Library of Parliament.

As a result of her longstanding quest for an alternative budget determination process, the Auditor General was able to present for the Committee's consideration several funding options, including one modelled after the United Kingdom's National Audit Office. There, an all-party Commission of Parliament, created by statute,

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examines the proposed Estimates of the National Audit Office and tables a report to parliament with any modifications it sees fit. The Public Accounts Commission is comprised of the Chair of the Committee on Public Accounts, the Leader of the House of Commons and seven other Members of Parliament appointed by the House, none of whom may be a Minister of the Crown. Commission members hold office until they either fail to run for election, are defeated in an election, or are replaced by another Member of Parliament. The Commission normally meets twice a year and is required to receive advice from the Committee of Public Accounts and the Treasury (the equivalent of our Department of Finance).<sup>15</sup>

Some modified versions of the U.K. model were also presented to the Committee. For example, it was suggested that an enhanced parliamentary committee could be established that would allow for all-party membership and include both Houses of Parliament. It was also proposed that a parliamentary committee or committees could receive budget proposals from Officers of Parliament for review and report back its findings to the Treasury Board for tabling in Parliament as part of the government-wide Estimates process. The Official Languages Commissioner clearly favoured parliamentary scrutiny of her budget through the official languages committees in the House of Commons and the Senate.<sup>16</sup>

Another budget determination model put forward by the Auditor General involves the use of a blue ribbon panel of experts to review and to challenge the budget proposals of Officers of Parliament. The panel would report on the level and details of each Office's Estimates to the Speakers of both the House and the Senate and to the President of the Treasury Board for tabling as part of the Parliamentary review of the Estimates process. As in the case of the Ethics Commissioner model, the Estimates would not be subject to a final vetting by the Treasury Board Secretariat or to approval by the Treasury Board.

Finally, the Committee heard testimony on multi-year formula funding models. In particular, Professor Forcese promoted a sustainable and long-term funding formula that would be pre-established to increase according to an objective benchmark over a fixed period of time (such as five years). Annual increases in funding could be based on objective criteria that are tied to the individual functions of each Officer of Parliament (for example, the number of complaints received by the Information Commissioner). If the formula were legislated, criteria could be set out in the legislation.

The principal difficulty with the multi-year formula funding approach, however, was pointed out by Professor Thomas, who indicated that finding the most appropriate reference point for such a model would be

controversial and artificial. Some body (Parliament, a blue ribbon panel or the executive) would still be required to determine the initial level of funding, and some arbitrary but automatic mechanism would determine all subsequent increases.

## Recommendations

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All Members of the Committee agreed on the need for greater parliamentary involvement in the budget determination process, and the fact that resource-allocation decision-making must be based on objective and expert analysis. It was also agreed that the process must include the elements of the government-side budget design and approval process that ensure accountability to the public for expenditures of public funds. As a result of the expertise already developed by the Treasury Board Secretariat in terms of challenging, analyzing and advising on the budgets of Officers of Parliament, the Committee felt that the Secretariat should maintain this function in any new funding mechanism. In view of the timing of the Committee's study, which took place as consultation was ongoing between the Treasury Board Secretariat and the Officers of Parliament, the Committee recognized that certain details about its proposed new funding mechanism could not yet be spelled out.<sup>17</sup>

The Committee therefore recommended that a new permanent parliamentary body be created as the budget-determination mechanism for the funding of all Officers of Parliament.<sup>18</sup> Like the U.K. model, the membership of this body would be representative of all parties of the House of Commons and the Senate, and equally comprised of government and opposition representatives. This body could also incorporate the Senate, where, for example, some Officers report to both Houses of Parliament, by having both Speakers as *ex officio* members of the commission.

Annual budget submissions of Officers of Parliament would be made directly to the parliamentary body along with an accompanying submission from the Treasury Board Secretariat setting out budget parameters and providing analyses, challenges and advice on the feasibility of the Officers' submissions. While the Committee rejected the idea of a blue ribbon panel or the use of existing parliamentary committees in determining the budgets of Officers of Parliament, it did incorporate the essence of these models by recommending that assistance be provided to the parliamentary body by appropriate parliamentary committees and experts with in-depth knowledge in areas in which Officers function. The recommendations of the new parliamentary body would then be submitted to each House of Parliament, as appropriate, who would provide the recommendations to the

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Treasury Board for tabling as part of the government-wide Estimates process.

The Committee was concerned that more foot-dragging might ensue with respect to the implementation of its recommendation. Therefore, in order to facilitate the process, the Committee recommended that a pilot project be launched for the fiscal years 2006-2007 and 2007-2008 using the existing House of Commons Board of Internal Economy as the parliamentary budget-determination body and the three Commissioners within its mandate – the Information, Privacy and Ethics Commissioners – as the initial participants. A pilot project would also facilitate an assessment of how best to construct a parliamentary budget-determination mechanism that could be legislatively applied to all the Officers of Parliament. For this reason, the Committee also recommended that a parliamentary review of the pilot project take place immediately after its completion.

### Reaction

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The Committee's report was issued while the Treasury Board Secretariat's consultation process with Officers of Parliament was ongoing. Judging by the comments made by Treasury Board President Reg Alcock before the Senate Finance Committee, as discussed above, the process of developing a pilot project for the new mechanism for funding Officers of Parliament is still underway.

In her appearance before the Committee on her Office's 2005-2006 Estimates, Privacy Commissioner Jennifer Stoddart congratulated the Committee on its report and indicated her willingness to work with the Committee toward the new funding mechanism.<sup>19</sup>

The Committee met in June 2005 with the Information Commissioner, John Reid, on his Annual Report for the year ending 31 March 2005.<sup>20</sup> At that meeting, the Deputy Commissioner, Alan Leadbeater, indicated to the Committee that the Office of the Information Commissioner was very supportive of the Committee's report, as its recommendations would provide Officers with rigorous review, independent of the government of the day. He suggested that the Treasury Board Secretariat was moving toward implementation of a pilot project that would be roughly compatible with what had been recommended by the Committee, but possibly involving all Officers of Parliament.

### Notes

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1. House of Commons, Standing Committee on Access to Information, meeting No. 3, November 3, 2004.
2. *Ibid.*, meeting No. 4, November 17, 2004.
3. *A New Process for Funding Officers of Parliament* May 2005.

4. In June 2003, the previous Privacy Commissioner, George Radwanski, resigned during investigations of his financial and human resources practices.
5. *Matters Relating to the Office of the Privacy Commissioner*, June 2003.
6. See its Seventh Report, February 2005.
7. *Third Interim Report on the Main Estimates 2005-2006: Officers of Parliament*, Twelfth Report of the Standing Senate Committee on National Finance, May 2005.
8. It is important to note, however, that the appointment procedures for such Officers of Parliament are not consistent, despite a 2001 recommendation of the Special Committee on the Modernization and Improvement of the Procedures of the House of Commons that the appointment processes be the same.
9. Neither the Ethics Commissioner nor the Chief Electoral Officer felt that this concern applied to his office.
10. House of Commons, Standing Committee on Access to Information, meeting No. 13, February 24, 2005.
11. All of the Officers of Parliament considered in the Committee's study except the Chief Electoral Officer.
12. House of Commons, Standing Committee on Access to Information, meeting No. 14, March 8, 2005.
13. Paul G. Thomas, "Notes for Submission to House of Commons' Standing Committee on Access to Information, Privacy and Ethics on the Topic of Funding Mechanism for Officers of Parliament," March 5, 2005, page 1.
14. This would be similar to some provincial funding models.
15. One of the principal concerns raised by witnesses with respect to the U.K. model centred on the fact that money paid out to the U.K. Comptroller and Auditor General stems directly from the Estimate laid before the House of Commons by the Commission. In Canada, our constitutional framework requires that the initiation of spending resides with the Crown and Parliament's role is limited to approving, rejecting or reducing spending proposals. Thus, for the U.K. model to work in this country, it would have to be modified, for example, by having the Estimates submitted to the Treasury Board for tabling as part of the government-wide Estimates process.
16. House of Commons, Standing Committee on Access to Information, meeting No. 11, February 15, 2005.
17. For example, the Committee felt that consultation with the Senate of Canada was necessary before the nature of Senate participation in the new funding determination body was to be prescribed.
18. The Information, Privacy, Ethics and Official Languages Commissioners, the Auditor General of Canada and the Chief Electoral Officer.
19. House of Commons, Standing Committee on Access to Information, meeting No. 26, May 31, 2005.
20. *Ibid.*, meeting No. 32, June 21, 2005.