Transcript of the Public Hearings of the Statutory Review Committee on Access to Information and Protection of Privacy

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ATIPPA Review Committee Members:
Clyde K. Wells, Chair
Doug Letto, Member
Jennifer Stoddart, Member

C. WELLS:

Okay, gentlemen, welcome and thank you very much for appearing. We appreciate it.

P. GULLAGE:

Thanks for having us.

C. WELLS:

Okay.

S. MOREMAN:

Good morning, Mr. Chair, or good afternoon, I should say, and Committee Members. Just this morning we've provided you with updated versions of our submissions. I hope you've been given the correct copy, if you choose to follow along. It's the one with the cover page.

C. WELLS:

I can't follow it because I didn't have it in time to look at it. I have it here now but I just got it two minutes ago. My notes are all on the other one and that's the one that I would intend to follow, unless you've abandoned it totally. I assume it is not too much of a deviation, is it?

S. MOREMAN:

There are some changes but we'll go through them together, if that's all right. The Canadian Broadcasting Corporation, Radio Canada, is pleased to be here today to make submissions on what it feels are very troubling amendments to the province's Access to Information and Protection of Privacy Act. My name is Sean Moreman and I'm Senior Legal Counsel with CBC. With me is Peter Gullage who is the Executive Producer responsible for news in Newfoundland and Labrador.

Today, we wish to convey to you our position that the amendments to ATIPPA made as a result of Bill 29 are antithetical to the very purpose of the Act itself and are not in keeping with decades of court decisions favoring openness over secrecy.

Peter will then discuss how these changes have helped prevent the media from doing its job of informing the public on matters of public importance.

In preparing for today's hearing we've had the opportunity to review both the overall access

legislation in the province and, obviously, the changes enacted two years ago by Bill 29. We've also looked at the access laws in the other provinces and territories as well as that of the federal government.

Lastly, we have read the Cummings Report on which the government purported to base many of the Bill 29 amendments. What we found most surprising is that after that review it became apparent the most shocking changes enacted two years ago are either not contained in the Cummings Report, do not appear in other Canadian jurisdiction or both. In particular, sections 2 and 3 of Bill 29 removed certain records entirely from being subject to the Act; whereas, before, they could have been withheld under existing discretionary exemptions. This distinction is important as well as dangerous. For clarity, section 2 of the Bill has excluded investigative materials of the RNC entirely from the Act, and section 3 did the same for ministerial briefing notes. Since Cabinet confidences are still covered by a mandatory exemption under section 18 of the Act, we assume the records intended to be captured by section 3 of the

Bill are much broader in scope.

The preamble to Bill 29 stated that one of the objectives of the amendments was to (quote) "clarify" the right of access does not extend to briefing materials. It is our position that this is not at all a clarification of a vague aspect of the previous law, but in fact brand new law that drastically modifies the process as it relates to those records.

Neither briefing materials nor RNC investigative records were automatically available upon request under the prior legislation. Each type was already covered under exemptions in the previous version of the Act. Investigative matters were covered under section 22 and ministerial briefing notes formed part of "advice" contained in section 20 of ATIPPA. Both of these exemptions are discretionary. Saying the public body (quote) "may withhold records".

Since its decision in *Baker*, the Supreme Court of Canada has long viewed that any discretionary act undertaken by government must be done in a manner that is consistent with the purpose of the

legislation that confers the discretion. The court has also examined access to information legislation in several cases. Time and time again it has found that the primary purpose of these laws is to allow members of the public the opportunity to review the actions of their government in an open and transparent way to permit them to make informed opinions on those actions. Furthermore, the courts have routinely said that any restrictions on the right of access should be viewed narrowly and applied sparingly.

This philosophy is iterated in the Newfoundland and Labrador Act as well, both pre- and post-Bill 29. Section 3 of ATIPPA clearly states that, "The purposes of this Act are to make public bodies more accountable to the public ..." by "giving the public a right of access to records" and "specifying limited exceptions to the right of access."

In examining what factors are to be considered in exercising the discretion to withhold information the Supreme Court in *Blank* has also stated that any discretionary provision in access to information

legislation requires the public body to evaluate whether it is in the public interest to do so. The reason for this analysis is in order to encourage the government to disclose more information, not less.

Based on the principles outlined by the Supreme Court of Canada, the analysis of whether records should be disclosed to a requester under discretionary exemptions must follow a two-step process. So what I refer to as the "could/should" analysis. Firstly, "could" the government body withhold the records, meaning is it the type of record described in the Act, and has the public body met the evidentiary burden to withhold it? If the answer is yes, then one moves to the second prong of analysis to ask, "should the government withhold the record after balancing the purpose of the legislation against the public interest in receiving the information it contains?"

As a result, by removing these records entirely from the application of ATIPPA the government is absolving itself of the responsibility to explain why it is in the public interest to withhold the records

in question. That is entirely contrary to the very principle of accountability that the Act says it is trying to achieve.

It is interesting to note that none of the provinces or the federal *Access to Information Act* excludes these records entirely from their applicable legislation. Newfoundland and Labrador stands alone in that regard. And given that the government already had the discretion to withhold the records if it is in the public interest to do so, we question what particular harm is being remedied by placing an absolute bar to access over them with these amendments.

It is also interesting to note that the Cummings Report did not recommend these changes. In fact, it recommended against what was contained in Bill 29. However, what was in the Cummings Report may shed some light on the present government's view of ATIPPA's mandate of providing accountability.

In particular, when discussing the idea of Cabinet confidences at page 38, the report quotes the

executive council as favoring a greater "protection from disclosure". This idea of protection seems to suggest the government feels it is under attack or at the very least being threatened by public scrutiny but it cannot be overstated. The Act is not called the "Protection of Government Documents Act". It is called the *Access to Information Act*. Its very purpose is to make government accountable, no matter how uncomfortable that might get at times.

P. GULLAGE:

As Sean said, the idea of public accountability is at the very core of access to information legislation. But it is also a fundamental part of what we do as media. The courts in this country have recognized that the freedom of the press guaranteed by section 2(b) of the Charter includes a journalist's ability to acquire information about public institutions and to act as the eyes and the ears of the public. Without that ability, major stories would go unreported and no one would be held accountable.

I can think of several examples of issues that have been raised as a direct result of access to information requests by members of the media.

Nationally, the sponsorship scandal was first uncovered by reporters using the federal *Access to Information* law. Access to information requests also played an important role in stories about excessive spending by the former Premier of Alberta and questionable practices. Stories that led to the involvement of the Auditor General and now the police.

In this province, access to information has allowed CBC journalists to do a number of stories in the public interest. We revealed a lack of public activity by the legislature's budgets watchdog, the Public Accounts Committee. Six years with no public meetings, with one member getting more than $10,000 for attending one private meeting. The story resulted in action. The committee is now active.

Access to information allowed us to tell people there is no ambulance on standby ready to respond to emergencies on the northeast Avalon for an average of half an hour a day.

Access to information allowed us to tell people

about a lack of safety inspections in one of the province's most dangerous industries - the fishery. The province carried out just one inspection per month. There are 6,000 commercial fishing vessels operating in this province.

And access to information allowed us to tell people how pressure from the military resulted in marine medical distress calls in our waters being handles by a free service in Rome, a practice that changed after the first CBC reports revealed a significant language barrier.

Those were important stories, we believe. And in all cases the *Access to Information Act* allowed us to report on issues of significant interest to our audience in order to enlighten them on the activities of their government. That is the very purpose of the Act. Without the ability to file those requests it is likely none of these issues would have ever seen the light of day. But perhaps more important are the stories we can't do now, thanks in large part to changes brought in by Bill 29. The system was far from perfect before Bill 29, now it's much worse.

To quote Donald Rumsfeld, "there are also unknown unknowns, the ones we don't know, we don't know." We can't know what government is up to until we ask unknown unknowns and because of the changes made to ATIPPA, there is no way to find out. As a result, public is left in the dark and the government is not made accountable for its conduct.

Putting ministerial briefing notes off limits to the public has choked off the flow of information that led reporters to make calls to the government about possible items of public interest. If we don't know what ministers are being briefed on, we don't know what to ask about.

Bill 29 has led our reporters to file fewer ATIPPA requests because the type of information they can get has been severely restricted. These changes have led to more information being kept from the public domain. How much more, we don't know. It's all blacked out.

I mentioned the federal sponsorship scandal as an example of a story that was revealed because of

access to information. When public scrutiny is not allowed to happen, bad things often do happen.

Here in Newfoundland we had the House of Assembly spending scandal. At the time, Chief Justice Derek Green attributed the scandal to a lack of access to information by the media. This is what he said: "One of the antidotes of this lack of confidence and suspicion is to shine light into the darkness and give access to information. Indeed, if an access regime had been in place over the past several years, it is arguable that investigative media could have used such legislation to review members' allowances and spending patterns."

And as you can see from these examples, access to information legislation plays a vital role in informing the public and in exposing government waste, corruption and other matters of fundamental public interest.

And the very nature of these stories also means there are likely to be many requests filed by many journalists on related topics, even if they are all

employed by the same broadcast corporation or the same news room. That is the reality of today's media landscape where broadcasters such as the CBC create content on traditional platform such as television and radio, as well as newer platform such as the internet and social media.

One reporter cannot do it all and often different angles are being explored at once, which is what made section 21 of Bill 29 particularly worrisome.

S. MOREMAN:

The exact wording of that section allows for the head of a public body to refuse to answer one or more requests if one or more of them is frivolous or vexatious or if it decides the request is made in bad faith or is trivial. There are several problems with this provision in our opinion: Firstly, there is no guidance in the Act on what frivolous, vexatious, bad faith or trivial mean; secondly, an individual head of a public body who may be embarrassed by the content of records that cannot otherwise be properly withheld under the Act should not be empowered to simply disregard a request on vague criteria; and thirdly, the wording "one or more" allows the head to

ignore all the requests by a particular requester simply because any one of them at any time is deemed to be offside.

While we understand this section of the Act has only been used seven times to date, the potential for abuse is very real, as was the case with one of our journalists in Manitoba. She filed a simple request for e-mails containing her own name during a four-month period. In refusing the request, the City of Winnipeg stated that her previous 52 requests on completely unrelated matters made the current request repetitious as well as vexatious and frivolous. We've attached a copy of that refusal letter to our submissions today.

Although one can appeal the decision of the head of a public body to the Commissioner, we fear this power may be used as a stalling tactic by public bodies if the heat gets too high. As was mentioned earlier, stories grow, the more we find out. And the more we find out, the more access requests we file in order to dig further. It is this very journalistic process of asking more questions that a head is

likely to deem vexatious in order to avoid further scrutiny.

P. GULLAGE:

Understanding that news has a very short shelf life, a public body can simply refuse to answer more requests on the basis that they are vexatious knowing it will have the effect of stalling any momentum and public interest in an ongoing story. In that case, the appeal of the Commissioner is really illusionary since it can take months to resolve. And even then, that is only to have the request considered not necessarily to have the records released.

And in this is not what was recommended by the Cummings Report. In that report, the author clearly rejected the government's position that there should be a unilateral grant of power to the head of the public body to deal with vexatious requests. And I want to read that section into the record from page 35 of the report: "I think it makes sense for a public body to be required to obtain the approval of the Commissioner before refusing to respond to a request on the basis that it is frivolous and vexatious."

We would also like to comment on the ability of the head of the public body to seek permission to refuse a request that the Commissioner deems to be excessively broad. Section 9 of ATIPPA states that, "the head of a public body has the duty to assist the applicant in making a request". It is our position that this duty includes a requirement to work with the requester to narrow his or her request and to make it more manageable. In that spirit, we would hope that the public bodies will only seek permission to disregard a request that is broad only after it has exhausted all reasonable means to narrow the request, and we hope the Commissioner will do a thorough evaluation of those efforts prior to granting permission to refuse it.

S. MOREMAN:

To conclude, CBC/Radio-Canada has had the opportunity to review ATIPPA and is concerned by what it views as a movement toward more government secrecy as opposed to a further accountability. Three changes are particularly worrisome.

The government already had the discretionary power to withhold ministerial briefing notes and RNC

investigative records under the previous legislation. It would appear the only reasons possible for the government to want to now exclude them entirely from the Act are firstly, to avoid having to explain why withholding the records is in the public interest; and secondly, to avoid having to sever and provide the portions of their records that cannot be properly withheld. In our view, neither of these reasons should be sufficient to draw the curtains shut on a process that is supposed to shine light on government operations.

As well, we are concerned about the possibility that government heads will improperly use the ability to declare requests vexatious in order to prevent further scrutiny. The power being granted would effectively allow the head of a public body to refuse all access requests filed by CBC simply by deeming any one of them to be vexatious. While that extreme situation does seem unlikely, it is more probable that the power will be used and abused in order to simply delay answering a request unless there is no more interest in the story or when it is politically expedient to do so (such as in a lead up to an

election).

None of these changes was proposed in the Cummings Report. In fact, it specifically recommended against what was finally passed. The government has not explained what harm it is expecting to remedy with any of these changes and CBC/Radio-Canada believes that's because there is none.

For these reasons, we urge everyone to take a very close look at the changes and the very negative effect they have on the public's ability to keep its government accountable.

As a result, it is our respectful submission that this Committee recommend the repeal of sections 2 and 3 of Bill 29, and also recommend that the Act be amended to require the head of a public body to obtain approval from the Commissioner prior to refusing a request as being vexatious or frivolous, as was recommended in the Cummings Report.

Subject to any questions, those are our submissions.

C. WELLS:

Thank you, gentlemen. We do have some questions. Just tell me, you recommend sections 2 and 3 of Bill 29 be removed. Last night when I was reading this, I had sections 2 and 3 with me and I don't have them at the moment, of Bill 29. Oh that's, right, I forgot for the moment, the amendment to sections 5 and section 4. It's those changes. Thank you very much for that.

You say for clarity section 2 of the Bill excluded investigative materials of the Royal Newfoundland Constabulary entirely from the Act and section 3 did the same for ministerial briefing notes. Is it the CBC's position that you should have unrestricted access to Newfoundland Constabulary investigative reports?

S. MOREMAN:

No, it's our position that under the old Act those materials were already covered by the existing discretionary exemption for law force investigations. It is our position that the public body, in refusing to disclose those materials, should go through the could/should analysis that I talked about and

evaluate is this the type of record covered by the exemption, do we have the evidence of the harm that's trying to be prevented and is it in the public interest to withhold them.

What the government is attempting to do now is to avoid that two-step analysis and just hive off those records automatically. It's hard to speculate on what documents exist or may exist in the future but we take the position that since the public interest test was in place under the old Act, that would be sufficient to prevent or avoid any harm, and there is no need for the government to have gone one step further to exclude them entirely from the Act, to be accessible at all.

C. WELLS:

I'm concerned about police reports. Police reports and investigations are a very special thing. It's of the nature of police investigative work that they be suspicious and that they express suspicion and they write to one another, and in their process that we think so and so committed crime or we think this person is guilty of having done that. And the person might be completely innocent. That's difficult for

people to manage that kind of, that kind of even years, maybe months or years after the event when those reports might be being sought, it is difficult for people to know exactly what was under investigation at the time and what should be redacted or should not. Isn't it safer in terms of protecting the public interest to have those excluded totally?

S. MOREMAN:

Safer? Our position on whether it is safer would be that there should be no *Access to Information Act* at all. In that case all records should never be made public.

C. WELLS:

No, that's just extreme now, Mr. Moreman. That's not what I'm talking about.

S. MOREMAN:

I think there are, I think in the Act as it existed and it exists now there are sufficient safeguards to prevent that particular risk of any --

C. WELLS:

How?

S. MOREMAN:

There are also the personal information sections. So just because the investigative records are

theoretically accessible, the head of the public body would have the power, firstly, to say is there a current harm to law force investigations in releasing these materials. And almost invariably it would be in the public interest to withhold them, if that's the case. If it is not in the public interest to withhold them under the law enforcement exemptions, in your example of years later naming a suspect who was actually innocent.

C. WELLS:

Or any time, even currently.

S. MOREMAN:

If it falls under the law enforcement category as it existed, and there would be a legitimate harm to an ongoing investigation, the government would have been able to withhold the records anyway. There is no need, there no additional harm.

C. WELLS:

What if there is no legitimate harm to an ongoing investigation but potentially legitimate harm to another individual who --

S. MOREMAN:

And then that's if there is a personal harm to an innocent third party, then there are the personal

information exemptions that exist under the current Act as well. So just because it doesn't fall under one, doesn't mean it can't still be withheld under another to protect another type of harm.

Our driving point here on this particular section is that the harm the government one assumes is trying to protect was already protected under the old Act. And then the additional harms, as of the type you're discussing, are covered under other exemptions. And if they are not covered under other exemptions, perhaps we're speculating a bit, then we'd have to really look and say is it in the public interest to withhold it?

C. WELLS:

I'm thinking about the nature of police investigations and reports because of what it does and says about people who turn out to be totally innocent and it is part of the nature of police work that they do this. They must do this in order to be effective. And police reports rarely, if ever, see the light of day. And most of them should never see the light of day for just that reason.

I can think back to a very serious event that took place in this province a long time ago when a police report was leaked to the media by an errant person and an individual suffered immense harm as a result of it. Was accused of arson and potentially a multiple murder or manslaughter and the CBC was involved. The CBC published it. Another newspaper published it and did immense harm, without even a second thought to what they were doing. Should that risk be there at all?

S. MOREMAN:

Well, I'm aware of that situation and I think the answer is that was a leak. That's completely separate.

C. WELLS:

I know it was a leak.

S. MOREMAN:

So the harm that the government is trying to protect now would not have been avoided if someone from within the department chose to leak the documents. Whether it is accessible through access or not, subject to the access Act is not related to that leak. That would have happened anyway. The old Act didn't lead to that leak.

C. WELLS:

I understand that it was a leak. I know that. But the CBC, nonetheless published it? So any risk that this kind of information gets out, even accidentally, if somebody overlooks redacting it or when it is requested and it gets out, the risk of that kind of harm being done is so immense that I can't imagine what good, what harm is being done by not providing access to police reports and police investigative reports. They've come out through the courts when and if charges are laid and if the person is shown, if there is no evidence that the person should be charged, he isn't charged. So where is the public interest in accessing reports of that nature?

S. MOREMAN:

It's always very difficult to speculate about what might exist in the future. And our position is there may be, there may have been and there may continue to be in the future instances where it is not in the public interest to withhold information right off the top. What the government is doing is trying to read a crystal ball and saying in no instance in the future will there ever be an occasion where it is in the public interest to release this information. And

furthermore, if there is that ever such occasion we don't have to explain it because we are not making these records subject to the Act anymore. We can't guess.

C. WELLS:

Ms. Stoddart has a question.

J. STODDART:

Okay, thank you very much for your presentation, for coming here today to make it. I hope you can just clarify for me in listening to your submission it's not perhaps crystal clear to me what part of your submissions are apprehension and what are experiences since Bill 29. And I guess I am further confused by the attachment of a letter that has to do with the City of Manitoba, so it is Manitoba legislation which you say is analogous to amended Newfoundland legislation. And we don't know what happened to that in the end. Did your reporter get the information or not? In the end there was (inaudible).

S. MOREMAN:

Okay, so I'll start at the beginning.

J. STODDART:

Perhaps you could tell us, since Bill 29 what has been your experience? How many requests have you

made? How many have been turned down using amended legislation? And how does this compare with pre-Bill 29 experience of CBC in Newfoundland?

S. MOREMAN:

What I will do is I'll answer the question on Manitoba first and then I will pass it over to Peter to deal with the actual request. The Manitoba situation is an analogous to the frivolous and vexatious amendment that's been included into the Newfoundland legislation in that it also gave the head of the public body the unilateral power to declare a request vexatious. Joanne Levasseur, our reporter, that's her beat, City Hall is her beat. So she files regular access requests. And on the 53rd requests, apparently, following up a variety of stories over a two-year period, the city decided it had enough of her requests and of her, and turned down all of her requests, saying that they were frivolous and vexatious.

So, the reason we've included it here is to show that that does in fact happen when people are empowered with that unilateral ability to declare a requester vexatious, just because they don't want to

deal with them anymore.

C. WELLS:

Was there a right in the Commissioner to review it?

S. MOREMAN:

Pardon?

C. WELLS:

Was there a right in the Commissioner to review it?

S. MOREMAN:

There was and we did appeal. So the second half of your question, Ms. Stoddart, was what happened? So we did appeal that request and before it could get reviewed the city decided it was still going to consider the request frivolous and vexatious but notwithstanding, respond to the request by giving a $15,000 filing fee estimate. So CBC then abandoned this request on that basis.

So that's what happens, when you give the head of a public body that power to just decide that a requester is a thorn in their side and to refuse to answer requests. With no really effective review mechanism, a lot of information gets buried.

C. WELLS:

Why do you say no effective review mechanism if the

Commissioner had the right to review it?

S. MOREMAN:

Because, as Peter pointed out in our initial submissions, news has a short shelf life and a story that is of public interest today is often forgotten next week. And even though you have the ability to appeal to the Commissioner, that process can be lengthy. Even getting them to open a file to review it can be lengthy, never mind getting a decision.

So, as Peter pointed out, the head of a public body, just knowing the nature of human nature and the interest in news and its short shelf life can declare something to be vexatious, refuse to answer it and just wait out the appeal period. And then hopefully it will go away. Hopefully, there will have been a change of government. Hopefully something else more interesting will have come along.

This is one of my areas of expertise in all the provinces. I have seen them use access legislation as a delay tactic. Very antithetical to what it is supposed to be.

C. WELLS:

I don't know how you create perfect moral. There is a right of review and a commissioner can review not alone whether or not the information should have been released, but can also review the actions of the department in its treatment of it. And it's that kind of thing and publication of what the department did. Like the Commissioner here issued a release after requested information was held up unduly for seven months before it was released, and the Commissioner did a thorough assessment and released, and did that assessment. And this kind of information is what's caused this pressure on the government to do something about the present circumstances of ATIPPA and its move to do it. But public pressure causes that. Wouldn't that have been the approach to take, must you have an absolute unrestricted right to whatever you demand? That surely you got to have an objective intervenor to oversee the request and determine whether or not it's a valid one and should be responded to.

S. MOREMAN:

And we agree. And our position has never been that there should be an unrestricted right of access to

anything we request. Our suggestion to this Committee is to recommend what the Cummings Report recommended, which was to allow refusals on the basis of frivolous and vexatious requests after seeking prior approval of the Commissioner.

C. WELLS:

Well, that may be an equally valid approach and I think that would probably be a better approach and that may well be the thing. But you got to have the Commissioner in there. You can't eliminate the frivolous and vexatious provision altogether.

S. MOREMAN:

No, we agreed with that. We think that the order in which the present Act does it is backwards, because it can be used as a stall tactic. If the order was reversed and the head of the public body had to approach the Commissioner for permission, the Commissioner then is empowered to set the deadlines. And it's our belief that the Commissioner would come to a faster conclusion than the head of the public body will.

C. WELLS:

It's quite likely that that would make for a much more expeditious process and might overcome the

concern you would have about the delay. But it would still leave the Commissioner in place and with the Commissioner having the ability to assess whether or not it was in fact frivolous and vexatious. Okay?

S. MOREMAN:

You were asking?

C. WELLS:

Sorry, I interrupted.

J. STODDART:

Yes, yes. The second part of my question was, could you tell us about your real experience under Bill 29 and how it compares with previous experience?

P. GULLAGE:

Well, we don't have a number for how many have been either rejected or not filed, because since the legislation have come in we have trained our brains to work within the legislation. We know what would have been acceptable before. We know now what not to bother with. Because if we just file information requests knowing that they'll be rejected then that becomes frivolous. It becomes a time waster on both sides. So we've come to learn to play within the rules as the government has set them out.

C. WELLS:

If you know it's not going to be answered, it's not point in trying.

S. MOREMAN:

That's a waste of time, energy and money on both sides. So we have to work within the legislation.

C. WELLS:

Do you have any record of circumstances in which you would have wanted the file request but didn't because of these changes? Do you have anything to indicate that?

P. GULLAGE:

You know what, we'll have to think about that but I think we can come up with some examples. Rob Antle is there in the back. The way we operate now is, there was a time when access to information requests were sort of like a fishing expedition. There was a net that was cast wide, reporters were filing access requests and producers. But now we've streamlined our efforts through one part of the newsroom and access to information requests are talked about. They're discussed. We plan them out. And then we file them through one funnel.

C. WELLS:

So you may have a record of ones you've talked about and decided not to pursue.

P. GULLAGE:

Yeah, so I'll have a look for that for you.

C. WELLS:

It might be interesting to have that because your submission says, "the changes in Bill 29 have led our reporters to file fewer requests". And like Ms. Stoddart, I was interested in getting the sort of backup material on that.

P. GULLAGE:

Without a specific number, I can tell you that there was a time that a reporter would say I'm going to do this, I'm going to file this. And sure, go ahead and do it. And then we wanted to get some sort of system built around that and since we've built that system we've seen a real decrease in the number of requests we're filing.

S. MOREMAN:

It's very hard for us to show you what we haven't done as a result. So we'll have to figure out a way to communicate that to you.

J. STODDART:

Yes, but surely you would be able to see in the volume of requests filed that the chilling effect that you're alluding to, which is very important, if you had those statistics I think it would be very useful to us in trying to understand what the impact of the changes of the law have been.

S. MOREMAN:

I think what we will undertake to do, because it might take some time, is to go through probably the year before Bill 29 and the year after and just to compile the number of requests filed versus year to year. I think we can do that.

D. LETTO:

Oh, I have lots of questions.

C. WELLS:

I was hoping you would, as a matter of fact.

D. LETTO:

I wanted to get to the RNC investigative reports. Beyond suspicions that police might have about who's responsible for a particular crime, let's say, what else can police investigative reports reveal that has nothing to do with pointing a finger at someone, because my suspicion is that they can reveal other

things, including maybe missteps that the police made in terms of how they did their work? Do you have any thoughts on that?

S. MOREMAN:

The short answer is no. It's not either of our jobs to speculate as to what might be in the records.

D. LETTO:

But you would know what it is that you want or why it is that you want a police investigative report?

S. MOREMAN:

Yes, and I will let Peter fill that in but let's not stray too far from what we're talking about. We're not talking about what's in the records themselves necessarily and whether they should have been disclosed under the old Act or whether they should be excluded from the Act altogether. That's what we're talking about. It is not the content of the record that's important and it is not any one of our jobs to speculate about what might be in them. It is our job to discuss whether they should be subject to the Act at all or whether they should be excluded altogether. And our position on that question is, they should be subject to the Act because there may be at some point in time records that are in the public interest to be

released. And what the current Act is doing will always keep those in the shadows. And that is really the question we have to be examining today, not speculating about what might be in a record in the future.

D. LETTO:

I appreciate your effort to direct the conversation that way but I'm still interested because I'm also informed by the questions that the Chair asked, which is that police records can have very substantial, untested allegations about people and what they might have been up to.

P. GULLAGE:

I can think of a few cases that I would like to ask for them, just to find out what's in them, but I can't think of a case where we've asked. The way a request becomes a real thing is that there is a tip. There is a phone call, there is an e-mail. There is a whisper in someone's ear. And that starts this process of asking for more information. So what you're talking about is maybe it is not about who the target of an investigation is but more about process. We would go asking for that. We would go looking for that in any department, because there is a suggestion

that there is something to find. We don't go on fishing expeditions. When this bill was being debated in the House of Assembly the minister stood up and talked about the CBC's fishing expedition around restaurant inspections. In other provinces, the result of restaurant inspections are made public. They are put on websites and anybody can find out before you go to dinner whether or not you should go. Here, we asked for some inspection reports and we had to ask for a lot of them and then the minister stood in the House and said it was a fishing expedition and it was a frivolous and it was a lot of work. In the end they did make the step to make it public. You can now go to the government website and find out whether or not you should go to a particular place for dinner that night. But that happened because there was a wink wink and a nudge nudge and you should take a look for that.

So if it is about police reports, I can't see us wanting to go target an individual in a case. It may be more around investigative techniques, what are some other areas that they are interested during an investigation, whether it is a drug investigation.

Say if it is a drug investigation, are there bikers involved, what other organized crime, organizations may be involved in an investigation? But like Sean said, it is hard to speculate on what we don't know we would ask (inaudible).

D. LETTO:

But I get your point, that there could be information that's of public interest other than who police suspect of ....

P. GULLAGE:

Yes.

D. LETTO:

Yes, fair enough. I got a question about ministerial briefing notes. It's my understanding that they kind of have at least two components: One is policy advice to the minister; and the other part is information and factual information about the state of various key public issues that ministers should be aware of. As you've stated, they were put out of bounds with the amendments to Bill 29. Is it your view that you are arguing for the right to have access to the entire ministerial briefing notes or do you draw a distinction between let's say the policy advice part and the, let's call it, the hot button

issues that the minister should be aware of, and the facts surrounding those?

P. GULLAGE:

That depends on whether or not the policy advice part becomes a hot button issue. Like I said, we don't know what to ask for if we don't know what they're being told. I'd argue for the whole package.

C. WELLS:

The whole package? Including the policy advice?

P. GULLAGE:

Well, if it's going to be a Christmas wish list, absolutely. The stories that have come out of ministerial briefing notes have been the hot button issues. It is when a new minister comes in, we get a sense of how the government has been fielding the questions and the hot button issues in that hand over. You get some real insight into what people on the hill really think about a particular issue. We don't have access to that anymore.

D. LETTO:

What informs my question about it, I guess, is that other jurisdictions have dealt with this issue as well, including most recently Justice Committee in the UK looking at the same issue. And they raise

concerns about public officials needing what they call a "safe place" to be able to give advice to the minister that includes the range of options that could be there, and some of them would sound rather extreme if they were presented in isolation. And that's the reason, that's what informs that question. And the sense that perhaps if officials don't have that kind of protection, ministers won't get the advice, or they'll follow the line that we've heard so many people have talked about recently, that you get no briefing notes at all.

S. MOREMAN:

It's our submission on that front that the advice and the recommendation section of the Act is sufficient to cover that type of scenario. The Supreme Court of Canada within, I think, the last year has just put out a decision to uniformly define advice and recommendations to be a broad range of topics, and it has been divided into essentially what they call objective elements, fact-driven elements and subjective elements which are the broad range of policy options.

D. LETTO:

So there is no need, then, to explicitly exclude the

briefing notes?

S. MOREMAN:

So, but this is why Newfoundland is going against the flow gone, whereas the Supreme Court of Canada has said advice and recommendations cover, really, the bread and butter of what people want to keep under wraps, these wild recommendations, the Government of Newfoundland and Labrador has gone even further to say even the factual elements are not subject to disclosure. Even Question Period, House of Commons, if some aide says "be aware you may get a question on flag design today", that is no reason in the public interest why that would not be disclosable; however, under the present version of the Act it's off limits.

C. WELLS:

It doesn't seem to be much basis for refusing to disclose factual performance, is there?

S. MOREMAN:

We agree. The facts are the facts, and if they can be known, there may be an argument and, again, the current should analysis is already good enough if it is advice based on facts that technically is withholdable, and if it is in the public interest it is already covered under the ....

C. WELLS:

And it is your view they can severe?

S. MOREMAN:

Correct, they should.

C. WELLS:

Severe the opinion and advice portion from the factual.

S. MOREMAN:

Yes. And the Federal Court of Appeal which was referred to by the Supreme Court of Canada in that decision, the name of which is escaping me, says exactly that. It says it should severe where it's possible, and it does also recognize that there are instances where the facts and the advice are so intimately connected it can't be done.

C. WELLS:

If that's what the statute provides for, they should do it.

S. MOREMAN:

Correct.

C. WELLS:

And your proposition, I take it, is that there is no reason to permit or allow the public body to withhold the whole of the document because they can severe the

factual portion from the opinion portion.

S. MOREMAN:

Sort of. It is not our position there is sort of no reason to be able to withhold it. It is our position that the elements of the test are already there to allow the government to do that when it is in the public interest to do so. So it is not a be allowed, not allowed. It is the analysis or lack of analysis that these changes are really tipping in favor of government secrecy. They're not having to justify anymore why withholding these records is in the public interest. Whereas under the old sections, that was the test. They could have withheld them as long as it's within the public interest to do so. Now they just don't even have to explain why. They can just sit on them.

D. LETTO:

Mr. Gullage talked about, and this is something, I guess, that we tried to get across to people as we talked about this work, a lot of people think it's only about Bill 29 and Bill 29 is part of what we're doing. But the idea is to obviously, and the Terms of Reference, to look at the Act in its entirety. And you said that ATIPPA wasn't perfect before Bill

29, and I'm wondering if you could maybe put your finger on some of the things that you would want to educate us about in that respect, some of the aspects of the pre-Bill 29 that you had issues with.

P. GULLAGE:

Well, before Bill 29 there were still refusals, I can't think of a particular example at the moment, but there were examples where we did disagree with the government on disclosure and we did have to go in front of a judge and argue for disclosure of documents. So there was a bit of a wall but it depends on how you feel about how high the wall should be. I mean, from this side it's, yeah, well, we want more, more, more, more. But there has to be some sense of commonsense about where there is protection for that information and what should be made public.

C. WELLS:

There is information that government can validly or should be able to validly withhold.

P. GULLAGE:

Yes.

S. MOREMAN:

One thing that we've talked about at the federal

level when I've been at similar hearings is the question of remedies and incentives. The government, for whatever reason, whether it is to hide information or whether it is overly sensitive or whether it's a stalling tactic, can invoke whatever exemption it wants. And the remedy for the requester is to go to the Commissioner and obtain an order that they were incorrect and that documents should be released.

Even if they did it, even if they did for the sole purpose of stalling and knew they had no basis to argue the exemption, there is no consequence. And not to suggest that we want there to be consequences because then that becomes a punitive statute, but maybe there should be incentives. And we don't have the answers to what those should be. But under this Act, and under, frankly, all of them across the country, there is nothing to stop a public body from just invoking every exemption possible and just being told by the Commissioner that they were wrong. And if it was for a nefarious purpose, as I say they were really just trying to hide stuff, invoking twenty exemptions for no need, why wouldn't they do that,

just to put a lid on the story with no sanction?

So that's one element that perhaps, again, we don't have the answers on that but that would be why it wasn't perfect and why all of them aren't perfect, because they all allow for the same thing to happen, and it does.

D. LETTO:

Time limits have been a source of great anxiety for people who make requests. What's been the experience pre-Bill 29, post-Bill 29 in that respect? The government says in recent months there's been a huge improvement.

P. GULLAGE:

There's been a long history of the 30-day deadline but there's been a long history of asking for extensions and extensions. That really hasn't gone away.

C. WELLS:

Is that still the case?

P. GULLAGE:

It's still, yeah. I guess it depends on the request. Like, it depends on the time of year of a request, too. I understand if I'm going to submit a request

to the government in July, it's like any organization, there's vacation and all that is going to happen. But it's not uncommon to have the letter show up in the newsroom and then it's we need more time. Some of these are not that complicated. It's almost like they've fallen through the crack and maybe not taken seriously. And now when we do get a request within 72 hours they're posted online. So you've asked for this information, you've waited 30, 60, 90 days and then once it's in your hands, three days later it is public and it is up on the government website, which is fine given that the government wants to have more public disclosure, the danger in it is that you're putting documents out there without context. And that's our job is to provide context. We can ask for a lot of information and once it is up on the government's website, well, what's the reason it's there? What's the back story behind that request? Why is that information up there? Similar to what you were talking about earlier about an RNC investigation and a target, a suspect or someone becoming a suspect that's really not. That could happen in this case, if you disclose information without context. If I'm reading the

government website and I'm reading through these requests that have been posted, I don't know what the story is behind them.

C. WELLS:

You don't know why the request was made.

P. GULLAGE:

Right. To me that's a little dangerous.

C. WELLS:

You mean it is dangerous to make that information known to the public without having a background or context?

P. GULLAGE:

Without the context and the background because a document is a document, like, similar to your argument about RNC investigations. You have documents that have potentially names attached to them; company names, individuals. I know from a couple of weeks ago, just going on the site and reading, there are a couple there that raise some questions about individuals. Like, I don't know what the real story is. That, I would assume, is up to someone in our business to put the context around it.

S. MOREMAN:

And there's also been discussion in several

jurisdictions whether the Information Commissioner level and the courts about simultaneous disclosure, when media applicants file requests based on a tip we'd like to think the tipster only came to us but who knows, they could have gone to two or three different media outlets. And if we are the ones who are, we, CBC alone, are the ones driving the access request, driving the appeal, bringing it to judicial review, and spending all that money, to then have the public body be declared wrong and withholding the records and post them on the website three days later, those other media outlets who haven't done any of the work, who might have had the same tip, also now have an unfair advantage in that they've taken advantage of our work product. How much time is reasonable I think would have to depend on the volume of records, if we know what we're looking for.

C. WELLS:

But that's the purpose of the 72 hours, isn't it? Now your proposition, it seems to me, maybe that the 72 hours is not a long enough?

S. MOREMAN:

I think it's always, it is a question of volume.

C. WELLS:

More is better, from your point of view.

S. MOREMAN:

We may know in some instances we are looking for a letter from A to B that will take four seconds to read and we can write a story and get a jump on someone even in an hour. Or some requests might produce thousands of pages of records. And in those other instances three days might not be enough. So there may have to be some analysis or some scale as to when the public body should be allowed to release records based on the volume.

C. WELLS:

Yes. So you're not arguing that it shouldn't be posted. You're arguing there should probably be more time between the date it's provided to the requester and the date that it is made public?

S. MOREMAN:

Yes. I mean, certainly, our underlying is principle is that the Act is one of openness and that the public records that are being disclosed, it is in the public interest to disclose them. But there is a bit of a balancing act between someone's investment in the process, both financial and manpower, and the

other side of getting the documents that no one else (inaudible) possible.

C. WELLS:

Presumably if there isn't adequate time between being released to the requester and it being made public, there'll be somewhat of a chilling effect on making the request?

S. MOREMAN:

That's correct.

C. WELLS:

Is that your proposition?

S. MOREMAN:

That's correct.

P. GULLAGE:

Well, we're concerned about accuracy and if we get information and then we're in a race with everybody else to publish or broadcast the information that we requested, maybe there should be a concern about accuracy and fairness.

C. WELLS:

But the question then reduces itself to what's the right quantum of time.

P. GULLAGE:

And just to be clear, there are access to information

requests that are filed that come back to the newsroom that never become public stories because they're not what you thought they were. So what is the interest in making that information public? You're getting into really deep, gray areas when you go down that road. And who decides if it should be public? Just because the request has come in, is it fair to whoever or whatever entity is the subject of that request to then have that document published? (Inaudible).

D. LETTO:

Do you ever have an access question or access request answered before the 30 days?

P. GULLAGE:

Oh yes. Yeah, it does happen.

D. LETTO:

Frequently or.

P. GULLAGE:

Not frequently. We're shocked.

C. WELLS:

You were shocked when it happened?

P. GULLAGE:

When it happens.

D. LETTO:

The Act also has a duty-to-assist element to it and in some jurisdictions they've created guidance, brochures and so on to explain to public officials how to assist, and that includes everything from making sure the request is understood to narrowing it or if it's vague being able to focus it. What kind of experience have you had in that respect where there might be concerns about it and what kind of follow up is there to get you on side about how to go about this?

P. GULLAGE:

Personally, I've had better experience federally with access to information officers in departments and I do get a sense most of the time they are working with you and helping you along in the process. Provincially, I get the sense that it depends on the individual person who's dealing with the request and sometimes depends on the department. So, it's not always even across the board.

S. MOREMAN:

And in my experience in helping the journalists on the appeal front those manuals have been very helpful to us, both to get the advice to say don't bother

appealing because they're right, or they're so way off the mark based on their own tests we should appeal this. So I'm actually not certain whether there is one in Newfoundland. I mean it would seem there's not since you are asking the question, but. The manuals that I've found to be the most helpful are the ones that not only talk about how to narrow the request but also set out the elements for each of the exemptions, what exactly does the public body have to prove in order to withhold the record.

D. LETTO:

There is a Practices and Procedures Manual for access and one for the privacy.

C. WELLS:

Yeah, for privacy. I just asked Tracey to get the access manual for me because I saw, reading your comment on page 7 and I'm reading here with the original one, which, by the way, we didn't get very early either. It arrived only on Friday night. And this is a matter of interest. You talk about government departments not filing within 30 days. You fellows have had several months now indicating you were going to appear and we had requested make some kind of a submission so as to give us half a

chance to read it, but this arrived Friday afternoon, after months. Is there some explanation for that that we should hear?

P. GULLAGE:

No excuse other than we've been dealing with at lot stuff inside CBC in recent months, so.

C. WELLS:

I'm sure most government departments would say exactly the same thing.

P. GULLAGE:

Yes. No excuse.

C. WELLS:

Okay. There's one in my briefcase in the room. I was reading, I go back now to the page from which I sprung, at page 7 of your original one I'm going from, and you write that, "we also would like to comment on the ability of the head of the public body to seek permission to refuse a request that the Commissioner deems to be excessively broad. Section 9 of ATIPPA states, that the head of a public body has a duty to assist an applicant in making a request. It is our position that this duty includes a requirement to work with the requester to narrow his or her request to make it more manageable." That

makes sense but have you looked at the access manual, the government's manual for guiding ATIPP officers as to how to do it?

S. MOREMAN:

No, not on that front. If that is already the practice and our statement there is kind of useless. If the practice isn't already or if this is going to allow the public bodies to not attempt, even, to narrow the request or to find responsive records on its face and seek permission, that is where we have a problem. An example with CBC, as you know, we are subject to the federal Act and we received a request for something to do with how much we spent on water in a year. And the records were thousands and thousands and thousands of pages because there were expense receipts for bottles of water. And on its face we likely, if that section had existed in the federal Act, we could have gone to the Commissioner and said this is going to result in thousands of receipts. I would like you to allow us to refuse answering it. Whereas, the correct approach was go back to the requester and ask them do you mean bottles of Naya water or do you mean the water contract we have for water coolers? It was the

latter is what the person wanted.

So our only concern on that front is it is going to be a quick and easy on its face this request is too broad, Commissioner. Please allow us to refuse answering it. And the Commissioner would say yes, on its face it is too broad. Don't try to narrow it. If that's not the practice, we're quite happy with the practice then. But if that is going to be the practice, that's where we are concerned.

C. WELLS:

Were you even aware of this document?

S. MOREMAN:

I have never read that document, I don't believe.

C. WELLS:

Do you know anything about it, Mr. Gullage?

P. GULLAGE:

No.

C. WELLS:

I just suggest to you this is one of the documents you ought to request and read it. And the reason why I say it, it seems to me that knowledge of what's in this by requesters or frequent users like the media in all its forums would be very helpful, because this

spells very clearly for public servants involved a duty to assist, that the Act requires public bodies to try to respond quickly, accurately and fully to applicants and to help them to as reasonable an extent as possible and it goes on to spell out what they should do. That the duty to assist is an underlying principle of the Act and that it entails clear communication between the ATIPP coordinator and an applicant occur at all stages of the request to keep the applicant informed throughout the process. And it goes on and it spells it out and the duty to assist includes the assisting of an applicant in the formulation and clarification of their request. Broad requests are often the result of applicant's lack of knowledge of the public body's activities and/or how to frame the question to fully capture the records that they are seeking. Clarification of the request may involve assisting the applicant in defining the subject of the request, the specific kinds of records at interests.

Now, I'm surprised that you're not even aware. The date on this is August 2013. So that's a year ago. It just seems to me that if those who were

using the ATIPP were knowledgeable and familiar with this, they could develop a rapport and a working relationship with the ATIPP coordinators to do this because they are clearly directed by the policy. And if anyone was at all reticent you could say, well, look, here is your government policy. I am just asking you to do what the manual says you're supposed to do.

S. MOREMAN:

Makes sense.

C. WELLS:

And do you have any explanation as to why the CBC, so efficient at gathering information, would not be aware of this year-old document?

S. MOREMAN:

No. And again, I'll go back to my initial statement about that particular manual. If the policy is that the Commissioner will ensure that the public body has done all of those steps before authorizing a refusal, we are quite happy with that.

C. WELLS:

But it seems to me that some of these difficulties might be overcome with a better working relationship between the requesters and the people responsible for

custody of the information.

J. STODDART:

One of the questions that we have to examine is: what is the appropriate model for the functioning of the Office of an Information and Privacy Commissioner? You have a unique perspective because you deal with all Canadian jurisdictions and you know that in the largest, the most populous jurisdictions, there are commissioners with order-making power - Quebec, Ontario, Alberta and BC. Could you tell us in your practical experience, if CBC, requesting information across the country, dealing with all these offices, if you note that there are advantages or disadvantages to either of these models or are there differences that you may note, if you note any differences, or the delays attributable to other factors in your mind?

S. MOREMAN:

I think order-making power from a requester's perspective is preferable. And the reason I say that is, a refusal to comply is then a refusal of an order. Whereas, recommendation power, there's really no stigma, for lack of a word, in the eyes of the public, when the public body refuses to comply. So

understanding that access legislation - I keep saying that I am not overstating - is often used as a shield as opposed to a sword by public bodies. It is our position that as a requester they should be ordered to comply and defy that order when it disagrees. And also, practically speaking, when it's a recommendation power and the government refuses to comply, it's on us, the requester, to go get a judicial review of the recommendation, or, sorry, of the decision to continue to not provide the records. Whereas, if it is an order it is on the public body to get a judicial review of that decision. So the money question doesn't become the burden of the requester, it becomes the burden of the government.

J. STODDART:

Does that go to delays? Years ago when I was an information commissioner with order-making power I was told by a leading director of a leading media organization that the ombuds model was preferable because you got the information more quickly than an order-making power. Is that a particular experience? Perhaps that's changed?

S. MOREMAN:

I'd have to look at the numbers but my gut feeling is

there is no difference. If the public body doesn't want the information in the public realm, it doesn't matter whether it is a recommendation or an order. It just will either defy the order, get a JR, or just ignore the recommendation.

C. WELLS:

I think the thrust of Ms. Stoddart's question was: the director of whom she spoke was saying ombuds model was better than order because order-making power, we had an order and then you go through a court appeal process and you get into longer and longer and delays. That's what I read into it; maybe I'm mistaken.

J. STODDART:

Well, no. At that point this very prominent member of the media said, we deal with ombuds model, an ombuds model and we deal with an order-making model. And the ombuds model gets us answers faster. That we weren't talking about. Yes. And being media, they needed answers faster.

S. MOREMAN:

What I found, not necessarily in the order or recommendation model, is really if we're talking about the ombuds model in the sense of mediated

settlement, certainly some are better than others in trying to figure out at what rate or what pace we can have our requests answered. Is this really the information you're seeking. Dealing with them in batches, if the records are too much. Federally, as Peter said, they seem to be better than some of the other provinces, who don't go through that analysis, they just wait for all of the records to arrive and then they apply the analysis at once, which is a delay. But I don't think they're related necessarily to whether they have the ultimate ability to order or recommend. Does that answer your questions?

J. STODDART:

Thank you, yes.

D. LETTO:

I've got one other question and it relates to, once you make a request the head of the public body has 30 days to respond and then the head of the public body unilaterally can extend it another 30 days, and then if they want to extend it further they have to get permission of the Commissioner. That intermediate step where the head of the public body can delay for an additional 30 days, what's your position on that?

S. MOREMAN:

It's our experience, again, I'm not limiting my comments now just to Newfoundland, but it's our experience that everyone works the deadline when they are given the opportunity. And if that ability is unilateral and they now have 60 days, often they will take the 60 days.

C. WELLS:

That's our experience, too.

S. MOREMAN:

Yes. And that in and of itself is not in the public interest. If the test is to authorize an extension that can be reviewed or other models that exist where the extension must be reviewed before it is even taken, then that involves, again, the Commissioner to look at the actions of government and to question is this a legitimate extension or are you just playing games? So if we had our druthers, we would have the shorter limits not only on paper but also actually in forest with some sort of consequence.

P. GULLAGE:

I guess ideally in a perfect situation, if the body needs the extra time, even if there would be a conversation with the requester to talk about that

and then maybe that's where that conversation about that book comes in.

S. MOREMAN:

The manual, absolutely.

C. WELLS:

Exactly.

P. GULLAGE:

And then maybe we can narrow it down and makes it easier. Sometimes it is on the requester's end, sometimes it's on the public body's end, but without a real decent conversation about what it is you're asking for, I'm guessing that a lot of time gets wasted in the guessing of what the request really is and without a conversation.

S. MOREMAN:

If I can give just an example, I can see you want to move on, Mr. Wells, but. Often we'll request records over a year or often several years and the public body has two ways of dealing with that request. They can say unilaterally we're taking a 60-day extension and because of the volume of records it is going to take us an additional 180 days. And then at the end of your 240 days, you might receive 10,000 pages of records. Or, under the duty to assist, the other

approach would be we can process your request month by month and each month we'll get them to you on the last day of the month. It is going to take 240 days but in the meantime you'll be getting your information as we move along. And we think that that's a preferable approach than just an extension and not receiving any information, if there are other ways that we can start to see what it is we're looking for.

C. WELLS:

And that's the kind of thing this procedures manual provides for or suggests be worked out between the requester and the provider.

D. LETTO:

You talked, as well, and I've read a number of the UK manuals that I think they would be quite helpful to requesters as well as to the public body. You talked about in terms of understanding what frivolous and vexatious means, and I'm thinking that ultimately it is about how will that be applied. Will it be applied arbitrarily or will there be some kind of test and so on.

Could you speak a little more about maybe how

ATIPPA should approach the various sections that obviously are going to be interpreted as people apply for information, and what kind of care it should take to maybe develop some of these manuals? Do you have some thoughts on that?

S. MOREMAN:

I think when it comes to that particular section certainly the public bodies should not be the ones to decide what the meanings are. That's the starting point, which is why we are really against the notion that is the unilateral manpower. I know that doesn't answer your question.

C. WELLS:

When you say what the meanings are or whether or not a particular one is frivolous and vexatious? What the meaning of it is?

S. MOREMAN:

That's sort of where I'm going is, over time these manuals are not typically drafted and then implemented. It is a collection of decisions over time. And so what we wouldn't want to see happen is that each individual public body gets to determine what is vexatious and that forms the common law of Newfoundland *Access to Information Act*. So honestly,

that's a legislative decision, what they mean, as long as it's clear.

D. LETTO:

So clarity is what you're aiming toward?

S. MOREMAN:

Right. Because if we look at, again, Ms. Levasseur's request which should not have been declared vexatious, it is quite easy to put in the name Levasseur for e-mail over the course of four months, but that head of the public body said well, you filed 52 others, that's vexatious. That cannot, in any legislation, be the test for vexatious. The request itself has to be looked at, not the requester, over the long course of time.

So whatever the ultimate answer is, we just don't think it should be one that's driven by the common law, the developed common law of each individual head making decisions because he or she doesn't want to release the records on any given day.

C. WELLS:

And I can't see why it should be, frivolous and vexatious is a well-known, long interpreted phrase. Courts have been using it for two or three or four

hundred years. As you would know, they often strike out pleadings on the basis that they're frivolous and vexatious. And frivolous and vexatious is a very well-known phrase, the meaning of which has been interpreted and applied thousands of times by the courts. So what the meaning of the concept is shouldn't be difficult. Whether or not a particular situation is frivolous and vexatious maybe something else. But there shouldn't be any difficulty with applying different standards. Just take the phrase out of any recent procedural decision on Rule 14 of the ....

S. MOREMAN:

I think, I mean on a definitional front, again, the Access to Information legislation has a presumption of openness. So we should always start there. So even on the basis of frivolous, the public body should not be undertaking to say there is nothing of interest in this record, therefore your request is frivolous, which would be kind of analogous to striking out a pleading. That's not the public bodies' job to say oh, there is nothing of interest in here, therefore, I am not giving you the record. The presumption of openness is actually the opposite.

It needs to be the request itself is causing harm to the public body in some way that's vexing to the public body, not the records. So that's why it is a bit of an inverse scenario. The requester has to be doing something wrong in order to be deemed vexatious and frivolous, as opposed to the records having no chance or no public interest.

C. WELLS:

Gentlemen, thank you very much for your presentation. We do appreciate it. Was there one thing that you were going to get me? The figures?

S. MOREMAN:

Yes, we're going to get you year over year.

C. WELLS:

If you have them. You may not have them, you've indicated that. But if you have them.

P. GULLAGE:

We'll poke around. We'll find something.

C. WELLS:

Okay, all right.

P. GULLAGE:

Thanks for having us.

C. WELLS:

Thank very much for doing that and thank you for

preparing your document and submitting it to us today. We do appreciate it. Thank you very much. We will take a 15-minute adjournment. Is 15 the right number or 10 is okay? All right, we'll take a 10-minute adjournment in that case.

(Off the Record)

C E R T I F I C A T E

I, Beverly Guest, of Elite Transcription, of Goulds in the Province of Newfoundland and Labrador, hereby certify that the foregoing, numbered 1 to 72, dated August 18, 2014, is a true and correct transcript of the proceedings which has been transcribed by me to the best of my knowledge, skill and ability.

Certified By:

Beverly Guest
Beverly Guest