August 18, 2014

C. WELLS:

Well, good morning, and I welcome people present in the room. Most of the people present in the room, with the possible exception of the information commissioner's office for Canada, would have been here before and would have heard these remarks, so I apologize for the repetition of them. But so far as we know, there may be a significant number of people watching this session through our webcast, so that I think it important, particularly for those who are new to it, to have some understanding of what we are about here and what the limits of our authority are and what the real objective is.

This is the third and final set of public hearings of the Statutory ATIPPA Review Committee that was created to review the *Access to Information and Protection of Privacy Act* appointed by the government earlier this year.

Just to give some real context to what we're doing, I might read Section 74 of the Act, it is very

brief, which sets out the authority for the existence of this Review Committee. It provides:

After the expiration of not more than 5 years after the coming into force of this Act or part of it and every 5 years thereafter, the minister responsible for this Act shall refer to it to a committee for the purpose of undertaking a comprehensive review of the provisions and operation of the Act or part of it.

That's the general statutory mandate but the Terms of Reference spell out a little more clearly what the mandate is and I will just cover those in a moment, but first I ought to introduce the Panel to those who are watching on the webcast.

On my left is Jennifer Stoddart, Former Privacy Commissioner for Canada and we are delighted that the government appointed Ms. Stoddart. She brings to this Committee a wealth of knowledge about the protection of privacy and similar provisions for that purpose in many other jurisdictions. So she brings great knowledge and great experience to the Committee

and we're grateful for the government's appointment of her.

On my right is Mr. Doug Letto who is a former CBC journalist, very well known throughout this province and probably in many other parts of the country as well. He had a distinguished record with the CBC, and with his knowledge and understanding of the value of accessing information he brings excellent knowledge and opinions and views to the Committee.

I'm also a former, and most people know, that I've been involved in politics as premier and in the legal world as a lawyer and as a judge. And that's the Committee that the government constituted for this purpose.

The instructions they gave us are spelled out in the Terms of Reference. I will just mention a couple of specific points and perhaps it's easiest to read directly from the first sentence of the overview paragraph. It provides that:

The Committee will complete an independent,

comprehensive review of the *Access to Information and Protection of Privacy Act*, including amendments made as a result of Bill 29, and provide recommendations arising from the review to the minister responsible for the Office of Public Engagement.

It then gives us two fairly explicit directions as to the manner in which we're to undertake this approach. It provides that:

The review will be conducted in an open, transparent and respectful manner and will engage citizens and stakeholders in a meaningful way.

It also directs us specifically to provide for the protection of personal privacy in the course of conducting the review.

The remainder of the Terms of Reference just simply elaborates and provides for matters that ought to be considered and assessed, and I don't think it is necessary to spell them out, except to point out that the Committee was specifically directed to consult with the Office of the Information and

Privacy Commissioner, and we did so by asking the Information and Privacy Commissioner to appear as the first witness before the Committee and to lay the groundwork and spell out the experience that he has had. And this set the stage for us very well and we're grateful to Mr. Ring and his staff and, particularly, Mr. Murray for their appearance and for the detailed representations that they made.

His office has been in attendance throughout and we're impressed with that level of interest. And we have also asked that he appear at the end of this session to add to it any further comments the office might wish to make as a result of matters that they heard during the course of these representations. So we are grateful for having that.

Following the direction to engage citizens and stakeholders in a meaningful way, the Committee undertook right from the beginning to promote interest in making submissions. And we sort of shamelessly made suggestions here and there in all sorts of directions, and we advertised in the news media, on our website, and through interviews with

the news media. And so far we've had a total of 63 express presentations of interest. A goody number of whom have already appeared in the two prior sessions and many others have simply submitted a written submission as we provided for, or have allowed their initial e-mails or letters to stand as the only comment they wish to make.

Those who have been unable to attend or observe, and there haven't been a great number in attendance, but I'm given to understand there are rather significant numbers tuned in to the webcast of these hearings. So that gives the Committee more encouragement that there is a greater level of interest than the numbers appearing in the rooms during the hearing would indicate.

We regret that so far there have been very few expressions of interest from areas outside the immediate St. John's area. As a result, we've not sat anywhere else in the province and that was a conscious decision because of the low number of representations, but we did provide for, and made known through advertisements in news statements and

so on, that if there were adequate numbers seeking to make a representation the Committee would go to any area of the province. But absent a number of expressions of interest instead we would provide for financial assistance for those who wanted to make representations to come to St. John's to do so because that would be at great cost savings and we thought that the more appropriate approach.

We have taken other steps as well to broaden the consultation. Over the last few weeks we have been posting kind of an online questionnaire that people could respond to and address on various topics that we thought would be of interest; including access generally and protection of privacy generally, the role of the Commissioner, fees, and making the process more user friendly.

So far we have gotten very few responses which may be good news or bad news, depending on how you look at it. It may mean that on the whole, apart from what some people see as missteps people are generally satisfied with the way the Access to Information and Protection of Privacy legislation is working;

although, we've heard some expressions of dissatisfaction, some of them very substantial. But it would appear that from the lack of response, despite our shameless efforts at trying to generate interest, that the level of concern may not have been as great. May not be as great as we thought it may have been. There's still time to receive more and we would be happy to do it.

We took another step that we thought would provide information of great value to the Committee. We sent a questionnaire to all of the ATIPP coordinators. Some 354 questionnaires were sent out. There may be some other coordinators that we didn't have on the list, but we sent out over 350 with the express invitation to answer questions and make any additional comments that we made. We identified questions that were of significance that would provide the Committee with information as to exactly how the ATIPP coordinators dealt with requests for information. We also assured them that their anonymity would be protected by providing that they need not indicate who they were or what their role was or what department of government or what public

body they worked for, and provided an unmarked envelope for them to put the questionnaire in and then provided a stamp-addressed envelope into which they could put that, would send it to us, and told them that we would not open any one of the envelopes until ten days had passed after August 15th, which is the final day for sending it.

Up till Friday, we had more than a hundred replies which is pretty nearly a third. And we're happy with it. We'd like to see 354 come back but that might be an unreasonable expectation.

Short of those steps, we can't really think of anything else that would not be an appropriate approach to pressuring people to make representations to express their views.

Our rules of procedure here, for those who are watching it on the webcast, are very few and they're very simple. After the presenter completes the presentation the Committee will then ask any questions that they have and this might involve a fairly lengthy discussion between the Committee

Members and the presenters. Only a presenter may participate in discussion during the hearing. And we've cautioned all presenters, I'm sure it is not at all necessary to do so with the presenters sitting before us at the moment, but we've cautioned all presenters to be careful about expressing of personal information because we are being webcast and we're concerned about that.

We also prohibit the use of cellphones in the hearing room, and we have asked the media to conduct any interviews they want to conduct a discrete distance away from our doors so as not to interfere with the hearing. And I have to express appreciation to the media, they have not interfered with us in the slightest and we're grateful to them.

The hearings start at 9:30 a.m. and we will have a mid-morning break. We will break for lunch at 12:30, come back at 2:30, have a mid-afternoon break, and usually try to adjourn by 5:00 p.m.

In the hearings this week, the participants include, as well as Madam Susan Legault, who is the

Information Commissioner for Canada, who will be the first presenter this morning. We will be hearing this afternoon from the CBC and from the Veterinary Medical Association.

Tomorrow morning we will start with the Minister Responsible for the Office of Public Engagement, Mr. Collins and with him will be various government representatives. And we're grateful to the Minister and to the representatives for providing us with information as to challenges that government faces in dealing with this. We would not be in a very good position to make recommendations as to changes that ought to be made without having the fullest possible information from both sides of the issue as it were; those who have responsibility for providing the information and those who want access to it. So we're grateful to the Minister and his staff for making this presentation.

And in the afternoon, we will hear from Mr. Kavanagh. On Wednesday morning, we will hear from Memorial University and that's expected to take most of the morning. In the afternoon, we will hear

from Nalcor Energy, a major provincial government-owned corporation that plays a fairly significant role in the economic life of this province. So it is important that we have their views as well with respect to access to information.

And finally, we will benefit again from further representations by the Office of the Information and Privacy Commissioner of the province, and then we really have to get to work after that.

Thank you all very much for being here and thank you to those who have sufficient interest to be watching these hearings on webcast. And now, Madam Legault, if you would be so kind.

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

Date: Monday, August 18, 2014 (9:45 a.m.)

Presenter: Suzanne Legault
Information Commissioner of Canada

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

C. WELLS:

And now, Madam Legault, if you would be so kind.

S. LEGAULT:

Thank you very much, Mr. Chair, and good morning, and good morning to the Panel Members. I thank you very much for the opportunity to present my perspective on freedom of information issues to your committee. I'm accompanied this morning by my colleague, Jacqueline Strandberg. Jacqueline is the one that has diligently prepared some comparative research material which we have presented to the Committee this morning to assist in your review.

To start, I should state that I have reviewed Commissioner Ring's recommendations and that I support them fully. Hence, my remarks this morning are brief and they will focus on three key issues: the exceptions regime and the Commissioner's ability to review decisions on disclosure, proactive disclosure, and the duty to document. This will allow more time for detailed questions of interest from the Committee.

At the onset, I congratulate the Government of Newfoundland and Labrador to have given the Committee the broad mandate to conduct this independent review of the *Access to Information Privacy Act* and for moving forward with its Open Government Initiative.

The Supreme Court of Canada has very recently recognized again the important role of access to information legislation in Canada. In the John Doe case, the Supreme Court case stated that: "Access to information legislation serves an important public interest: accountability of government to the citizenry. An open and democratic society requires public access to government information to enable public debate on the conduct of government institutions. However, as with all rights recognized in law, the right of access to information is not unbounded. All Canadian access to information statutes balance access to government information with the protection of other interests that would be adversely affected by otherwise unbridled disclosure of such information."

Hence, in reviewing any freedom of information legislation the key issue is, and always is, does the legislation achieve the right balance between the confidentiality that's required to conduct the business of government while ensuring that citizens have access to information under control of the government so they can hold their governments to account?

In 2014, I will submit to the Panel that this balancing exercise must be conducted in the context of open government initiatives which are developing not only in Newfoundland and Labrador but across Canada and many other countries in the world. My review of the current ATIPPA, post-bill C-29, leaves me to conclude that it does not achieve this balance. And let me explain.

In section 3, the ATIPPA recognizes the right of the public to access government records subject to limited exceptions to this right of access. Model access to information laws endorsed in this principle and generally provide that limitations to the right of access should be constructed as discretionary,

injury-based exemptions. These exemptions should also be of general application and be time limited.

It is important to understand that a discretionary exemption does not necessarily result in all information being disclosed at all times. Discretionary exemptions are considered the progressive standard because they require the decision makers to make an informed, fair and reasonable decision about disclosure.

Injury-based exemptions are favored because they take into account that the level of sensitivity attached to the information changes with circumstances and perspectives.

An additional tool used to balance exemptions with the right of access is a public interest override. Public interest overrides are favored because decision makers must ask themselves whether the general public interest in disclosure outweighs the specific interest the exemption is intended to protect. If the answer is yes, the information must be disclosed. Recent model laws in some provinces

include a public interest override of general application.

Section 3 of the ATIPPA also provides for an independent review of disclosure decisions made by public bodies. Independent oversight is also consistent with international norms. The changes brought forward by Bill 29 have expanded the scope of key exceptions to disclosure under the Act such as the exceptions for Cabinet confidences, policy advice and recommendations and business interests of a third party. In conjunction to these changes, it has in some circumstances curtailed the ability of the Commissioner to review disclosure decisions.

In addition, exclusions under the Act do not allow for consideration of any of the factors that must be taken into account under discretionary exemptions and, in most instances, decisions on the application of exclusions are not independently reviewable by the Commissioner.

The ATIPPA, in its current form, excludes from its application a broad range of records. All the

records listed at section 5 and records listed in subsection 7(4) - the records created solely for the purpose of briefing a member of the Executive Council with respect to assuming responsibility for a department secretariat or agency or a record created solely for the purpose of briefing a member of the Executive Council in preparation for a sitting at the House of Assembly.

The issue of whether the Commissioner is able to review disclosure decisions made pursuant to the application of the section 5 list of excluded records is currently before the appeal court. Further, section 43 prevents the Commissioner from reviewing decisions made under section 18 that the record is an official cabinet record or reviewing decisions made under section 21 that information needs to be protected by a reason of solicitor-client privilege.

Although I did not review all of the various provisions of the acts or regulations that have been designated to prevail over the ATIPPA, I did review the *Energy Corporation Act* provisions that govern access to information held by Nalcor and its

subsidiaries given the importance of this corporation's activities to this province. Section 5.4 of the *Energy Corporation Act* essentially precludes the Commissioner from reviewing decisions on disclosure by the chief executive office of Nalcor if the latter certifies that the information qualifies for nondisclosure and the Chief Executive Officer's certification is confirmed by the board of directors of the corporation.

In my view, the expansion of the exceptions regime, the exclusions and the curtailment of the Commissioner's ability to review decisions on disclosure has tipped the balance in the ATIPPA excessively in favor of nondisclosure of government information to the detriment of Newfoundlanders and Labradorians' ability to hold their government to account.

It is also in my view inconsistent with the principles of the government's open government initiative which are transparency, accountability, participation and collaboration.

I'd also like to address briefly the issue of proactive disclosure. Section 69 of the ATIPPA provides for the creation and publication of a directory of information to assist people in identifying and locating records held by public bodies. Commissioner Ring has pointed out in his brief that the directory has not been established yet and he recommends that it be commenced and maintained.

I support this recommendation but I would also recommend that the government amend the Act to include provisions for publication schemes. Publication schemes are mandatory requirements within access laws to disclose on a routine basis certain classes of information, such as policies and procedures, minutes of meetings, annual reports and some financial information. Usually this information must be made available to the public via an institution's website and is updated on an ongoing basis. Comparable jurisdictions, as well as model laws use publication schemes.

The benefits of implementing a comprehensive

publication scheme are numerous. Public schemes can promote a pro-disclosure culture. It can transform the access framework from a reactive to a proactive system; limit government costs because it results in decreases in access requests and reduces delays for the public looking for information. Imbedding publication schemes in the ATIPPA would also be consistent with the government's Open Government Initiative.

In relation to the duty to document, the ATIPPA currently does not include a provision that requires the documentation of decisions, including information and processes that form the rationale for that decision. The access to information regime relies on recorded information. Without an explicit duty to document in the Act, it is possible that not all information related to the decision-making process is being recorded. This risk is compounded by the advent of new technologies used in government institutions such as instant messaging. A legal duty to document the decision-making process protects information rights but also leads to better governance and ensures that the historic legacy of

government decisions is preserved. I thank you very much and I will be pleased to answer your questions.

C. WELLS:

Thank you, Ms. Legault. Just so that I don't forget to do so, my memory is not what it used to be, I want to express sincere appreciation to you and your staff for the presentation of this comparative research material. I have to say to you that it will save us a great deal of work. We've done some preliminary work along those lines but the detail that's done here will be very beneficial to the Committee in its work and we're grateful to you for making it available to us. Do you have any questions you need to ask?

J. STODDART:

I do but perhaps I would defer to my colleagues for the moment who are concentrating on many of the access provisions.

C. WELLS:

Okay. Just let me get started. In your opening remarks you noted that the "reviewing any freedom of information legislation the key issue is: does the legislature achieve the right balance between confidentiality required to conduct the business of

government while ensuring citizens have access to information under the control of government and for holding their governments to account." And then you say this: "In 2014, this balancing exercise must be conducted in the context of Open Government Initiatives." Now you are aware, of course, that the government of this province has announced its Open Government Initiative. Would you elaborate on why you feel that this review must be conducted in the context of the Open Government Initiative, because while it is referenced in the Minister's statements and so on, it is not a specifically identifiable part of our mandate.

S. LEGAULT:

Well, I think it has to be considered in that context because there are some initiatives that are occurring around the world which may have a bearing on the types of amendments that are put forward in freedom of information legislation. And if you think back 30 years or so when the first access to information pieces of legislation were put into effect in this country, they were actually open government initiatives, because most access laws in Canada will state that they're actually the exception to the rule

that information should be made available to the public. Most access laws are drafted like this. ATIPPA is drafted like this. The federal access to information is drafted like this. Such that, it says this Act does not mean that the government should not disclose information proactively. So it is almost like it is an exception to the rule of Open Government and for some reason history seems to have been forgotten and now Open Government seems to be a new and parallel initiative promoting transparency for purposes of accountability, for purposes of interaction with citizens. And when Open Government started around the world in the US, Australia, the UK, each of these jurisdictions actually had different perspectives on why they wanted to promote open government. And in my view, accountability, like the reason why we have access laws is always about accountability to citizens, that's tactually changed somewhat. There are other considerations for transparency in the context of the information age. And many Open Government Initiatives are focused on cost saving to the government, efficiencies related benefitted, such that if citizens actually can use some of the data that's publicly available by the

citizens they can provide difference services. In the UK they developed bicycle routes to avoid where there were most accidents, using public accessible data. These are things that the government doesn't do.

Part of the federal initiatives in terms of disclosing data is also related to innovation. So let's proactively disclose as much data as we can in order to let citizens use this data and develop innovative applications that would be serving the community.

But a very specific example to an issue that the Committee has been looking at is the issue of fees, whether we should charge fees under access to information. Well, the government, just in 2013, adopted the open government, open data charter and in that the G8 countries basically agreed that data sets should be provided free of charge to citizens, and this Charter is considered one of the international norms in terms of open data. And why that does not apply in the context of freedom of information whereas international norms will basically put

forward that it should be free of charge and really only reproduction costs should be charged.

So if you look at the issue of fees under FOI legislation and Open Government principles we should be consistent in our approach. There is, under the Open Government Initiative, certainly internationally also, a movement to disclose information in relation to royalties extracted from the exploitation of natural resources and that there should be a very high level of transparency in relation to royalties paid to government for the (inaudible) of nonrenewable resources.

C. WELLS:

By that, you mean specifically you mean in each individual business case or they may be dealing with 30 or 40 mining companies or five or 10 oil production companies. They're made available in the sense that they show up as government revenue in gross.

S. LEGAULT:

In gross.

C. WELLS:

But the detail is not there. Are you suggesting that

the detail ought to be there?

S. LEGAULT:

The Extractive Transparency Initiative, which the Government of Canada has not become a member of, basically states that revenues in excess of $100,000 should be disclosed in (inaudible) form. The Government of Canada has announced in March of this year, I believe, that they will - they're not a member of the Extractive Transparency Initiative - but they will put forward either guidance or legislation for companies in Canada on a series of information that they should disclose, and that threshold of 100,000 was certainly mentioned, I believe, and Jacqui, you can correct me, but I think it was mentioned specifically by the minister, and that's very recent.

And so, these are initiatives that are occurring in the context of Open Government which I think have an impact on what we put in, in our legislation. If the international movement is that this kind of information should be disclosed, and there is a reason why they think it should be disclosed, because that's where there is high level of corruption around

the world and that's why this initiative has been going on for this specific area. So when we do look at our freedom of information legislation, we should make sure that we're consistent with that. That's what I mean when I mean we need to look at them consistently. And if we want to have, for instance, open dialogue and open consultation with our citizens under Open Government Initiatives, it doesn't work if your freedom of information legislation actually restricts so much access to any kind of policy development, such that there is no information coming out, then you can't engage in an open dialogue with your citizens because they don't have any of the information that they need to actually engage intelligently. So that's why it has to be taken into consideration, sir.

And lastly, what I will say about that is I really do believe that expectations of citizens have changed. We live in the era of information. I have three children, that is personal information, but they are used to accessing information readily, very quickly, and they're also used to collaborating in this exchange of information, building on each

other's knowledge that it has changed the culture in Canada. And so, when we think of our freedom of information models they really do date back to a last quarter of the century. We have to be mindful that the environment surrounding us in terms of the age of information is changing. And so that's what I mean, sir, when I mean we have to take these things into consideration.

C. WELLS:

Your general comment is we also have to achieve the right balance.

S. LEGAULT:

Correct.

C. WELLS:

The other side of such things as extractive royalties and so on, they would also disclose private business information of the mining companies and oil companies and extracting resource companies involved. I take it, you've considered that and it's your view that the public right to know and the importance of giving that information to the public in order to diminish or avoid potential for corruption and so on overrides. That's an overriding public interest.

S. LEGAULT:

I think in this particular context, sir, I think that the Panel should be mindful of the initiatives that the Government of Canada is going to take at the federal level in terms of what will be the requirements of these institutions, these companies in terms of proactive disclosure. I think it would be instructive for the Panel to look at the requirements of the Extractive Transparency Initiative and we can certainly provide the references to those initiatives.

C. WELLS:

Would you do that, please?

S. LEGAULT:

Oh sure, we can very easily do that. And I think the Panel has to be mindful that if the Government of Canada comes forward with specific requirements for proactive disclosure in the extracted industries, it is possible, for instance, if the Panel is recommending publication schemes that this is something that could be added to a publication scheme through regulations. It is fairly easy to amend anything or to change anything via regulations in a regulatory type of process. And if that's something

that then is recommended nationally by the Government of Canada I think it would be an opportunity or certainly a possibility for the Panel to consider that this might be something that companies that operate in Newfoundland might have to do as part of publication schemes.

C. WELLS:

I'd just like to go back to, for a moment, to your more general comment that in a sense the Open Government Initiative is not really new. That we've had a history and a culture of recognizing the importance of the public having information about the affairs of government in order to make intelligent voting decisions and assessments of the performance of government. And I share that view. I think that's true. Our statue specifically states that the rights under the statute don't replace any existing rights.

Those existing rights to be informed were in the past very often assured and put into effect by opposition Members of the House of Assembly having the right to ask government questions. And there is a Question Period. It explains why one-sixth of the

normal days functioning of parliament is taken up with Question Period each day, to hold government to account. And that's the process by which it's done.

In the past, there's also been, and each parliament or legislature may have had its own rules in this regard, but, generally, there's been a requirement where the question was detailed and asking for detailed economic and financial information that had, the question would be presented as a written question and placed on the order paper and it would remain on the legislature's order paper until it was answered. That was the practice here. And if you ask a minister the question directly and it was detailed and elaborate and the minister obviously couldn't answer it on the spot, he would simply say "I will take that as notice and provide it". So the notice of that question would appear on the order paper and it would remain until the minister answered the question.

We had representation in the last sitting from the leaders of both opposition parties - the NDP and the liberal party - and each of them was complaining

about their ability to get access to information because it seems that once the access to information legislation was developed and the *Freedom of Information Act* was passed, members of the house were encouraged to seek their information by that means. And then when the 2005 legislation came into effect they were still in that practice and now they had to pay for it out of their operating budgets. And one of complaints we had from both the leaders of the opposition is that often they will make a demand for or file an access to information request, only to get an estimate back from the government department or agency involved that it would cost $850 to do it. And when they look at their limited operating budgets and, I guess, oppositions all over the world think they have too small an operating budget, they say we can't afford it.

Do you know if that practice exists in any other jurisdiction in the country, because it seems to me that is still a critically important means of accessing information? Opposition members are more immediately on top of what's happening and tend to get information and they're in a position to call the

government to account more readily than anybody else. Is that kind of restraint happening in other jurisdictions in Canada in particular that you're aware of?

S. LEGAULT:

In terms of the parliamentary process and written returns for questions from parliamentarians, it certainly still exists in Ottawa. In fact, I follow them because sometimes they make requests of the government in terms of the administration of the *Access to Information Act* at the federal level. Sometimes this is information that's actually not found in government-produced statistics. So I find that quite useful. But, yes, it is still used.

What we do find, however, is we do get throughout the system, certainly at the federal level, access to information requests that are made by parliamentarians. The distinction between a written return of questions in parliament and an access to information request is you get an answer from the government in response to the questions from parliamentarians. You get a government response. What you get in terms of an access to information

request is you get records. And that is a distinction. And sometimes, either the public or the media or any other interested party that wants to make an access requests, sometimes it is about looking at the records as opposed to looking at proactively-disclosed information or information disclosed via a parliamentarian's question. So it a different kind of basis for accountability.

C. WELLS:

The intended focus of my question, which I obviously didn't convey very effectively, was: is it usual to require opposition members to pay to get information from government?

S. LEGAULT:

Sure. I mean, under the federal legislation there are fees that are and can be sought from requesters.

C. WELLS:

From requesters.

S. LEGAULT:

Yes but any kind of requester, whether it is parliamentarian ....

C. WELLS:

Including members of parliament in the ordinary course of their duties?

S. LEGAULT:

Yes, it happens, if they make an access to information request to a department. You see, what happens usually is that the identity of the requester under access to information legislation is somewhat protected. It needs to be kept protected. So, a lot of parliamentarians will do access requests via researchers. They are not necessarily identified by their constituency nor do they necessarily want to be identified. So yes, that happens.

I can tell you exactly what I think about fees. And I think the Panel should look at fees, not just in the context of here in Newfoundland it is $5 and then other fees can be charged for processing, searching, culling, identifying exemptions and so on. Those can lead to complaints, right? So, the Commissioner's office can be engaged and resources are engaged. And if you, sir, you make an access request to MUN university and they tell you in response that your request is very broad and so therefore they're going to be charging fees and then, so you have then to tell them whether you're going to pay those fees or not and then it goes back and then

they may ask you whether you want to reduce the scope of your request, and then you consider that and then you can go back and then they'll have to consider that. I have a case now before the federal court in relation to fees.

Do you know how much money is spent on, is generated in revenues in the Government of Newfoundland on fees charged through access?

C. WELLS:

Not very much, I wouldn't think.

S. LEGAULT:

$7,523.95. Now, I don't know about you, sir, but this is outside of my job as Information Commissioner, but if you're looking at efficiency of government I think I would bet at least $5 that there is more money spent in trying to deal with whether or not fees should be charged, with whether or not I should be a complaint to the Information Commissioner than $7500. And I think that if you look at the Act, the way it is structured here in Newfoundland and Labrador, this piece of legislation has a lot of discipline around the scope of the request, the multiple requests, whether the requests are frivolous

and vexatious, whether they are made in bad faith, whether they are trivial. There is a lot in this piece of legislation to deal with requests that are considered to be in bad faith or frivolous and vexatious. So the fee structure in my view under this piece of legislation here, I think, frankly, is complicating matters and it's a waste of money, I think, for the government.

C. WELLS:

I share your view on that.

S. LEGAULT:

And it creates a lot of delays.

C. WELLS:

My guess is it takes at least ten times as much as the government gets in the $5 fee, at least ten times that amount simply to administer through the books and records of government to account for. So, I don't think government does it as a means of generating revenue.

The real thrust of my question is: if the opposition is in fact persuaded or guided to use the access to information as an alternative to asking for the information in the House of Assembly and getting

it free of charge, should they really be required to pay for it? Does that make sense, to have one of the government take it out of one pocket and put it into another, because the opposition income, opposition budget comes from government resources?

S. LEGAULT:

I agree with you, sir, but I think the same applies to any citizen of Newfoundland and Labrador. They're already paying the government to produce information.

C. WELLS:

So are you suggesting there should be no charge at all?

S. LEGAULT:

I don't charge anything in my office.

C. WELLS:

No, no, for the cost of production.

S. LEGAULT:

Reproduction costs?

C. WELLS:

Yes.

S. LEGAULT:

Like photocopies?

C. WELLS:

Yes.

S. LEGAULT:

I think that's consistent with the international norm. The Organization of Americans States, as it should, this model law which I refer to quite a bit when I look at a model piece of legislation, and they are recommending no application fees and reproduction costs. And frankly, from what I see in the system, it seems to me to be the most appropriate way of dealing with access to information requests from any party, be it a politician or a citizen anywhere in provinces, territories or at the federal level.

I think in some instances fees have been charged in order to deal with a different matter. To deal with more what I call discipline in the matter to make sure that the requests are reasonable under the circumstances. But as I said, we are subject to access to information. We have haven't charged anything in our office. It hasn't led to more requests. It hasn't led to anything that has changed from the time we were charging the $5 fee. But as you said, quite rightly, administering the funds that we get from that I have to report it in my financial statements. The Auditor General audits my office.

The cost of it all -

C. WELLS:

Is ten times the amount.

S. LEGAULT:

- as it goes from A to the end product, I just think it's inefficient and it complicates access and ultimately it actually delays the response to the requester. It really does create, I think, an unnecessary delay.

C. WELLS:

And let me just get clear what you mean by reproduction costs. By that you just mean photocopying paper. You don't mean the time of the staff, government staff involved in finding the information which is charged here?

S. LEGAULT:

No. No, I don't. I don't. And I think that when you have criteria such as those, you know if you have an institution that has poor information management practices, if you have a newer analyst that takes more time, they could be charging more fees. It's very broad. And at the very least, sir, if the Panel decides that fees should be charged, because I know that you will hear from a lot more people that will

think that fees should be charged, and that's fair to have that perspective from their point of view, and if the Panel considers that I think that there should be very specific criteria for when fees should be waived.

C. WELLS:

It's been suggested that another purpose of the fee is to act as a deterrent to frivolous or vexatious requests.

S. LEGAULT:

And it has been considered like that to a certain extent at the federal level. And as I said, I've reviewed the legislation here and I think that there is a lot of discipline in this piece of legislation to address these types of issues. In fact, probably excessively I would think. I'd be very interested in finding out how many requests are actually disregarded on those kinds of basis. I think that this is something that should be looked at quite seriously. Since I've been Information Commissioner at the federal level I think I have seen about 9,000 files and out of those 9,000 files there may be one case where I would have considered whether that would be frivolous and vexatious. In my view, certainly

from the oversight perspective, I think it would be a very rare instance where we would consider that requesters meet the test of frivolous and vexatious. I mean there are provisions like that in BC and they are few and far between, those cases.

C. WELLS:

Five dollars is not much of a deterrent anyway, is it?

S. LEGAULT:

And it is not appropriate to use the fees to deal with that.

C. WELLS:

Other means should be used.

S. LEGAULT:

If that's a problem, then frivolous and vexatious provisions should be applied. But it's not in the fee schedule that it should be achieved.

C. WELLS:

Mr. Letto may have some questions.

D. LETTO:

I have lots of questions. I'll start with the Open Government comments that you made and the need to take it into account as we think about access. And I researched a speech you gave a year ago where you

addressed some of these matters at the Canadian Legal Information Institute in Ottawa. That was September 13th. And in the context of Open Government, you said the weakness in Open Government is that the government decides what to release, when, how and in what format and you went on to say "Open Government must be complemented by a robust access to information system". I'm wondering if you can expand on that a bit more. Why you've reached that conclusion.

S. LEGAULT:

The government can produce a lot of data sets that it's producing. On this score, by the way, we are seeing now at the federal level some instances where institutions are unwilling to release data sets as a result of access requests. And it is only after there are complaints that data sets are released. So that's one thing. Most access laws in Canada have very strong exceptions regime which really leads to not that much government information being released.

The combination of solicitor-client privilege, advice and recommendations, cabinet records, those three together are very broad exemptions. Regardless

of where you are in Canada, those are pretty broad. If you look at international norms, like the model for the Organization of American States, they will really look at these and they say it really has to be as limited and specific as possible to protect the interests that you want to protect, and there has to be an injury test and there has to be a public interest override. And you have to make sure that there is independent review. So that's what I talked about in my opening remarks. This is the framework that's there internationally. If you're going to depart from that framework there should be really sound policy reasons to do that.

D. LETTO:

So that's the robustness that you talk about that needs to be present.

S. LEGAULT:

Yes. And so, if we go back to this advice and recommendation, all commissioners around Canada consider that exemption to be very, very broad. There was a recent amendment in the US in February 2014 and two senators basically said the equivalent of this exemption really amounts to whatever the government doesn't want to disclose. At the federal

level that exemption is considered to be the Mack truck of exemptions. So, what do we do with that? The Supreme Court of Canada in the *John Doe* decision that I was quoting, actually, in my remarks, this is a very recent decision, 2014, and the Supreme Court of Canada recognizes the need to protect the work that public servants do within governments in order to advise politicians, in order to advise their ministers, in order to advise their deputy ministers. So there is definitely a need to protect that information. But along the same lines of what Commissioner Ring proposed to the Panel in relation to cabinet records, it has to be linked with if there is a disclosure, will that result in injury to that process of providing advice. That's the extra test that's missing. It is missing in the ATIPPA. It is missing in the Federal *Access to Information Act.*

And then the other part for this exemption is what's the time limit that one should put on that? That's very important as well because most legislation in Canada you will see this varying from 15, 20, 25 years. I think ATIPPA is ... Sean is here.

S. MOREMAN:

It varies.

S. LEGAULT:

But for advice and recommendation.

S. MOREMAN:

I don't think there is a time limit.

S. LEGAULT:

So the model of the Organization of American States, they recommend 12-year limit. I would probably recommend for the federal regime a five-year limit in terms of advice and recommendation. That's more than one government cycle.

In terms of Cabinet records, we go into the same analysis. So for Cabinet deliberation, of course there needs to be protection of that information if we're going to have the ability of ministers to deliberate in terms of policies. So, yes, there needs to be protection around Cabinet discussions and Cabinet deliberations. The question is what's the scope of the exemption? At the federal level it is an exclusion. I don't have the right to see Cabinet records. I think that is not the right framework to have the right balance. I think it can be a

mandatory exemption, i.e. if it is a Cabinet record it shall be exempted from the review of the Act, but you need to have the Commissioner have the ability to review whether or not that exemption has been properly applied. In my experience, exclusions lead to various problems in terms of transparency. Oftentimes, certainly at the federal level, more experienced requesters will simply say I want to have information about this or I want to have the documents related to this issue but exclude Cabinet confidences. So they're excluding the application right away because they don't want it to be delayed and they know I can't review it.

So when I talk about a robust law, you really have to go from the basics, the fundamentals, in terms of what's a proper framework for exemptions and then see are there really valid reasons to make it a mandatory exemption, to make sure that it's protected for a longer period of time. That's what I mean by a robust framework. And in Canada, for instance, solicitor-client privilege, of course solicitor-client privilege needs to be protected but in my view the decision to apply solicitor-client

privilege exemption needs to be reviewable by the Commissioner. I had a case in Federal Court of Appeal where information was disclosed. It is something that as part of our investigation we routinely find that that exemption is misapplied. So, and a lot of the time what we manage to do is effect some severance of the documents where solicitor-client privilege is applied.

So if you have a framework where the exemption is too broad, there is no injury test, there is no public interest override, there is no review chances are you're tipping in favor of nondisclosure and that's not the right balance.

D. LETTO:

One of the issues that's been raised before this Committee is the Canadian law itself which was put in place in the early '80s hasn't really progressed much, either at the federal level or at the provincial levels. That what we tend to do is copy what each other does.

I'm interested to know, given the work that you do and maybe to look outside of Canada, to get some

sense of what are some of the progressive elements that you're seeing in other nations, not necessarily in model laws but I know that the UK has had a law put in place since the Canadian law. I know that New Zealand, I know that some of the Australian states have gone down this road as well, similar types of governments, similar parliamentary democracy. Can you tell us what some of those elements are and maybe you might have some thoughts and recommendations along those routes?

S. LEGAULT:

Well, we provided you with a comparative table. We've tried to look at some Canadian jurisdiction and some international jurisdiction. Comparing access laws is extremely complex. So, because when you look at an access to information legislation there could be all sorts of other acts that have a bearing on it. So it is really difficult to assess other models. It's easier to assess them on issue by issue and to trying and figure out, for instance, what's the rule in terms of fees, what's the rule in terms of exemptions, what's the rule in terms of oversight models.

D. LETTO:

Well, let's see if we dealt with cabinet confidences, how it may be treated in other places, something that can give us a different perspective than we're used to seeing in the Canadian context.

S. LEGAULT:

Well, even if you look just at the Canadian context for cabinet confidences they are subject to review by most oversight bodies, except now in Newfoundland if it is certified as an official cabinet confidence, certainly at the federal level, we don't get to see them either. In the UK, which I think is a good example because we have a Westminster-type parliamentary system in Canada it is a good comparative, the commissioner in the UK has order making power at the national level. It is a Westminster parliamentary system and they do have the ability to review Cabinet deliberations. And then, of course, there are protections for it. If it is a Cabinet deliberation then it's fine, it is going to be protected. I don't think that any information commissioner would consider that that's inappropriate. The question is, that you can verify that it is and then you have to look at whether or

not all the records that go to Cabinet get excluded or exempted as opposed to information contained in records that have gone to Cabinet. So, for instance, here my understanding is that we're talking about records. So, and your Cabinet confidence is very, very broad. So, any record that is basically related to a Cabinet function gets excluded. So it not about information that's contained, that really goes to the substance of deliberation of the Cabinet process, which would be a much narrower piece of exemption, it's the entire record.

C. WELLS:

Well, now it is anything that the clerk of the Executive Council certifies being official and that puts it beyond question.

S. LEGAULT:

Yes, if it is an official Cabinet record.

C. WELLS:

An absolute no right of review of any kind.

S. LEGAULT:

Right. So if there are background facts in those records, if there are just basic factual analysis I think normally those kinds of issues should be disclosed, unless it affects the substance of

deliberation.

C. WELLS:

Just so my failing memory doesn't come into operation here, if you don't mind, Doug.

D. LETTO:

No, no, not at all.

C. WELLS:

I will just ask you to elaborate on one more thing. Are you familiar with, are you aware of any significant level of problem with commissioners having the right to review Cabinet confidences or solicitor-client privileged documents? The Commissioner here has said when they did have the right to review there were never any problems and the office never had any complaint from government that they were not adequately protecting the Cabinet confidences or the solicitor-client privilege. Are you aware that commissioners in other jurisdictions in Canada having a right to review Cabinet confidences or solicitor-client privilege documents have resulted in significant problems?

S. LEGAULT:

Not that I'm aware of and certainly not for our office in terms of reviewing solicitor-client

privileged information. And you may not be aware of that but at the federal level my office has the ability to review any records dealing with national security. Even the most high level of national security documents we are able to review them.

Now there are things that can be done if the government wants to have additional assurances. Like, there are things that can be done. For instance, for our office in our legislation in terms of making sure that there is more protection around the review of highly sensitive records, so, we have some of our investigators that have a special delegation and I'm the only one that can specially delegate some of our investigators to review the most highly sensitive records. Something that we do in our office, that we don't have to but that we do, for the most sensitive records we actually don't bring the records to our office or we don't ask the institutions to send the records to our office. We actually go on site and review the records on site. See, these are measures that can be taken to actually curtail the number of people who can review them. And on the federal legislation, certainly for

national security, it is done in the legislation. It can be changed by regulation. If the government is very concerned I think that that's a middle ground that the Panel may consider. That's an option.

But, no, I'm not aware of any problems. In fact, I am not aware of any breaches of confidentiality of information in relation to records obtained by information commissioners in Canada. I stand to be corrected but I'm not aware of those kinds of incidents.

What I am aware of, however, is that when we do review records we do find that government institutions over apply and do a very broad application of records. You know just to give you perhaps the most recent example in terms of what happens with an exclusion under a legislation, you know the Canadian broadcasting corporation became subject to the *Access to Information Act* in 2006-7 and they have an exclusion under the Act, and when they became subject to the Act they refused to provide us the records so that we could confirm whether or not the institution had applied the

exclusion properly. And we had to go to Federal Court of appeal in order to actually obtain the ability to review the records and the first thing that happened when we were able to do that is we realized that the institution actually had never retrieved the records in many of these requests. So they had basically decided on the basis of just the wording of the request that the exclusion would apply. So that was the first thing that we found. So we had to have the institution actually retrieve all the records that were responsive to the requests where they had to apply an exclusion. And in many instances we found that the exclusion was misapplied. And that was just not on one file, but on several files. And now that we have reviewed these records the institution has basically now really changed its practice significantly over the years since they've become subject to the Act.

But to me that was very compelling of what happens when you have something that's excluded from the review process. There is a reason why internationally, in speaking about international norms, independent oversight is a clear international

norm in terms of freedom of information legislation around the world. I don't think there's any dispute about that. It is not being implemented the same way across the various jurisdictions but it is a clear international norm. And having done this now since 2009 I strongly believe that without that the public can never be assured that exemptions or exclusions are properly applied.

D. LETTO:

Can I maybe just close off with a short question on this area and, I mean, I'm sure Jennifer is anxious to ask some questions. But it sounds, then, from what you say that when it comes to oversight in the area of Cabinet documents exemptions, Newfoundland and Labrador, apart from the Government of Canada sharing the same approach, is pretty much alone in this respect. That in other countries in the UK the commissioner has the ability to whether an official Cabinet document is actually an official Cabinet document?

S. LEGAULT:

Correct.

D. LETTO:

Lonely place to be it sounds, is it?

S. LEGAULT:

I don't think that this is the way to go. I profoundly believe that and I, and every other federal information commissioner since 1983, has advocated the same way in terms of Cabinet confidence exclusions. So I'm not here standing alone. I have 30 years of federal information commissioner experience on that particular view.

D. LETTO:

No, I don't mean to imply that you're alone. I mean that the Government of Newfoundland and Labrador in terms of this approach not many jurisdictions with this style of government would have the same system in place.

S. LEGAULT:

No.

J. STODDART:

Thank you. (Speaking in French.) So, I just echo Mr. Wells' welcome to you here and we're very grateful for you sharing so much of your experience. I would like to go back, first of all, to something that you mentioned that I think is very significant in the context of the Canadian economy and the economy of most provinces in Canada which is our

economies are highly depended on resource extraction of one type or another. This is the Extractive Transparency Initiative. Quite frankly, I was unfamiliar with this initiative. Could you give us a bit more information about this? Is this a UN initiative or an OAS initiative or who's involved? What countries have become members of it? What is its genesis and what is its likely future?

S. LEGAULT:

Um-hmm. Well, first of all, its genesis, I have this briefing note here on this because it is actually not very well known and it's not something that even my office was very aware of. It is something that started, actually, some time ago. So it is more than five years, I think. And it's a coalition of government companies and civil society working together to improve openness and accountable management of revenues from natural resources. And basically, there was a G8 meeting in June 2013 and that's where Prime Minister Steven Harper announced that the Government of Canada would be establishing new mandatory reporting standards for Canadian extractive companies with a view to enhancing transparency on the payments they make to government

and these standards would be aimed at aligning Canadian policy with the standards of other G8 countries and reducing corruption within the extractive resource industry.

In terms of who is a member of this, so there are reporting countries under the Extractive Transparency Initiative and you will see that the countries are countries where there is or at least a reportedly very high level of corruption in this type of activity. So Norway, Guatemala, Peru, Nigeria, Cameroon, Zambia, Mozambique (phonetic) and Tanzania are actually the reporting countries. There are candidate countries which have basically indicated that they will participate in this - the United States, Indonesia, Philippines, Chad, Ethiopia and Madagascar. The countries that have announced that they plan to join the initiative are Australia, Columbia, France, Germany and the United Kingdom. In fact, Prime Minister Cameron, at the G8 country in the UK, announced that the UK was going to join. In fact, before the G8 meeting Prime Minister Cameron had actually urged his colleagues of the G8 to join this initiative. And so, the Canadian government

responded by saying that they would not join the initiative itself but that they would come up with these rules in order to increase the transparency. And I know, for instance, that Engineers Without Borders in Canada is very much involved in this initiative and has been one of the civil society groups that have been pushing for this initiative. It is mentioned as part of the Open Government partnership. This international movement of countries that have joined Open Government and Open Government partnership, the Extractive Transparency Initiative is one of those areas that is recommended for countries.

So this is the minister. It is Minister Joe Oliver, the Natural Resources minister at the federal level, that announced on March 3rd, 2014, that "Canada will be implementing legislation to impose disclosure obligations on the mining industry".

So, more to come on this issue in terms of what the requirements are going to be in Canada. The minister indicated that legislation was expected to be introduced by April 1st, 2015. So I think that it

is something that has to be on the radar for the Panel in looking at the level of disclosure that's going to be required.

C. WELLS:

Have I misheard or did you indicate that the Canadian NSU (phonetic) imposes the obligation on resource companies to disclose information but doesn't indicate that government will be required to disclose its revenues?

S. LEGAULT:

Yes, that's it. It will basically be an onus on companies but we will see what the actual details of this is going to be because we don't know what the government is going to say. But this said, the minister announced that some of what will be required is that Canadian extractive companies will publicly report payments over 100,000 to all levels of government. So, what does that mean in terms of what governments and public entities must disclose on their end, if the private section mining industries --

C. WELLS:

Payments to whom?

S. LEGAULT:

Payments to the government in terms of royalties.

C. WELLS:

To foreign governments or any government?

S. LEGAULT:

Any government.

C. WELLS:

So, a mining company operating in Newfoundland would, under the Canadian or anywhere in Canada would, under the Canadian law, be required to report to the Government of Canada the amounts that it paid to the individual provinces for extractive royalties and to any foreign government?

S. LEGAULT:

I can't tell you specifically, sir, because the government has been fairly scant in terms of what the details are going to be.

C. WELLS:

That's the conclusion to which I was coming, listening to you.

S. LEGAULT:

Exactly. So that's why, it is not something that I am recommending that this Panel do but I'm recommending that the Panel be aware that this is

something that is in the works. I don't know what the details are going to be but I think it might be of significant relevance in Newfoundland and Labrador. And if there are mandatory requirements in terms of proactive disclosure that, as I mentioned before, that could be something that could be easily done through publication schemes if there are requirements.

J. STODDART:

Just to perhaps conclude on this topic. Is there any sense that this initiative will apply to other extractive industries in the mining industry? We have many other natural resources that we extract in one way or other from nature?

S. LEGAULT:

I don't know. I think that one way to look at it again in the context of Open Government. If one has a set of rules that applies to one type of extractive industry and there are specific reporting requirements then one should look at whether or not other extractive industries of nonrenewable resources should actually disclose similar levels of information. But when I bring this to the table it is because it is not that well known. It is part of

the Open Government partnership. It may lead to specific proactive disclosure requirements. The Government of Canada has announced it is going to do this. So I think it's something that the Panel should be aware of. And it's not necessarily something that a lot of people would bring before you to this table.

C. WELLS:

Ms. Legault, do you have any objection if we take a 10-minute break or so and return?

S. LEGAULT:

Not at all.

C. WELLS:

Thank you very much. We'll take a 10-minute break.

(Morning Recess)

C. WELLS:

Okay, Ms. Stoddart, did you have any further questions?

J. STODDART:

Yes. Yes, I do, thank you, Mr. Chairman. I would like to go to something that you haven't mentioned in your brief but that has been mentioned by several

people or groups who have appeared before us and which, as you know, is an ongoing debate and that is what is the appropriate model for administering access to information legislation? As you know, Canada is kind of split. Many provinces having commissioners who have order-making power in their, I guess, type of administrative tribunal, others, I think federally, having an ombudsman model. Newfoundland currently has an ombudsman model. You must have looked at all of these various possibilities and know of the international developments. So could you give us your opinion on what kind of enforcement model is the most appropriate and does it depend on the size of the jurisdiction?

S. LEGAULT:

Sure. The recommended international norm is an independent oversight that has the ability to review all of the records and all of the decisions on disclosure and that has the ability to issue order in all respects of the disclosure decision. And I'll explain what I mean by that. That's really the international norm. In fact, you will find that also, for instance, the OAS actually favors not just

if one commissioner with the ability to issue order-making power but it recommends at least three. You have to put this in context. This is really in context of what's happening around the world.

Who is implementing access to information legislation? We are seeing, basically, a lot of countries implementing access legislation. And in the Americas, it really was Mexico that was at the forefront of, say, what we referred to as the third generation of access laws. So the most modern group of access pieces of legislation and, really, you see Mexico and India. So they all have order-making powers. In Mexico, they have a five-member commission. So that's kind of the most recent development.

I recommend to the Panel the articles written by Laura Neuman from the Carter Center in the US. She's often cited, in fact, by the Organization of American States on the issue of oversight model.

So you have to look at it in context. For instance, an ombudsman's model can work in Canada,

obviously, because we have democratic institutions which are well functioning. It would not necessarily have worked in Mexico. It would not necessarily have worked in India. So you have to put the oversight model in the context of the existing institutions, with the judiciary, the parliamentarians and the government institutions. If you are within the context of where an ombuds commissioner, if the recommendations are not going to be respected at all then it will not work.

So, that being said, what happens in the ombudsman's model is there is a lot of time delay in terms of the investigative function because there is a lot of back and forth on the exchange of representations and the analysis by the ombuds body. And that's where there is the most gap.

What happens, also, is the representations often are not very detailed. It's difficult to substantiate the application of exemption. So it takes a lot of time to actually get to a resolution of a case. What happens if the recommendations are not accepted by the institution, it is the ombuds

commissioner that then has to take the matter to court, sometimes with the consent of the requester or not. Here in Newfoundland the requester is able to take the matter directly to court. Really, the onus to seek and obtain disclosure is on the requester and the complainant and the commissioner. In an order-making power model, the difference is the onus shifts on the institution and away from the requester and the complainant, such that the sort of discipline around the exercise of investigating the complaint is shifted on the institution.

So if you have an order-making model, by the time you get to the adjudication part, and this is what happens in Ontario, for instance, it is very disciplined, there is so much time to make representations, there is so much time to respond to the representations, and then there is an adjudication process. And so, the onus is really on the institution at that point to make its best case if it wants to refuse disclosure. And so, it puts a lot of discipline into this process. In Ontario, they also have a code of procedure around the adjudication, so there is specific timelines around

it. So there's a lot of discipline. And the onus is really on the institution to make its best case if it doesn't want to disclose.

On the ombuds model what often happens is if we have to go to court, all of a sudden at the time we go to court then all of these representations are coming forward which were not presented before. So, there is a little bit of a lack of discipline in that respect.

Here, in the ATIPPA another problem is that it seems to me, anyway, and the Commissioner is here, he can correct me, but for issues related to fees or time extensions, it is not quite clear to me that the Commissioner can actually take these matters to court. There is a distinction between complaints and reviews and it doesn't seem to apply to time extensions or fees. So as far as time extensions are concerned, there is very little discipline here. The Commissioner can make recommendations but doesn't seem to be that there is a recourse in court. I personally think that it is a problem. At the very least, for these kinds of administrative preliminary

matters I'm very convinced that the Commissioner should have order-making power, at the very least. And these are simple matters. They are time extensions and things like that.

C. WELLS:

So for procedural and administrative matters should be ....

S. LEGAULT:

At the very least. And if it is an ombudsman's model that remains then the ombudsman should have a stick related to these types of complaints investigation as well.

Now, I personally believe, certainly for the federal model, that an order-making model is the best model. It is the one that's consistent with international norms. It does put the discipline required in the legislation. It puts, in my view, the onus on the government to really present a valid case in order to prevent disclosure. And if you think about the burden of proof, really, in matter of access the burden does lie with the institution that wants to prevent disclosure. So the order-making model actually puts the onus on the body that

actually has the burden of proof in the first place. So I think it is more appropriate.

I did look at the statistics for the Commissioner's office here because I was curious to see whether the recommendations are accepted because that has to be considered as to whether or not the model is working or not. Do you have the annual report for the Commissioner?

J. STRANDBERG:

I don't, actually.

S. LEGAULT:

I think I have it here. I won't be able to find it. Oh, there it is. I have it, yes. I thought that was interesting to look at that. And I look at the stats. And so last year 118 requests for review dealt with and then 13 percent of the recommendations were rejected and seven percent were partially accepted. That's high in my view. Like, at the federal level one percent of our cases go to court. So, I don't know. This is something you may want to ask the Commissioner. And maybe I'm wrong. I'm looking at page 72 of the Annual Report of the Commissioner here in Newfoundland and public body

response to Commissioner's reports. Recommendations partially accepted seven percent. Recommendations rejected 13 percent. I think that's high.

C. WELLS:

What year are you looking at? Thirteen.

S. LEGAULT:

I'm looking at the Annual Report for the Office of the Information Privacy Commissioner.

C. WELLS:

For 2013?

S. LEGAULT:

For 12-13.

C. WELLS:

2013. Yeah, 12-13.

S. LEGAULT:

Yes. So that also has to come into consideration.

C. WELLS:

It would be informal to look at the average in the years before that.

S. LEGAULT:

For sure.

C. WELLS:

It just may be that that might reflect reaction and implementation of changes made as a result of Bill

29.

S. LEGAULT:

It could very well be.

C. WELLS:

That's a possibility but I just don't know. We haven't looked at that yet. But I thought I would mention that as a possible explanation. But that level of rejection is high, level of applications to court?

S. LEGAULT:

It's high, I mean. And the other thing is when I looked at that as well, and I did speak to the Commissioner about that, if you look at the number of requests versus the level of complaints here in Newfoundland and Labrador, 11 percent of the requests resulted in complaints. Now, at the federal level we have about, just the access to information requests, about 55,000 last fiscal year. We get about, in between three to five percent of the requests result in complaints. Like, over a long span of time. It varies between three and six percent. So here it was 11 percent. Again, it may be that this is related to the changes in the Act. I don't know. That seemed high to me.

C. WELLS:

We will take a look at that.

S. LEGAULT:

That includes both privacy and access requests. At the federal level we'd have over 100,000 access to information requests and requests for personal information. And I don't know what the Privacy Commissioner's office at the federal level, what the ratio of complaints would be.

But I think that that's a bit of a contextual analysis in relation to whether an ombudsman model versus order-making body should be in place. I think that if you have a consistent high level of rejection of recommendation, and I think that the Commissioner is sitting behind me, I think the Commissioner would disagree with me that that's a high level. I'm just comparing it to the federal level.

C. WELLS:

Is there a hybrid model?

S. LEGAULT:

There is.

C. WELLS:

And what I'm thinking is a model whereby if a

requester was dissatisfied or if the Commissioner was monitoring the progress of any particular one and complained to the Commissioner, tried to find a solution, resolve it, that didn't work and the Commissioner wrote a report recommending release. If the law required simply no order, just ombuds, the law required that if the government didn't accept the recommendation it would have to apply for authority from the court not to accept it. It would have to take the action. Government would have a choice - accept the recommendation or go to court to have it set aside.

Now, it gives the recommendation a kind of a status of an order. So we may be blindfolding the devil in the dark but would that not work fairly efficiently? So it leaves the burden, or if the individual didn't accept the Commissioner's recommendation that it not be disclosed, the individual would have the obligation to go to court.

S. LEGAULT:

Well, not the obligation.

C. WELLS:

Or the right.

S. LEGAULT:

I think they have the right. They have the right to go to court. The hybrid model that I thought you were referring to, sir, is whether or not you can have order-making power for the more sort of what I consider to be administrative issues so that there is no time wasted on this aspect of things. And certainly at the federal level it's a large component of our complaints. I would love to see those go away. It has been recommended in the past that that's an appropriate model. I think former Commissioner Marleau at the federal level recommended that and I think there was a previous report open and shut might have recommended something like that. I think there was a previous. We can find that for you as well in terms of that hybrid model.

But what you're talking about, I'd have to really think about it in terms of administrative law and judicial review. It is just, I'm sorry, I can't give you an answer on the spot on that one. I 'd have to really think about it.

C. WELLS:

Okay.

J. STODDART:

One of the persistent challenges in access to information administration is the question of delays. Often delays are in fact, when viewed overall, not that significant but, of course, the spotlight shines on some spectacular delays in some high profile cases, usually with high profile requesters.

I believe I noticed that you took a case to court recently to the federal court involving, as I understand, a three-year delay. And perhaps you could talk about that. Tell us why it wasn't successful and from that experience and your experience with delays enforcing the production of material that the government or the public body may not want in the public domain, what would, internationally, be the best solution for this? Is it quick recourse to the courts to get a court order? Is it more power for the Commissioner? Is it reversing the burden of where the onus in the absence of producing the document, the document is deemed to be public? Now we know sometimes there are very sensitive things that governments rightly withhold and the federal area we can talk about national

security issues, there may be confidential business information at the provincial level as well and so on.

So, have you come across any compelling methods for dealing with excessive delay on the part of public bodies?

S. LEGAULT:

Well, in that respect I must say I've looked at the ATIPPA specifically because the rules at the federal level are different in terms of time extensions. And the case that we have in the federal court, it is 1,110 day delay which the court has upheld. So the situation here in Newfoundland and Labrador under the ATIPPA is different.

When we look at the initial time to respond, the Organization of Americans States, I think, talks in their model about 20 working days which is along the same lines as the 30-day timeline that exists here. And then, if I'm not mistaken here under the legislation, there is another 30-day extension that's possible at the behest of the institution and then they have to seek permission of the Commissioner for

an extension beyond that.

The problem here under the ATIPPA, in my view, is because I don't think there is any stick (phonetic) if that's not respected. If the delays are not respected, if the extension is .... It has to be approved by the Commissioner after 60 days, essentially, so. There is quite a lot of discipline here in this piece of legislation. It is not inconsistent, really, with what's going on internationally. Before coming here, we did ask to see what's the volume of pages per request because in order to assess what's an appropriate time you need to have information about volume of pages per request. So, the average here is 37. Thirty-seven pages per request. Six hundred and sixty requests in the last fiscal year across 460 bodies covered by the legislation. And if you look at the details from the Office of Public Engagement in terms of each institution, the ones that receive the most requests they are looking at around between 30 and 40 requests. So institutions here overall in the aggregate, they're not dealing with high volumes of pages on their routine requests and they don't seem

to be getting like huge amount of requests. It is nothing compared to Citizenship and Immigration Canada that receives over 20,000 requests.

So, that's sort of the data I think one has to look at in terms of timelines, but I didn't see in here in the ATIPPA in terms of the timelines, anything that I thought was inconsistent with international norms. It seems to be appropriate. I would like to see the Commissioner being able to say this extension is, and I guess under this legislation he can basically approve an extension beyond that. That seems appropriate to me and that is consistent with international norms.

C. WELLS:

There are timelines. I agree, they seem to be fairly consistent with other jurisdictions but the extent to which they're honored is another question or dishonored can be a problem. The Commissioner here has recommended that the Commissioner's office have power to audit practices in different government departments, I assume more or less like an auditor general does, and examines what this department did or that, and to sporadically audit. Maybe not carry

out an audit every year of every department but just selectively audit, particularly where there were indications of difficulties. Do you have a view on that?

S. LEGAULT:

Yes, I think that that's a very valuable tool in terms of the range of powers of an oversight body. We, at our office, have done report cards on institutions looking at timeliness. All the recommendations that we've made as part of those reports have been implemented by the government. One of which, actually, is something that might be useful in Newfoundland and Labrador and that is we made specific recommendations under the details of the statistics that's being collected by the government in terms of the performance of institutions. So, for instance, the volume of pages for requests is something that I like to look at because institutions invariably tell us, well, our requests are very complex. They are like thousands and thousands and thousands of pages but really they are the outliers, and when you look at the data you're able to make this kind of assessment.

C. WELLS:

A lot of requests are only two or three pages.

S. LEGAULT:

So this kind of detail statistics was a result of these types of audits. For us, it was a report card. I think they are extremely useful. They are extremely useful to get an independent perspective of the government's performance and all the public bodies performance in matters of access to information. And it usually leads to very valuable recommendations for the system and sometimes the recommendations about administrative changes. They don't have to be legislative changes. Sometimes they make quite a big different. The detailed statistics, now I don't even need to do report cards on institutions because I can just look at the statistics and do the analysis based on that, which is what I wanted to be able to do. And they are very instructive in terms of assessing the performance. So, yes, audits are very good. They allow the Commissioner to look at systemic issues as supposed to one specific complaint. And it is usually a lot more useful.

C. WELLS:

You mention in your submission the circumstances of the *Energy Corporation Act* and Nalcor, and noted the ability of Nalcor to preclude disclosure of a document on the basis of the CEO certifying that the information qualifies for nondisclosure provided it's certified by or confirmed by the Board of Directors. Is that a method or a practice that's used in other jurisdictions for similar circumstances, similar business or commercial circumstances that are connected with government?

S. LEGAULT:

Not that specific issue, that the CEO would be in a position to basically say this almost giving the chief executive officer the same powers as the clerk of the privy council to certify a cabinet or hear the equivalent of council. I haven't seen that. This whole issue of having other acts prevail over the *Access to Information Act* is the broader issue surrounding the *Energy Corporation Act* provision. And I note that the Panel is interested in having an Act that is simple to apply. And I have been on record speaking about these almost exclusions to the application of the access legislation. I think it is

extremely complicated to administer. For our office, for instance, when we do have complaints it's extremely difficult for requesters, unless they are highly skilled, to figure out what information the institution is allowed to refuse disclosure on. And I'll come back to the Nalcor, but we have similar exemptions to our Act in a schedule and we were involved in the case here in Newfoundland, involving Hibernia and the CNLOPB in respect of a similar provision. And just to tell the Panel what happened. I mean, we are a body with a lot of expertise in dealing with these types of cases, and the rules around the disclosure information was so complex that we had to seek special expertise in order to understand the regulations that applied that would have allowed Hibernia to refuse disclosure. We sought expert advice here in Newfoundland and Labrador and every single law firm was conflicted and could not assist us. We did the same search across Canada in the oil and gas industry. We had the same response. And we ended up having to seek expertise from an academic. And the case was heard here in Newfoundland and Labrador, and Hibernia was trying to prevent disclosure of records pertaining to safety

and environmental audit of the Hibernia platform oil and gas operation on the offshore Newfoundland and Labrador. And so the first hurdle in the case was to accomplish whether or not Hibernia was entitled to refuse disclosure on its specific Act. Once that hurdle was passed, whether or not the provisions dealing with sensitive commercial information applied in the case, and once we had that what my office argued is that there was also a public interest override in relation to health and safety environment for the specific information. And so, in the end the judge basically stated that specific provisions didn't apply, commercial sensitive information didn't apply, and had they applied the court would have applied the public interest override.

Now I mention to the Panel because when you have a provision like the Nalcor provision under the *Energy Corporation Act*, so you have a whole scheme there in the energy corporation about what is commercially sensitive information. Now that is not exactly the same as what's under the ATIPPA. So that's the first level of complexity and in my view it is extremely broad under the *Energy Corporation Act*. And the

decision is then made by the CEO and approved by the board of directors that's non-reviewable by the information commissioner. There is in that context also no public interest override. The ATIPPA has not a very broad interest override but it has one but given the interaction of these two then it would not apply.

And I really do believe strongly and I agree with Commissioner Ring when he says whenever - whenever - we want to carve out exceptions to the general application of the access Acts, whether at the federal level or here in Newfoundland and Labrador, there has to be a very, very strong policy case made that this is absolutely necessary in that in fact the general provisions under the Act cannot apply appropriately. And when you look at all of these various pieces of legislation that prevail over the ATIPPA, that's the kind of analysis that needs to be done and is very complex.

C. WELLS:

When you say the analysis that needs to be done to see whether or not there is real merit in it, I mean there are some things like the *Child, Youth and*

Family Act. I mean it deals with personal information of children and is there. The provision in the statute has got nothing to do with ATIPPA. It is the burden on those involved with dealing with those issues of keeping that information confidential and a prohibition against its release and obviously a quite proper prohibition. So, it's proper that it be in that statute. That's where it belongs because it is not just dealing with public access to information, it is there dealing with management of that very private information in all context. And so that would be one of the statutes. Now there are other statutes that are listed that would fall into a similar category. I can't say they all do but certainly a good many of them do.

S. LEGAULT:

Well, sir, I really, as I said, I did not review all of these provisions. I think that that's a very complex exercise. We have not even been able to do it at the federal level. My experience, though, every time that I have had a complaint dealing with those specific provisions under our federal legislation, so far I have not found one where the general provisions of our Act could not have applied.

C. WELLS:

Could not have dealt with the issue?

S. LEGAULT:

Yes, in terms of disclosure. I think under the federal legislation there is the *Income Tax Act*, that may be one. Certainly, when I looked at the exemption basically for Nalcor and it's supposed to deal with commercially sensitive information, that's dealt with under the ATIPPA. And I think given the importance of this utility in Newfoundland and Labrador, I think that there has to be a high level of transparency that attaches to that and, certainly, it should be in my view, subject to the general regime.

I will also tell you that in my experience every time that a new entity is recommended to be subject to the provisions of any freedom of information legislation, in my experience they also all argue that they should have specific exclusions or specific exemptions applying to them. That's also my experience. That's what happened at the federal level in 2006 under the *Federal Accountability Act*. Canada Post Corporation became subject to the Act.

They have a specific provision that applies to them. What happens then, sir, is that when there is an access to information request - again, I go back to your interest in simplifying the application of the Act for citizens - what happens is the institution then will claim that it's exempted under their specific provision. It's exempted under the general provision. So you have a double banking of exemption. And what that does is it actually really complicates the investigation process as well. And if the matter is not resolved, it actually also complicates the litigation.

So if it is necessary, yes. In my experience it is not necessary in many cases. The general provisions do apply and when there are specific provisions they do complicate the process extensively, and I would add that *if* the government decides that it is necessary to have a specific exemption dealing with disclosure, I would highly recommend that it be imbedded in the general piece of legislation because then it is clear that it is subject to the same oversight model and the same review process and the same rights to go to court, as

any other case of access to information.

But you will get, I'm sure you will hear a lot of people differing from my perspective but all information commissioners in Canada at the federal have stated the same thing for 30 years.

C. WELLS:

Just let me mention two things that arise from your comments, two difficulties that would arise. Your suggestion is it should all be subject to the general provisions of ATIPPA and that would work. But the provisions are in the statute not alone to deal with access to information. The provisions are in the statute to deal with protection of the information generally in the hands of government or other officials. So it is not a loan to deal with requests for information under ATIPPA. So it has to be the specific statute in any event.

S. LEGAULT:

But I'm not sure why, sir, or it could refer to ATIPPA.

C. WELLS:

Because it's information that is peculiar. The statute is dealing with that particular circumstance

and it would be a deficiency, a defect in the Act if it weren't provided for and managed, and it has always been there.

S. LEGAULT:

As I said, it may be that in some instances there is a necessity to provide for specific regime but in my experience it is extremely, extremely rare.

C. WELLS:

Well.

S. LEGAULT:

So, for instance, I will tell you, for instance when CBC became subject to the Act they were particularly concerned with journalistic privilege. So in that context yes, you need to have a specific provision to deal with the protection around journalistic privilege. But if I look at the provision in the *Energy Corporation Act*, at section 5.4 it deals with records of commercially sensitive information. Now Nalcor, I understand, is a public body. It is covered by ATIPPA. So, why do you need to have a specific provision dealing with commercially sensitive information when there is protection for commercially sensitive information under ATIPPA that applies to public bodies that are covered by ATIPPA?

C. WELLS:

But the reason is that there is more than ATIPPA involved. There is more than access to information involved. There is the internal protection of that information from a point of view of company management and other dealings with that and the staff that they have. And the ATIPPA legislation wouldn't provide protection for that. I'm not sure that Nalcor is a good example of it, but other things like the Child, Youth and Family Protection and that kind of personal information, the Adoption Act is another one that I can think of. There are a few other statutes, some of the 24 statutes that are listed, clearly those regimes were in place long before ATIPPA ever came into existence or was ever thought of, and it was necessary to provide for that. What you seem to be suggesting is that all that should be set aside and everything is now regulated by ATIPPA. Well, ATIP PA doesn't protect for those other purposes. There were other reasons that had nothing to do with access to information why those provisions were in the statute. And what ATIPPA says, the regulation that lists those 24 statutes, what it says is those specific provisions providing for that are

exempt. Not the whole statute or anything, just those specific provisions.

S. LEGAULT:

I'm not quite ....

C. WELLS:

Well, that's what it says in relation to the other statutes, as I recall it. I don't have it with me. I think it is in the other room.

S. LEGAULT:

This clearly deals with access requests being made to Nalcor and it specifically says, "Notwithstanding section 6 of the *Access to Information and Protection of Privacy Act*". And I think, if I understand you correctly, sir, is your point is that there are issues in relation to information management in some pieces of legislation that need to be imbedded in their legislative scheme. What I'm talking about and what this list of provisions that prevail over ATIPPA - and it is the same thing at the federal level - there are specific provisions in those legislation that oust the regime of access to information, the federal level, or ATIPPA, or provide for a parallel regime. And it really does deal with requests for information at those bodies because they are public

bodies and they are governed by the access to information regime and so therefore the legislator has carved out this section and says, well, for this corporation there is a specific regime that applies if they get an access to information request. And that's what I'm talking about. And that's clearly related to access to information requests to these public bodies that would normally be covered by the general regime, and these are specific provisions that say their regime prevail over ATIPPA in relation to access for information requests.

So I think maybe we're not speaking about exactly the same thing in terms of information management for whatever reasons, what they need to preserve in terms of confidentiality of their records and whatnot. This really deals with access requests to these public bodies. And as I said, I agree with Commissioner Ring, that before the legislator actually does that there really need to be an assessment of whether or not the general provision will provide sufficient protection from disclosure and whether a parallel regime is warranted under the circumstances.

As I said, in my experience it is very rare that my office, over its 30 years, when it has reviewed these types of cases, where we have come to the conclusion that these provisions are necessary. What they do do is they do make the system a lot more complex. They sometimes prevent the oversight that I think is appropriate. They complicate litigation and it is very difficult for a citizen to understand their information rights when you have these parallel provisions. It is extremely complex for us and we are experts in dealing with these types of issues, so.

And certainly, when I looked at the provision dealing with Nalcor and I did, I looked at what happens with other electrical utilities in Canada and most of them are covered by the regular provisions of their access laws. So I'm sure you will hear much from the representatives of Nalcor on this issue.

C. WELLS:

Let's just set Nalcor aside. I don't think Nalcor fits with what I'm talking about. So let's just set it aside for a moment. What I was thinking about is statutes like the *Adoption Act,* like the Child, Youth

and Family Protection Act, the *Fatalities Investigation Act* and other statutes that are aimed at protecting private information. Those are the ones that I'm more concerned about.

And the second aspect of what you said, that it doesn't strike me as being, you said it would complicate things. It complicates things. Isn't it more complex in terms of litigation if you have two standalone conflicting provisions? ATIPPA saying it's got to act, the other statute having its standalone provision going in another direction. That's even more complex than having it structured the way it is and giving those specific provisions priority over ATIPPA.

S. LEGAULT:

What I think you have now is exactly the complex situation you're describing. You have two parallel regimes basically creating two different things.

C. WELLS:

You said one is said to have priority over the other around that resolves the complication, does it not?

S. LEGAULT:

Not all the time. Not all the time. And that's

exactly the case that we were faced with, with Hibernia. It is exactly similar situation. And the statutes that you refer to, the *Fatalities Investigation Act* or the *Child and Youth Advocacy Act* or these other types of legislation, we would have to look at the actual provisions to see what they are meant to do because in ATIPPA you have a large number of sections that deal with the protection of personal information. You have a general regime that deals with law enforcement and investigation. As I said, every time I look at these specific exemptions or exclusions in the parallel system we almost invariably find that the general regime does provide the appropriate protection. So, and I'm not saying that it is or it isn't. I'm saying that it really needs to be looked at in significant detail because it is a pattern, I would say, that any time a new public body comes under the access laws they invariably make the case that their information holdings deserve specific protection. And in my experience that is not very often the case. That's the point I'm trying to make.

C. WELLS:

Thank you for that.

D. LETTO:

You started by talking about the key issues that you wanted to identify, the broad exceptions under the Act and I wanted to deal with one of those in particular - business interest of third party. That's been raised in front of this Committee several times by the journalists, by people in the business community as well.

Prior to Bill 29, in order to prevent information from being disclosed it was a pretty high level of tests that had to be met and that got lessened. What I'm interested in is to give us, maybe, some sense of what you think the kind of wording that should be in the Act. I looked at the UK Act and it seems quite straightforward in its simplicity. "Commercial interests are protected if it constitutes as trade secret or if its disclosure would prejudice the commercial interests of any person including the public authority withholding it", and then they go on further and explain that you just can't say something is confidential and withhold it. You have to be able to prove it.

What are your thoughts in this area because, as I said, much has been said to us about this particular exception that's outlined in section 27 of the Act?

S. LEGAULT:

I did look at that. I did look at the submissions as well. You know, there is a recent Supreme Court of Canada decision in the *Merck Frosst* decision that has looked at these provisions. So, the case law is fairly well established, certainly for the provisions under the federal access legislation. It is very similar to, if not identical, to what existed in the ATIPPA prior to Bill C-29.

Our experience at the federal level, which I think is important, is over the years of the existence of the federal legislation which had the provisions similar to what existed in the ATIPPA before, that section used to be claimed quite a bit to prevent disclosure by third parties, and it is one of the areas of the access laws in Canada where there has been the most litigation. And so, the interpretation of the provision is quite well defined in Canada and so there is quite a level of certainty where ....

C. WELLS:

And that's the provision as it was prior to Bill 29.

S. LEGAULT:

As it was prior to C-29. So, what we have now in the ATIPPA is a much broader definition, and I think that will restrict disclosure quite significantly.

In terms of what we would be looking at is really looking at whether the disclosure would prejudice the position of the third party, whether the disclosure would interfere with contractual or other negotiations of the third party, or whether the disclosure would result in undue loss or a gain to any person, group or financial institution or agency. And this would be subject to a public interest override of general application.

D. LETTO:

Which in the UK is the case?

S. LEGAULT:

Yes. And at the very least, reverting back to what was there before C-29 would be providing a lot of certainty in terms of what information is protected. It wasn't the first pronouncement of the courts but this was a very recent one and Supreme Court of

Canada.

D. LETTO:

One other subject I wanted to touch because time is running out and that's on the duty to document. And you've raised the issue yourself that it has become a challenge in an area of great technological change. Given the variety of technological tools that we have our disposal, how do you document all that needs to be documented when these things have made our lives hugely more simple in my ways to communicate and to get bits of information to each other? What sorts of thoughts do you have that you could guide us in that respect?

S. LEGAULT:

This is a huge challenge for information rights all across Canada and all over the world, really. It used to be that we had a paper-based government. Most people had assistants who would classify things in paper folders and it was located a nice physical cabinet. That's certainly, and I'm dating myself, that's certainly how I used to operate when I was a lawyer in the private sector. And government has gone through this transformation as well and we have a government, and all governments across Canada, that

actually want to use the technology. They want to use the technology for the younger generation that they want to attract to work for them. They want to have social media sites that they can work on and exchange and collaborate within governments. They want to have people to be able to work in any kind of physical environment. The challenge is, how do you preserve the information such that information rights that need to be protected under our access laws are meaningful? And part of the challenge is to, (1), record the decision-making process. You don't have to record every single interaction that you have and that does didn't need to be preserved, but the decision-making process needs to be documented, and, yes, there has to be a positive obligation, in my view a legislative duty, to document the government decision-making process. That's one thing.

The second thing is, a big challenge is whenever communications are occurring on wireless types of technological devices a lot of the time the information does not get stored on government servers for enough time to make sure that if there is an access request that the records exist in order to

respond to their request. This is a challenge at the federal level and, I think, it is a challenge all across Canada. So in order to deal with that there has to be specific rules that apply when somebody is issued a device that allows for the use of wireless types of communication, these people have a responsibility to basically honor this duty to document government decision. It becomes a legislative responsibility as a public servant or as somebody who works in a public body governed by access laws that they have a legislative duty to document. It is part of their employment obligations to basically document what needs to be documented. And if there an access request that's being made to a public body, there has to be a message sent immediately to people who are holding these records that they have to be preserved. Because even if it is a transitory record, if there is an access to information that's done to a department it has to be preserved once the request is made, even *if* it is a transitory record. So that's that added complexity with the technology, because usually wireless texts go around servers. They don't get stored. So if they're being used you have to circumscribe when

public servants are supposed to use them and for what purposes.

D. LETTO:

You've talked, though, in a previous as well about the need to coordinate this and with the service providers because I believe you say, as well, that BlackBerry, for example, keeps this information for 30 days. So, I can see, let's say, the duty on the public servant to document but they don't control how this whole server system and network works. How do you do that?

S. LEGAULT:

The difference is, like, if I, for instance, get what we call a pin message, a message that's transmitted on my BlackBerry versus a personal identification number, then I know that it is not stored on the government server. It actually circumvents the government server and so if I know - and I have to make this assessment that it is something that needs to be preserved because it is part of the decision-making process - I have to send it to my government e-mail so it that is preserved on the servers.

D. LETTO:

So that's where the individual obligation comes into play.

S. LEGAULT:

That's the obligation. Now most of the time this obligation is captured in policies across federal and provincial and territorial regimes for information management. What information commissioners have all stated last year through a joint resolution and that needs to become a legislative duty to document for two reasons: one is we have seen an increase in requests that result in no records. There has been an increase in my office. It has been documented in the British Columbia office. The Ontario commissioner, the gas plants investigation had potentially deleted e-mails. And so that's the first issue. We do have evidence that this is becoming a problem for information rights. And interestingly enough, just before coming here last week I had discussions, virtual discussion, with several of my international colleagues and we were looking at some of the issues that are forefront in our minds in terms of access to information, and I mentioned this issue of missing records or no records exists in

responses to replies and this legislative duty to document, and I got a response from Chile and Germany that this was an issue as well. This is not just in Canada. It is becoming an issue for information rights.

And the second aspect is the proliferation of technology. So we want the government to be able to use this technology but at the same time it has to be done in a context where information rights are protected. So when we introduce the ability of public servants and people that work for public bodies to use this technology, it has to be circumscribed in the context of protecting information rights. And I'm not even talking about the protection of personal information that's being disseminated through these various devices, because that's another issue altogether at the same time in terms of the protections around these various devices for personal information. But for access to information this is a huge challenge, I think, for all governments and certainly for all information commissioners as well.

D. LETTO:

Thank you.

C. WELLS:

Is there a means by which government can control .... I know so little about the technology that I don't know even how to ask the question. But what flows from what you've just said, is there a technical means by which government can, in fact, prevent, say, deleting of e-mail messages and is there a means by which that can be done?

S. LEGAULT:

Again, this is something you might have to want to speak to a technology expert about. But, for instance, in our office, just to bring it back to what it means, I don't use pins. I have a BlackBerry but I don't communicate with my team with pins.

C. WELLS:

What's a pin?

S. LEGAULT:

A pin is a personal identification number.

C. WELLS:

That's what I thought it meant.

S. LEGAULT:

If I know your personal identification number on your

BlackBerry I can send you a message via ....

C. WELLS:

You mean I got a personal number identification number on this?

S. LEGAULT:

If you have a BlackBerry?

C. WELLS:

Yes, the BlackBerry.

S. LEGAULT:

So you and I could communicate even if I have a government server that records my communications and my e-mails, but if I communicate with you via our personal identification numbers it will not get recorded on my server in my office. And that's something that certainly some requesters are concerned that there is government decision that is occurring outside of the normal channels of communication. That's one thing. But if I use a text message, so in my office we do preserve the text messages on our servers. So there is a technological marines of doing that.

C. WELLS:

And I can't get around it by deleting it? It is on the server. I don't have the means of deleting it

from the server, do I?

S. LEGAULT:

Normally, no. Although it is possible but normally in most government institutions there is a centralized body who deals with permanent deletion of information. But also in some instances it gets deleted after a certain amount of time and that's another issue. You need to understand for each institution how long information is being preserved on the servers. It is a huge challenge because, as I said, it used to be that it was fairly easy. You would have a file and I'm a lawyer so you know what it's like. You have a file and you record everything on your file, that's what the way we used to do it, and then the file is classified, is put somewhere and it's in a cabinet. When you're talking about electronic information, very few people are properly trained to actually preserve their information in the right folders. It has become a virtual folder. But not a lot of people within institutions are really well-trained to make sure that all of the information that they are exchanging because business goes fast is properly put into appropriate folders. And it is an extraordinary challenge for information rights and

I think we're just beginning to see the tip of the iceberg because technology changes every month, every week, every year. It is not just the pin. It is not the BlackBerry. It is something else. It is the iPad, it is the iPhone. It's constantly changing. And that's why the legal duty to document puts the onus on the public servant and it is a higher onus than a policy and it allows the government to move forward in its use of technology.

D. LETTO:

And I guess with paper records as well you typically had people in an office who were expert at deciding where to put them so they're put in the right place. Where we've all become creators of files and documents with this technology.

S. LEGAULT:

Yes. Yes.

J. STODDART:

Commissioner Legault, I believe in your last annual report you talked about a case that you were unable to pursue because it took administerial authorization, but this was a case involving the last minute prevention of release of the document that otherwise would have been released by the

intervention of a political staffer.

In our hearings it is being brought to our attention that there appears to be a current government policy whereby members of the House of Assembly cannot make an access request directly to the department. They have to make it to the officer of the minister concerned.

So I'm wondering from your experience if you could tell us about some of the challenges of deciding what is properly in the public domain and what is not properly or what is properly in the political domain. And do you have concerns about information that would appear to pass from one to the other?

S. LEGAULT:

I'm not sure I understand the question, actually.

J. STODDART:

Well, I guess my question is, this has been brought up.

S. LEGAULT:

Yes.

J. STODDART:

We have the minister appearing before us who could

perhaps respond as to what is happening under this policy. But behind it, it raises the question of what information this case itself and personal information should stray into the political domain. And given that you had this recent case I thought you may have some observations you'd like to share with us about how you delineate in an appropriate way the difference between what information rights are exercised in the public domain and then where the political domain can justifiably intervene given the ministers have both a public governmental responsibility and, of course, have a political existence as well.

S. LEGAULT:

Well, the ATIPPA or the federal *Access to Information Act* is a legislative scheme. It is creating legal. Obligations whether you are a minister or a deputy minister, these are legal obligations. So what governs decisions on disclosure is governed by the Act. So, there is a professional that's being trained in terms of making decisions on disclosure in terms of access to information, and they will base their decision on whether or not there is an exemption that is appropriately applied to the

request for information or to the records that are the subject of the request. What happened in the two political interference cases is, to put it in context because I'm not sure how it works in Newfoundland and Labrador, but at the federal level the minister is the head of the agency in terms of responsibilities for *Access to Information Act*. That responsibility is delegated through a delegation instrument from the minister to various people within the department. The people who have delegated authority are the only people who are allowed legally to make decisions on disclosure.

What happened in the political interference cases is that there were people who worked in the minister's office who had no legal authority to make any kind of decisions on disclosure within those departments and they were giving instructions to the people who had appropriate legally delegated authority to make decisions and they were asking them and instructing them to do something other than what they thought was appropriate in applying the Act. That's what happened in those cases. And in some cases, in one case, in the first case the information

was disclosed many months later and only through additional requests made by the requester who at that time happened to be a journalist, and it is only because this journalist made additional access to information requests that this situation was actually investigated and exposed because they were documented records.

In the second case it was the same. We asked for asked for all communications between the ministers, staffers and the people who had proper legal delegation of authority, and through the chains of e-mails that we found that there had been instructions to change their decisions.

Under the ATIPPA, I don't know who has the legal authority. It is something that you may want to ask the Commissioner when he appears. I did read in some of the submissions that some people mentioned that this could have happened. If the scheme of the Act is such that this can happen, it's best if there is an objective decision made based on the provisions of the Act, the ATIPPA or the federal Act, outside of political influence.

C. WELLS:

We have received representations that there's been similar interference from the political side, and the other representation that I believe we received is that in a sense it's being masked by coming from the communications officials in the minister's office who used to be political but are now public servants but are still very closely connected with the political side. So I think those are the complaints that we've received and that's the basis for Ms. Stoddart's question.

S. LEGAULT:

Right. And you know what I have said in the past, and I believe the Ontario commissioner has said the same thing, I mean, there are times where information that's going to be disclosed in response to an access request could be politically sensitive. I think that we would be blind not to realize that that is the situation. So, what we have said in the past is it is understandable for the minister or the deputy minister to be informed of the information that's going to be disclosed. The two issues that have to be looked at is it must not delay the disclosure. So, for instance, informing the minister that there

is politically sensitive information that's going to be released as a result of an access request is appropriate but it must not delay the disclosure of the information. I.E., it is not grounds for delaying the disclosure. It is not grounds for getting a time extension for the minister to get prepared to answer questions. So, it must not delay. And the second thing is that it must not under any circumstance reduce the amount of information that is going to be properly disclosed under the Act.

So it allows for information to be provided to the minister or to the heads of the agencies. It allows communications people to be informed and to get prepared but it must not delay disclosure and it must not impact the amount of information that is properly disclosable under the provisions of the Act.

C. WELLS:

It seems you've exhausted us, Ms. Legault, but in a very nice way. And we're grateful to you for making the effort you and your staff have made to make these presentations and to provide us with the information. But before I finish entirely I might ask you, we may not have exhausted you. Is there anything else that

you may want to add or that you think might be beneficial for us to have?

S. LEGAULT:

Well, sir, my office is actually looking at ways that the federal *Access to Information Act* could be amended in order to conform more with more modern pieces of legislation and to address some of the issues that we've encountered. And we're planning to have this information finalized. And once it is, it will be put in the public domain and I would be more than happy to share this with the Panel, if that is of any use to your deliberations, once it is in final format and published. So that's one thing.

And perhaps also one thing that you have not asked me about but I do feel quite strongly about, and that is the length of the term for the Commissioner. The situation in Newfoundland and Labrador is quite unusual, as well, in terms of a two-year term. It is really not what's being advocated in terms of international norms at all. The key issue is always one of independence and the Commissioner here in Newfoundland and Labrador has done an excellent job over the years but, as you well know, sometimes there

are perceptions that are generated from these kinds of circumstances. And I know for a fact, having dealt with many complaints, that sometimes I decide in favor of government institutions and sometimes I make decisions in favor of the complainants, and that's the reality for all information commissioners. And I think that for an information commissioner that has such a short term of office it creates a perception of a lack of independence and I think that that is detrimental to the credibility of the oversight office, and I think that that is definitely something that the Panel should look at.

It also creates to an administrative perspective, having had to manage commissioner's office for a few years, it creates a lot of uncertainty for the team and I think that that should not be discounted in terms of the stability of the office. And we often don't speak about that but certainly as a general administrator of an office it is something that's very, very important to actually keep your team and develop their expertise. And I think if there's uncertainty about their work employment, because there is a lot of potential of turnover, I think that

that does impact the administration of the office as well. And with those words, I will close my comments.

C. WELLS:

I'm sorry we didn't ask you about that but you had so enthralled with everything else you said we must have gotten. But it's a matter that had been addressed by perhaps the vast majority of people who have already made representations to us. And like you, many have said in effect that the perception sometimes can cause consequences as bad as the reality, and so that it is important to get this right. They do note that a very short term is very difficult but at least one or two others have also noted that even the prospect of reappointment can create a bad perception as well. So we may have to look at that. And I would just ask, if you could change it, some suggested a five-year term, others have suggested a 10- or 12-year term. Some think 10 or 12 is too long. You might get a commissioner who wasn't performing and then you'd have the problem of having to replace the commissioner. And others have said, well, if you go to a five-year term you still got the prospect of reappointing. So finding the right solution is not

easy. I was just going to one further question. Do you have any magic formulas?

S. LEGAULT:

Well, I think that the first criteria, and it is going to be up to the Panel to find the magic formula for all of the potential recommendations, but the one first thing is it has to be more than the length of one government. So it has to be more than four years. I think that's a general criteria.

Personally, I think it should be a term that leads to no reappointment because there is also a perception that if you have the possibility of being reappointed that you may be making decisions in favor of the government of the day in order to be reappointed. And I have heard that.

So, it has to be a sufficient length of time such that it is an attractive position for qualified candidates because as information commissioner you don't make a lot of friends in governments. And so, one has to understand when one decides to take on these jobs that there are personal consequences and I think you have to go into those with your eyes open.

So my preference is no reappointment but the sufficient length of time in the term to provide for the ability to recruit qualified candidates and that it extends to more than one-year term. And that way you have no perception that you are seeking potential reappointment.

C. WELLS:

So you would be thinking something more in the neighborhood of eight to ten years or so?

S. LEGAULT:

Um-hmm.

C. WELLS:

I think that finishes us and thank you so very much once again.

S. LEGAULT:

Thank you very much.

C. WELLS:

We are grateful to you and your office for the effort you've made.

S. LEGAULT:

Thank you very much.

C. WELLS:

And we look forward to receiving that additional information when you have it available.

S. LEGAULT:

We shall do.

C. WELLS:

We will adjourn till 2:30.

D. LETTO:

Two.

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 111, 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.

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