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

Date: Wednesday, August 20, 2014 (9:30 a.m.)

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Chief Information Officer

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

C. WELLS:

I apologize to you. We're a little late coming out but we were talking about matters that are relevant. When we discover we are late, we suddenly did an assessment of what we were doing and concluded that we were being very diligent about our work, until Mr. Letto decided there was a more accurate explanation. We're so persuaded by talking to one another that the time passes and we didn't even know it. My apologizes for the delay.

Ms. Thorne, we're happy to you from you. Thank you very much for making the submission that the university has made and thank you for appearing here today.

R. THORNE:

Thank you, good morning. On behalf of Memorial University I would, first of all, like to say thank you to the ATIPPA Review Committee for the very important work that you re undertaking in the Statutory Review of the *Access to Information and Protection of Privacy Act*.

Two of my colleagues, I'm very grateful to say, are joining me this morning - Ms. Shelley Smith who is the recently appointed Chief Information Officer of Memorial University.

C. WELLS:

Good morning.

R. THORNE:

And Mr. Morgan Cooper who is the Associate Vice-President (Academic) for Faculty Affairs. Of the 11 recommendations that are contained in the written submission that we have provided to you, five of them are in fact recommendations that no change be made to the legislation.

And given the time that is allotted for the presentation this morning, if it is all right with you, and you may be relieved to hear, I'm not going to read the entire submission. And in fact what we will do is highlight some of the points that we feel we would like to raise in this public hearing.

C. WELLS:

That's the course we hoped you would follow. Thank you very much.

R. THORNE:

So the points that we want to highlight in particular are 1) the unique form of accountability and governance at Memorial University; the definition of personal information and in particular how that relates to opinions; the time limit for responding to ATIPP requests.

And then we are going to discuss some of the exceptions to disclosure in the ATIPPA legislation, and those are: section 20, the discretionary exception to disclosure for policy, advice, recommendations, deliberations and analyses; section 22.2 pertaining to workplace investigations; section 27 and 28 and 29 as they relate to the mandatory exception to disclosure for disclosure of information that could harm the business interests of third party; and also to touch on the burden of proof in section 64; and then finally, we would like to talk a bit about section 30 and the protection of personal information.

Of course if there are other aspects of this submission that you would like us to address, we

would be more than happy to do so.

C. WELLS:

If you agree, we found it most convenient in these presentations to address our questions at the end of each section, rather than wait till everything has been done.

R. THORNE:

Certainly.

C. WELLS:

You sort of lose track and it is better to do it by topic, if you don't mind.

R. THORNE:

Yes. We don't mind at all.

C. WELLS:

Okay, thank you.

R. THORNE:

So to begin, before I talk about accountability and governance at Memorial University, I would just like to make some brief introductory remarks. Memorial University is the only university in Newfoundland and Labrador. It has an enrolled student population of 18,500 and more than 85,000 alumni. Following proclamation of the *Access to Information and Protection of Privacy Act*, in 2005, the university

established an Information Access and Privacy Protection office, the IAPP office. The mandate of that office is to develop and implement policy, procedures and best practices in respect of information access and privacy protection; to carry out Privacy Impact Assessments on new programs and projects to identify privacy risks and to recommend measures to mitigate those risks; to deliver strategic and day-to-day advice to the university on matters pertaining to access and privacy; to manage ATIPP requests to the university; and also, to deliver access and privacy training to the university. And to date, we have delivered training to nearly 1100 employees of the university. And the record of their participation in the privacy training is kept in their personal file in Human Resources. The privacy training itself is an interactive two-hour session in which we do privacy exercises and one or two case studies, and it involves interaction between the employees and the facilitator of the privacy trainer.

The website for the IAPP office is mun.ca/IAPP. The website contains comprehensive information about

information access and privacy protection. In respect of information access, it describes and sets out the process for filing an ATIPP request with the university. In privacy protection there is a lot of comprehensive information there. It also includes a complaints form for people who wish to file a complaint.

C. WELLS:

If you don't mind, I would tell you that that microphone is off to one side and it really isn't picking up what you're saying, so we'll blame the microphone for it. If you had it a little more directly and were speaking more directly into it, we'd pick it up.

R. THORNE:

I will indeed, thank you. Is that better?

C. WELLS:

That's better. Yes, thank you very much.

R. THORNE:

All right. So also on the website for the IAPP office in addition to information on information access and privacy protection, there is information about privacy training which I have just mentioned, and our privacy training is called Privacy Rules,

Privacy Tools. And on the website, as well, there are numerous resources for employees with tools that are specifically designed to assist in particular in privacy protection.

The university established a privacy policy in 2008 and it has a number of associated procedures that are attached to that privacy policy. And I have a copy of it with me. If you like to have that I would be more than happy to provide it.

In 2010, the university passed an Information Request policy and it as well has a number of procedures that are associated with it, including the procedure --

C. WELLS:

We would like to have it, if you would leave it.

R. THORNE:

I certainly will.

C. WELLS:

Thank you.

R. THORNE:

There is also the procedure for managing an ATIPP request which is provided, whenever we receive an

ATIPP request it is provided to those employees and offices having records that we believe are responsive to the request.

A final mark that I would like to make before I move on to the first point, which is to say that a consideration of the ATIPPA is, of course, that it applies to records that are in the custody and control of a public body. And there has been some considerable jurisprudence, particularly by commissioners --

C. WELLS:

I'm going to interrupt you again, Ms. Thorne. It is probably my age and hearing.

R. THORNE:

It is not working? Okay.

C. WELLS:

Well, you're a very soft spoken lady.

R. THORNE:

Walk softly and carry a big stick.

C. WELLS:

And we don't want to miss what you're saying. So either the mike a little closer or a little more force in the voice; either would do the trick.

R. THORNE:

All right. Thank you. So in respect of the Act applying to records that are in the custody and control, I note that there are substantial numbers of interpretations of what that means when a record is or is not in the custody or control of a public body. And in the submission, I did refer, on page 2, at the bottom of the page 2, to one order in particular from the Information and Privacy Commissioner of Ontario that deals with custody and control of records, but, of course, there are numerous cases both in the courts and in Access and Privacy Commissioners throughout Canada.

So now I would like to talk about governance and accountability in a university and how ATIPPA applies to higher education. To begin, I would like to read a quote from *Memorial University Act* in section 38.1(2), which says, "notwithstanding paragraph 2.1(a) of the *Auditor General Act*, the university is not an agency of the crown for that purpose or for any other purpose".

And so now I'd like to highlight. There is I

think some detail in our written submission as it pertains to our discussion about governance and accountability at the university. I won't go through all of it but there are a couple of points about it that I would like to highlight this morning.

First, university governance is a form of collaborative governance. The power is shared between governing bodies. The Board of Regents has responsibility for management, administration and control of the property, revenue and business affairs of the university. The senate has responsibility for academic matters.

The university has a unique form of accountability that is derived from the tenants of autonomy, independence and academic freedom. And I wish to highlight in particular that collegial decision making is the basis of decision making about academic matters. And I would like to emphasize that it cannot function without faculty participation.

The other point that I would like to make about governance and accountability is that in accordance

with long standing practice and custom the independence and autonomy of faculty within a university means that many of the records they generate in conducting research, developing and presenting, teaching materials and creating knowledge through publication and presentation, these records are not in the custody and control of the university.

And so, to summarize on this point, the main point I think that I would like to make about this is that administering the *Access to Information and Protection of Privacy Act* at a university contends with some complexities that derive from the university's unique governance model and, as well, the important principles of collegial decision making, academic freedom and autonomy of faculty within the university.

C. WELLS:

When you say certain academic and research documents are not in the university's custody and control, on what do you base that? Everybody involved in the teaching process at the university is engaged and paid by the university to do the work on behalf of the university and provide the academic instruction

and research, I'm not quite so sure. Research may be different. The university may be providing facilities for the individuals to do their own designed and planned specific research. But in some cases the university is paid by governments and government-funded agencies and other privacy sector agencies in some cases to do specific research.

R. THORNE:

That's right.

C. WELLS:

In that situation and in the ordinary academic instruction are not those documents really, if they are in the control of employees of the university paid by the university, to carry out that function, doesn't that make them technically in the university's control?

R. THORNE:

The question of whether records are in the custody and control of a public body is not always clear cut. Thankfully, it often is and there is no question about that, but there are numerous decisions and interpretation of the concept of custody and control that is available, primarily administrative tribunals in access and privacy and perhaps in the courts as

well, although I am not able to point to particular court decisions. It is not my area of expertise.

C. WELLS:

Your voice is dropping.

R. THORNE:

Oh, sorry.

C. WELLS:

We're losing half of what you're saying.

R. THORNE:

I probably am afraid of feedback or something. My apologies. In respect of determining when a record is or is not in the custody and/or control of a public body, administrative tribunals, in accessing privacy in other parts of Canada, have set out, based, I believe, on a set of guidelines originally established by the Ontario Information and Privacy Commissioner some years back, that sets out a number of questions to be asked in determining when a record is in the custody or control of a public body. And so, for example, if you will allow me, I will refer to our Information Request policy which contains a definition of Custody and Control that is very closely relates to the decisions that we have seen in other parts of Canada. I don't know if you would

like me to read all of them. I certainly could. But just in terms of to get back to your question specifically in respect of research, for example, by faculty. They are exercising academic freedom in conducting their research, and by custom and by practice those records are not - now, I won't say it never but, generally speaking - are not in the custody and control of the university for the purposes of this Act.

C. WELLS:

You don't distinguish between those researchers and professors for whom you provide a physical facility to carry on the research that they want to do or may even be contractually engaged with others to do. You provide the facility.

R. THORNE:

We certainly do.

C. WELLS:

I can see that that's their research and their documents. But what about a situation where you've engaged with Benser (phonetic) to carry out certain research and you assign the task to certain scientists at the university and they do the work and carry it, report it to you, and you copyright it or

patent it or whatever in the name of the university. Aren't those documents university documents?

R. THORNE:

I think it is fair to say that generally we cannot say that it is the university that conducts research. It is researchers affiliated with the university who conduct research. The responsibilities of the institution, however, as you point out, are certainly to provide facilities for researchers to conduct their research and to secure it safely, and that they conduct their research, in particular research involving humans, that it is conducted in accordance with the standard which is the Tri-Council Policy Statement. And so the university's responsibilities, whether under contract to a research sponsor and as a signatory to the agreement with the Tri-Council or the Tri-Agency, and that would be SSHRC, which is the Social Sciences and Humanities Research agency, and NSERC, the Natural -- I'm not sure exactly what the ....

C. WELLS:

I have always known it as NSERC, National Scientific and something Research Council.

R. THORNE:

And Engineering Research Council and also the CIHR, which is the Canadian Institute for Health Research. And so as a signatory to that agreement with the Tri agencies, the university is responsible for ensuring that research at the university is conducted in accordance with the terms and conditions that are set out in the agreement, that the university respects the academic freedom of faculty in conducting their research, provide appropriate facilities for the research to be done and, as I said, to ensure that the research is able to be stored by the researchers securely.

C. WELLS:

So then it is the academic freedom that makes it (inaudible)?

R. THORNE:

Yes, I think that's probably the main principle.

J. STODDART:

Now I am very interested in this question about a scope of the coverage of this postsecondary institution. And certainly, section 5 does specifically give an exclusion for postsecondary teaching materials and research. I am very intrigued

by the exclusion of teaching materials.

Now, tell me, are there no rules, are there no standards for teaching at MUN? Do professors not have any kind of rules that they must follow about how material is distributed to the students, what is placed on, I presume, teaching materials placed on university websites now? Are there no rules for that? How do students access teaching materials? Do you regulate that in any way?

R. THORNE:

I'm probably not in the best position to give you a full answer to that question. I can say that there are certainly rules. The senate regulates academic matters at the university and so there are processes. And I don't know if my colleague, Mr. Cooper, can provide some further information. But certainly, in making decisions about the actual courses that are going to be taught, that is a decision, I believe, of the academic unit or the academic department within a faculty.

J. STODDART:

Yes, I am not asking about what courses are actually taught. I'm asking about why the records of teaching

materials would not be considered to be under the control of the university, because I presume it is not every professor invents his own style. There must be some kind of a common framework and so on, and they must be posted on a university website. So I don't understand how they're not under university control and custody.

M. COOPER:

The question, it is easy to ask. It is a very difficult question to answer. I mean my understanding is that jurisdictions across Canada have an exclusion under information, access to information and privacy legislation for both research and teaching, and I don't think that we're unique in that regard. I think it is important. I think what the university, because the discussion started with a discussion or a question from Mr. Wells around custody and control. And of course when you look at section 5 of the Act and there are certain areas which are excluded from the Commissioner's purview, research and teaching being one of them, and to a certain extent I think that's a separate inquiry with the respect to the appropriateness of those exclusions. And your question around teaching, I

believe, goes to that inquiry.

With respect to the question in around custody and control, that's an issue which really modifies or is a qualifier for each of the items which are excluded under question 5.

What I will say from certainly personal experience and from time to time I interact with Ms. Thorne in the performance of her duty as the university's privacy officer is the issue of custody and control, and I think it is a point that we wanted, to the best of our abilities we wanted the Committee to understand. In the university context, it has been problematic for us. We have a submission that indicates that we get approximately, I think over the last over the three years, not approximately, I think we've had 63 requests. So approximately 21 a year. That's, for our organization, a significant level of activity and results in almost a continuous involvement with the Office of the Privacy Commissioner here in this province.

So let me talk about custody and control, because

it is important that we understand, that we believe the Committee understand if you're making recommendations with respect to the Act that you understand our context. So I will just try to give an example.

J. STODDART:

Sir, I asked a specific factual question. Does the university not have standards for teaching materials? Are teaching materials not hosted on a common website? Are there not some kind of framework or does each professor do absolutely what he or she wishes to do? Are there not rules about how teaching materials are made available to students? In what format? When? In relation to the teaching session, does the university have no guidance to give professors or no say in teaching materials, so each professor does his or her own thing?

M. COOPER:

No, we teach in a context where our professors, our instructors have a great deal of latitude with respect to what they teach, with respect to how they teach. In terms of the context of academic freedom, teachers, faculty in the university are not required for example, to teach with deference to prescribed

doctrine. The university through its senate has --

J. STODDART:

Sir, I am not talking about the content. I am trying to understand, does the university have any kind of rules, any kind of standards for teaching materials? And if so, could you describe them.

M. COOPER:

The university, through its senate, has approved and endorsed and established, through its governance, structure programs which we offer. With respect to the programs we offer, a component of the program delivery involves teaching of courses. And our course calendar at the university which is part of our regulatory framework includes calendar descriptions for each of the courses that are offered. And there is an expectation and, I believe, in fact, a duty and a responsibility for faculty as employees of the university to deliver and to teach those courses in the context of the parameters of a course outline. Our university offers tremendous support to faculty in terms of teaching and learning and initiatives which are intended to improve. Its constant. All universities try to improve learning outcomes at the institution.

But within those general parameters and requirements, for example, that students receive a course outline early and at the commencement of a term. So there are parameters. There are regulations around teaching and exams, what you can and can't do in the first or second week or the last two weeks of a term. So no, there is a regulatory framework which the university places around teaching, but notwithstanding the foregoing, faculty, I believe, are unique. Not at Memorial but in Canadian universities in their latitude and their freedom with respect to how we deliver those courses. They have a certain amount of autonomy within our institution. We work very hard to respect that autonomy, to bring back that question the issue of custody and control because they are related. I would simply say we have a faculty collective agreement. We have language in it that predates our ATIPPA legislation in 2005 or the amendments in 2012. And for example, there is a provision that says the university respects the right of faculty to privacy in their personal and professional communications. That same clause places a restriction on the university with respect to our access to employee

computers in terms of ensuring the integrity of our information systems, et cetera. That kind of language is unique. It is not unique among Canadian universities but it is unique and not typical for other employment relationships. And that just characterizes a culture where that sort of parameter and how we operate, there is a deference, there is a custom and a practice which I think is recognized in the citation from Ms. Thorne around custody and control that suggests that there is information that are not within the custody and control of the university that might well be in other forms of employment.

C. WELLS:

To express it simply, the university has never and never expects to be supervising its faculty activities in the manner which it would an employer in the ordinary course would supervise other employees?

M. COOPER:

Absolutely. Simply, that's (inaudible) understand that context.

C. WELLS:

That's where the freedom comes in.

M. COOPER:

That's very important.

R. THORNE:

But I will add that, of course the outcomes and so the university and the senate in particular, does pay attention to outcomes and so they are looking at the overall grades and performance and satisfaction of students as they complete their courses. So when adjustments are needed, the senate working collegially with the academic, the faculty or the academic department of a faculty, will work to ensure that those courses are constructed in a way that maximizes the outcomes for students and still, though, respects the objectives of the teaching in the first place.

J. STODDART:

I'm not sure I just understand how this works. If you have a collective agreement that respects, if I understand correctly, the privacy of the personal and professional information of the faculty, then I presume that is a bar to any request that a third party could make under ATIPPA?

M. COOPER:

My answer to that would be it's indicated that the

language predated the promulgation and the action of the ATIPPA legislation back in 2005. When the university negotiated --

J. STODDART:

But then you said it was renewed in 2012?

M. COOPER:

If I may. When the university renegotiated its most, not its most recent collective agreement but its previous collective agreement, around about 2012, but certainly after the legislation was enacted in 2005, the university made a proposal to the faculty association to modify that clause, not to remove the respect for privacy and personal and professional communications, that's as important to the university as it is to our faculty, but we indicated or we added a clause the university proposed, faculty accepted, faculty association, that basically indicated that subject to our legal requirements, including our legal requirements under privacy legislation. The reason the university proposed and, I believe, the faculty accepted, I can't speak for the faculty, accepted that particular language is that the world changes. Our legislative framework changes. Norms change. And we wanted to make it clear to all our

faculty that we have legal obligations which we intend to respect that they have to comply with, and we didn't want our employees to believe that the language that was in place overreached in any respect. And I believe that's a respect for this legislative framework and the university's understanding of the need to comply.

That particular reference may be unique among Canadian universities but it is very much a reflection of the university's cognizance of our statutory obligations and our efforts and our intention to comply with them. And our conversation was very much collective agreement may trump policy, legislation trumps collective agreement. So let's, to the best that we can, be transparent so people don't engage in behaviors that are inappropriate and wouldn't be sanctioned. So we work hard at it.

C. WELLS:

Thank you, Dr. Cooper. And I assume that when this legislation was passed that explains why at paragraph (h) of subsection (1) of section 5 accepts from the Act record containing teaching materials or research information of an employee of a postsecondary

educational institution respects academic freedom. But you would agree that the administrative aspects of it, the funding provision for it and how that's managed, is subject to the Act and would not be caught in this?

M. COOPER:

I would agree that that form of records are different because they are records that the university may be directly party to and they speak to different things. I would agree with that.

C. WELLS:

Yes, okay, thank you. I'm sorry if our interruptions have made it more difficult for you. You proceed as you which.

R. THORNE:

No, that's quite all right. Thank you. So next in respect of the written submission that you have in front of you, I am now on page 5. And at the beginning of page 5 we deal with the definitions section of the ATIPPA, section 2. And we wish to talk just briefly about the definition of personal information. So the definition of personal information in the ATIPPA is recorded information about an identifiable individual. And like many of

the other jurisdictions in Canada, the definition then goes on to list a number of types of information that is included as personal information. And they, for example, would include a person's name, address, phone number, national or ethnic origin, age, marital status, identifying numbers, et cetera. While the list of examples is not intended to narrow the definition, I think it does tend to focus the definition, the list does. And I think, therefore, our submission is that it risks an overly narrow interpretation of what is personal information and, perhaps as a result, the definition is a bit cumbersome.

We do recognize that it is similar to the definitions in many of the other equivalent statutes in other provinces. We notice that in British Columbia's *Freedom of Information and Protection of Privacy Act* their definition of personal information is very simple. And it is recorded information about an identifiable individual other than contact information.

We believe, and we submit to you, that this

definition is to be recommended.

C. WELLS:

Over and above the more detailed?

R. THORNE:

Yes.

C. WELLS:

Is there any aspect of the subcomponents of the definition in ATIPPA that you are concerned about?

R. THORNE:

There is.

C. WELLS:

Would you identify it for us?

R. THORNE:

I will. It is subparagraph or clause, excuse me, (viii) and (ix) which refers to opinions.

C. WELLS:

The opinions. The opinions of a person about the individual, that's an opinion about an individual or the individual's personal views or opinions except where they are about someone else.

R. THORNE:

Right. Right.

C. WELLS:

You think they should not be there?

R. THORNE:

We think that your Committee, and we would like to ask you to give some consideration to the treatment of opinions in ATIPPA. And I will elaborate. Before I ask you to move, though, to the section dealing with opinions on page 11 of our submission, I would like to note as well that the simplified definition of personal information also aligns with the definition of personal information in Canada's *Personal Information Protection and Electronic Documents Act* or PIDEDA.

One of the things that we note, though, is if you should recommend an amendment to the definition of personal information, we believe that it should specify that it excludes business contact information to make it very clear that, of course, a person's home and personal contact information continues to be personal.

So moving then to page 11 on our written submission, we wanted to talk about opinions. And the definition of personal information states that "an individual's views or opinions are their personal

information except when they are about another individual".

C. WELLS:

Just before you go to page 11, I want to give the Members of the Committee an opportunity to raise any questions they may have about the recommendations 2 and 3 that you have. On page 11, you're up to recommendation 4.

R. THORNE:

Right.

C. WELLS:

So can we talk for a moment? Just take a look and see you're recommending that section 5 of the Act remain unchanged.

R. THORNE:

Yes.

C. WELLS:

I don't have any questions about that recommendation but my colleague might.

D. LETTO:

I'm okay on that one.

J. STODDART:

Okay.

C. WELLS:

No, they're okay. And then the next recommendation you make is 3. And you recommend that when conducting your review under section 43, the Information and Privacy Commissioner be empowered to require a sworn affidavit or declaration from a public body when access is denied because the records are not in the custody and control of the public body or are outside the scope of the ATIPPA.

I can see where they're not in the custody and control but what do you mean by "outside the scope of the ATIPPA"? Simply a declaration or an assertion by the university that it's outside the scope that the Commissioner be empowered to require a sworn affidavit. In lieu of what? Why?

R. THORNE:

This, and I would like to note, and we do say it in another place in the submission, that this is in recognition of the concern that has been expressed by the Information and Privacy Commissioner that the ATIPPA does not provide him with express authorization to conduct a review of records that are section 5 records or records that are excluded from

the Act.

C. WELLS:

Yes.

R. THORNE:

So in recognition of that concern, and we have dealt in the submission at some length about the exclusion of records, the types of records that are excluded and what might be, we suggest, the possible reasons for the types of records that are excluded and in acknowledging the commissioner's concern that he does not have authority to review records under section 5, we offer as a possible suggestion, and I would like to note to you that this suggestion is made simply as something for the Committee to consider, and we have not done any in-depth analysis of this but we simply offer it as something for the Committee to consider in its consideration of that particular issue.

C. WELLS:

How does the Commissioner deal with it now? I mean, you must convey the information to him by some means that the document is not in the university's custody or control or are outside the scope of the ATIPPA pursuant to section 5.

R. THORNE:

You may, despite all of our representations this morning you may be surprised to find, I think, that we have not responded to any ATIPP requests, with the exception of one particular issue that is now ongoing. But we have not actually responded, I don't believe, to say that the records are not in our custody and control. And I think that that, if I may?

C. WELLS:

So this is anticipatory in a sense.

R. THORNE:

Could be. And in terms of section 5, Excluded Records, in the very beginning, following proclamation of ATIPPA I believe we did, and perhaps the Commissioner has a better memory of this than I do, I think we may have once or twice refused records or some records because they were excluded under section 5. In the beginning we did supply the Commissioner with a copy of the records that we claim that were excluded.

C. WELLS:

You have no objection to supplying it to the Commissioner in order for him to satisfy himself?

R. THORNE:

We did not. And then following a decision of the Supreme Court Trial Division that dealt expressly with the Commissioner's jurisdiction over section 5, and I think I have the three references in the written submissions of those three cases that were heard by the Supreme Court Trial Division, once that decision came out we felt that we could not and provide the records then to the Commissioner when there was a section 5 claimed. But as it happens, there was only the one case that is currently now going to be heard by the Court of Appeal in respect of those excluded records.

C. WELLS:

We've heard from a great many participants, that section, that this should be revised and that the Commissioner, in order to do his work properly, should have access to the records for purposes of review. And to enable him to determine whether the claim is well founded or not well founded. That's one of the things this Committee is going to have to consider. Does the university have any underlying reason why it would be concerned about our recommending that the Commissioner have such access?

R. THORNE:

Yes.

C. WELLS:

And what is it?

R. THORNE:

The primary concern and, I guess, if I may, let me just talk about excluded records under section 5, and it will just take me a couple of seconds to say that. While first glance at the types of records that are excluded from application of the legislation, it may appear that some of those record types are probably there arbitrarily. But I think if you look at them you can see that there are some important distinctions to be made amongst those types of records. So we note, for example, that section 5 excludes, if you think about three branches of government, the ATIPPA clearly applies to the executive branch but it excludes the legislative and the judicial branch, and, as well, the criminal justice system and elements of the criminal justice system, certain elements are excluded, and, of course, records that are excluded reflect the autonomy and academic freedom and competitiveness that exists within universities and postsecondary

institutions.

In terms of the Commissioner's authority to review, so I won't and I couldn't and we can't comment on records that are excluded as legislative records or judicial and those other types, we can say in respect of research, however, that the university believes, and we submit to you, that the best authority and the established authority for dealing with reviews of research are the research ethics boards that are authorized to review research and are designed to do so and which are approved.

And the other point, if I may, I may be anticipating what you're thinking, I don't know. But, I think the other point that we would submit to you for your consideration is the distance and neutrality in terms of reviewing the records.

And so we are comfortable with the court having jurisdiction to review records that are excluded under section 5 and able to provide completely neutral and objective view of the records. And we feel that that's an appropriate response.

C. WELLS:

Is a necessary implication of that that you're comfortable with the court having the jurisdiction to review it but you're not comfortable with the Commissioner having?

R. THORNE:

We have some concerns, yes.

M. COOPER:

If I may make a comment, a fear sort of out of the fat into the fire on this particular issue. I hope not. But it's a fair question and I know the Panel is being asked to look at section 5 and which body, either the court or the Commissioner as a statutory tribunal to make that determination with respect to jurisdiction under section 5, and the university understands that it's an important question.

We also understand that when Mr. Cummings conducted his review, I think just a couple of short years ago, that he also made a recommendation that jurisdiction be changed in favor of the Commissioner.

Yesterday I just managed to find a bit of time to look at the local media around this issue. And what

I would say is that I understand, the university understands very clearly that the basis for policy choice to put that jurisdiction in the Commissioner, we believe access to justice, whether it comes through the courts or any number of statutory tribunals, is extremely important, both speed and cost I think which was one of the issues that was identified yesterday and the media. And what I would comment on that is we're here as the university. It is a body that's typically a respondent with respect to applications made under the legislation. With almost any public body under this Act or any body or organization that's subject to a jurisdictional issue, jurisdictional issues are important. Defines the jurisdiction of the tribunal to engage in an inquiry. An inquiry which may sometimes be a very lengthy and comprehensive inquiry. So those issues take on a particular importance for the university and we believe in law that those issues take on particular importance.

I believe the Commissioner, in the last round of review, had made a request that the 90-day time limit for the Commissioner to deal with reviews, putting

aside the jurisdictional issues, may be too short or there may need to be a discretion to go longer. Nothing sinister in that. It simply reflects a reality that with complex issues of some types it takes a significant amount of time to deal with issues. For us, in our relationship with the Commissioner, and I've said earlier, that for us it's an ongoing relationship. It's an important relationship that needs to be an effective working relationship. And to that extent the Commissioner is a different type of statutory tribunal. It is not like an arbitrator or board who interfaces with a party on an issue and they move away.

After an issue is made on jurisdiction then let's assume, for example, the matter falls within the Commissioner's jurisdiction, then the university has to deal with the Commission in relation to a range of limitations, exceptions under the Act with respect to the material that's been ruled by the Commissioner with respect to being in jurisdiction.

What I fear is that issues of jurisdiction are so important to the parties, our current litigation

before the courts around research, what's research, what's excluded, what's not excluded, are such that even if government were to modify the section on recommendation, for example, from this Panel and to move the jurisdiction there, then clearly there would, I think - I think clearly, maybe I'm wrong, maybe naive - there would be as a statutory tribunal still sort of a recourse to the courts by way of judicial review. And on jurisdictional issues that's more likely, I believe, to happen than other judgments determination the Commissioners make under the Act.

And if the object, if the object of the change in the legislation is to reduce reliance on the courts or to remove the courts from that form of decision making to somehow give a quicker or speedier decision to the applicant, I don't know. I'm not a cynic but I'm not sure. Sometimes administrative tribunals are slow. Sometimes the courts are slow.

C. WELLS:

Frequently the courts are slow.

M. COOPER:

And I say that because I think it's important because

I think in terms of the jurisdictional issue and he who deals with it, I just think it's important to understand that it needs to be about speed. It needs to be about accessible access. What I'm not sure is maybe there are other mechanisms. When Ms. Thorne makes the reference in her submission to the Commissioner requesting an affidavit as a mechanism to deal with certain issues under section 5, whether it is custody or control or whether something falls directly under one of the heads. In Justice Roberts Wells' decision there was a submission by then Deputy Minister Don Burrage that that might be a mechanism to allow the Commissioner to have a confidence that it claimed by a public body fell within one of the exceptions because an affidavit would give an opportunity to make sworn assertions with respect to the factual basis for the claim that something falls outside the jurisdiction.

I know Justice Robert Wells, very aptly, pointed out that an affidavit may not be an appropriate mechanism to deal with judge's notes or certain types of judicial records, but I didn't get any sense, in fact, he may have indicated that it might be a

reasonable mechanism. I apologize. I'm rambling but I am trying to give you a sense that we do have a confidence in the courts in terms of making this type of decision, and if there is a ruling by a court we don't believe that it has potential to interact or interfere with our ongoing relationship with the office, which is an important relationship, so.

C. WELLS:

You noted that you observed this discussion with government yesterday and with government it was more in the context of Cabinet confidential documents and solicitor-client-privileged documents. The information provided by the Commissioner, and it was not in any way challenged yesterday by the government representative, they accepted it as accurate, when the Commissioner had the power to review these documents to determine whether there was any validity to it or not, there was never any concern about the Commissioner's handling of it. While they may have disagreed with the ultimate decision on one or occasion there was never any concern that the Commissioner inappropriately handled it or there was a risk to the document.

In the university's experience with the Commissioner, when the Commissioner had power to review these documents at the university did you have any problem, any concern about the Commissioner's handling of the records that were made available to him for review? Not for release but for review?

M. COOPER:

I will make a comment but then I will defer it to Ms. Thorne because I think it is important because I'm not as close to that file as Ms. Thorne may be. My understanding is, is on the jurisdictional issue that particular matter is still before the courts. The particular application led to an odd result where the university had inadvertently released records and then, on assessment and determination with respect to our legal obligations under the Act, were of the view that the information that had been disclosed ought properly to have been excluded under section 5.

C. WELLS:

But that was the university's inadvertence, not the Commissioner's.

M. COOPER:

Absolutely. We own that.

C. WELLS:

My problem is, did you have any bad experience with the Commissioner mishandling it?

M. COOPER:

Well, that's one way to put the question. My only thought is I know that the Commissioner, in handling that, there were perhaps portions of the records which the university felt fell within the exclusion that the Commissioner, having the documents, and no fault to the Commissioner at all, they had the documents, they were moving to perform their duties, felt might not fall within the exception. And that is a position that may be different than what the university and the Office of the Privacy Commissioner takes before the courts (inaudible).

C. WELLS:

But the Commissioner would not have been doing his job if he simply accepted the position of the university. He had to exercise his own judgment on it.

M. COOPER:

Whoever has to make that determination on jurisdiction they have to do exactly that. We simply have a confidence in the current mechanism and the

courts who make, ongoing basis, regular decisions around jurisdictional issues on particular standards of review. And in some respects if the review is performed by the Commissioner and then we have a review to the court, we're still before the courts.

C. WELLS:

I missed that. The level dropped and I missed what you just said. If you have a review by the Commissioner and then you have a review by the courts?

M. COOPER:

And on jurisdictional, I'm suggesting that's more likely to happen. You're still back looking for and seeking a determination. Ultimately, I know a review is a different type of exercise than an appeal, but you're still back before that body and from a time perspective the days go on. You have two processes, not one.

C. WELLS:

Now let me tell you the concern that we have that causes to raise this with government yesterday. We are mandated, part of our Terms of Reference, to make recommendations that will make the operations of the Act more user friendly for people so that they can

more readily access it. One of the problems with the present provisions that people have expressed to us is that it's all very well and good to say go to the courts, don't go to the Commissioner. But look at the individual, what that means for an individual to have to initiate the court action and carry it through and the results. Like I said, to the minister yesterday, it's all very well to say you have a right to go to the courts but that's like telling me you can get a good meal if you're prepared to go to South Africa and stand the cost of going there to get it. It is just impractical for so many people.

The Commissioner having the right to review is the more ready thing and it would most likely eliminate or reduce the number of court cases that would be taken, if people could afford to take them, to begin with. But at least they get a ready answer from the Commissioner on the spot here and they don't have to go through the expense and difficulty of taking an appeal to court.

If the Commissioner decides against the public

body and determines the document really is not accepted under section 5 and should be released, the public body has the right to go to court if it wishes.

M. COOPER:

And I understand completely.

C. WELLS:

And the Commissioner then stands in the place of the applicant and the issue becomes between the Commissioner and the public body and the individual citizen who can't afford or even contemplate the immensity of taking an application through the courts. So that's why I wanted to know from you whether or not in your earlier experience, before you came to the conclusion that the Commissioner should not be reviewing this, if you had any trouble or difficulty with the way in which the Commissioner handled it. And I gather from your comment that there was no sense of mishandling by the Commissioner in any way.

M. COOPER:

I'm not aware but, again, I will defer to Ms. Thorne. But we just want the Commission to understand that, how do I say it? When I says move from the fat into

the fire, it's just got a little bit of intrepidation (phonetic). When I looked at the media attention around this issue and I still think it is important as a respondent under a legislation working with a process that we have a certain confidence in the structure and how it works. We know that there is pitfalls and there is downside. It is that it is also important for us to be able to be important to be here and communicate our experiences in that process and that's why we haven't recommended a change.

But at the same time, we need to say we fully understand the issues which you again articulated today about the different interests and having to make sure that at the end of the day the legislature attains the right balance. And quite clearly, as a university we will work with whatever structures are in place.

C. WELLS:

The status quo would be easier for the university to manage.

M. COOPER:

Oh, I don't believe it is easier for the university

to manage. At no point, I hope that the Committee, yes, has taken the university as making that suggestion because I think most bodies would prefer not to be before the courts or an administrative tribunal in terms of a jurisdictional argument or a jurisdictional struggle that may be protracted and adjudicated in this forum.

C. WELLS:

But if the legislature resolves the jurisdiction and gives the jurisdiction, then there is no jurisdictional argument anymore. It is just a question of whether or not the document falls within the category or it does not. And it may be differences of view on that but that's not a jurisdictional argument.

M. COOPER:

Oh I would have thought that in its essence it was a jurisdictional argument because if it falls outside the category then the tribunal has no jurisdiction. If it falls within clearly, it does. But anyway that's a different view.

C. WELLS:

But the question of whether or not it falls within or outside the category, if the Commissioner has

jurisdiction to do that and makes the determination, then there is no longer a jurisdictional question, unless you're going to appeal it and appeal the Commissioner's decision and say you were in order.

M. COOPER:

No, I understand.

J. STODDART:

Yes, and perhaps you could answer this in your next intervention. Just to put your concerns into context. I've been looking at Appendix A which are the ATIPP requests for the administrative year. And just looking at them it seems to me that the overwhelming majority are requests for personal information.

R. THORNE:

Yes.

J. STODDART:

Have you broken down over the years that you've been subject to ATIPP legislation, from whom do most of your requests under ATIPPA come from?

R. THORNE:

Most of our requests come from individuals. Most of them are personal information requests. The majority are from faculty members and from students.

J. STODDART:

Okay, and between faculty members and students, is it split evenly or?

R. THORNE:

Perhaps more from faculty than from the students.

J. STODDART:

More from faculty members. And there's roughly how many faculty members?

R. THORNE:

I'm thinking around 800, approximately 800.

J. STODDART:

And roughly how many students? Did I hear 18,000?

R. THORNE:

18,500.

J. STODDART:

Okay, thank you.

R. THORNE:

You're welcome.

D. LETTO:

My interest is in this whole question of the exceptions under section 5 or the application. Something that we haven't talked about is the public's expectation of *its* university and not only its university, all the institutions of bodies. And

the public needs to have confidence that what is being purported to not be a relevant record is actually that.

R. THORNE:

Right.

D. LETTO:

And the mechanism that's set up under the Act is the Commissioner. And it would seem to me that the more exceptions that we build into the Act, the less likely it is that the public can be confident that there is that independent oversight. And I appreciate that we want to go the route of the court. But it would seem to me that if the Commissioner has the ability to assess whether the records are as they're being determined by the university, then there is a level of public confidence that comes with that, that the Commissioner actually is not being excluded from particular areas and that the Commissioner has a complete and effective oversight role.

I'm just wondering if you can discuss what you're saying in light of the confidence that the public needs to have that its institutions are subject to

oversight?

R. THORNE:

Yes. I think that there are probably a couple of points that I can make in response to that question. The first is that the university endeavors at all times to provide whatever information is requested, and whether that's informally over a counter or a desk, online, on the phone, the university, it's been my experience since I have been there for ten years, is extremely open, transparent. We are not, and I'm sorry if it appears that way and it probably is simply a function of the structure of what this is, this is a review by a committee that's been appointed and our submission is dealing with the issues that we have concerns.

Perhaps what this submission does not say is the openness and transparency that exists at the university, that the ATIPPA is not and should not be the only mechanism for people to get access to information. It should be a mechanism of last resort. I think I can speak on behalf of the university and others, when a student, a member of the community, an employee or whomever, goes there

looking for information I would believe, and I'm sure that faculty would agree as well, every effort is made to provide whatever information is sought. And I do want to emphasize that point. And the fact that we are dealing with questions of jurisdiction and excluded records and exceptions to disclosure, I think that today it's fair to say that that's a function of what we are doing here. It in no way reflects the university's approach to providing information. And I can speak for myself in managing ATIPP requests, I bend over backwards and I lose sleep to ensure that we respond as fully as we can to ATIPP requests.

D. LETTO:

Right. And I appreciate that but I'm thinking that where ATIPP applies or where ATIPP has been brought into question, what is wrong with the independence of the Commissioner being brought into play to satisfy the public need that the proper oversight is happening?

R. THORNE:

We have and I have had very good experiences with the Information and Privacy Commissioner. They are professional. They are thoughtful. They are

thorough. We know that they do good work and I know from just colleagues and hearing from others that they appreciate the work that the Information and Privacy Commissioner's Office does on behalf of applicants. So there is no question in my mind that they do do a good job. And the recommendation that we have put before you applies to excluded records under section 5. We are not addressing what whatsoever the sections of the ATIPPA that preclude the Commissioner from reviewing solicitor-client-privileged information or Cabinet confidences or anything else. We are talking solely about section 5. And if I may, even within section 5 we are talking only about research. And so we are putting this before you as our view, as Mr. Cooper has explained, that questions about the application of the Act to research ought to be under the purview of the courts and not of the Information and Privacy Commissioner. However, we are very cognizant of the issues and the questions and the questions of the public and we have confidence that you will take and we hope that you will take all of these things into consideration.

C. WELLS:

We will indeed. And by way of explanation of what's behind our questions to you, we've been asked to recommend changes to the Act with respect to Cabinet confidences and solicitor-client-privileged documents, matters that are of the greatest and utmost importance in public life in this province or in any place, certainly as important as academic freedom and research. Academic freedom and research doesn't have a priority over and above Cabinet confidences and solicitor-client.

If we're being asked to recommend that the Commissioner have the ability to require the production of documents solely for the purpose of review to determine whether or not the claimed exception is valid in the case of Cabinet confidences and solicitor-client-privileged document, is there any reason that we don't know about why he ought not to have the same right with respect to documents under section 5? That's the thrust of our question. So if there is anything really special that gives them a greater priority than Cabinet confidence or solicitor-client privilege we're asking you to let us

know.

R. THORNE:

I just can't think of anything at the moment.

C. WELLS:

Okay, all right. That's the thrust of all of this. And I apologize if our questions have not made it abundantly clear from the outset.

R. THORNE:

That's all right.

C. WELLS:

Okay, that deals with recommendation 3. And now, I think you are on to recommendation 4. That the time limits for responding to ATIPP requests not be changed.

R. THORNE:

Right. If it is all right with you, may I continue to have the brief discussion about opinions as they relate to the definition of personal information and then I can discuss the time limits?

C. WELLS:

Oh, by all means. Did I skip over something?

R. THORNE:

I think that the discussion of opinions begins I believe on page 11 of the submission but I thought

this morning that I would deal with opinions on page 11 at the same time as I deal with the definition on page 2, I believe.

C. WELLS:

The reason why I meant is that recommendation 4 and time limits comes just before opinions.

R. THORNE:

Right, yes.

C. WELLS:

So you do it whichever way you want and we'll respond to you.

R. THORNE:

In any event, thank you, and I refer you to page 11 of the submission from the university. And so as I noted, the ATIPPA's definition of personal information states that "an individual's views or opinions are their personal information except when they are about another individual". And then it is "the personal information of the person the opinion is about".

And so I would like to note here in section 30, which is the mandatory exception to disclosure of personal information, it states, "a disclosure of

personal information is not an unreasonable invasion of a third party's personal privacy where (h) the disclosure reveals the opinions or views of a third party given in the course of performing services for a public body except where they are given in respect of another individual."

And so I would submit to you that this provision presumes two things: 1) that opinions by employees in performing their job responsibilities are not their personal information and are effectively work product. And although that is not a defined term in our legislation, I think it is something that has been considered by other information and privacy commissioners and the courts as well. And 2) it assumes that when an employee records an opinion about an another person, it is the personal information of the other person. And I think that that's fairly clear in the legislation.

In our submission in the section on opinions on page 11, we offer three reasons why we believe this treatment of opinions is problematic. And so the first, just speaking not of the legislation but just

in broad terms, we would like to say that we think it doesn't really makes sense to say that a personal opinion is not a person's personal information. We often hear people say that's just my opinion. This is just my opinion. And opinions, we believe, are directly related to freedom of expression. And in a highly decentralized environment, like the university, circumscribing opinions is akin to restricting freedom of expression. A person's opinion is closely connected to the values of dignity, integrity and autonomy that underlie personal privacy.

The second point that we would like to make is that the ATIPPA assumes that opinions that are expressed by employees in the course of performing services for their public body or for their employer are deemed effectively to be directed by their employer, by the head or by their supervisor, and that the public body - again, the head or whomever - is accountable for the opinions expressed.

The third point I would like to make is - and in particular it speaks to e-mail - employee may express

opinions in an e-mail or in another format which are the opinions of the employee only and in no way represent the views of their employer. Indeed, in respect of sometimes the type of opinion that we see expressed in an informal communication like an e-mail, no employer would direct an employee to express opinions that cannot be supported by the public body. And yet, in an ATIPP request an e-mail containing ill-considered and unfounded opinions by an employee would not be the personal information of that employee but would rather be the personal information of the person that opinion that ill-considered and unfounded opinion is about. And then they would also be records for which the public body is accountable. And so we say that this begs the question: why should the public body own an opinion expressed by one employee about another and be responsible for propagating it?

C. WELLS:

It depends, does it not, on whether the opinion is in the course of the employment. In ordinary law a corporation or an institution or government or anybody who employs a person is responsible for the actions of that person done in the course of the

employment. So any physical harm that a person, in the course of normal conduct of his employment, causes to a third party, not only is that person liable for the damage, the employer is also, because the employee is the agent of the employer and if it is done in the course of the employment.

Is there any difference in theory between that and opinion expressed in the course of the employment and done in the context of the employment rather than just a personal opinion about the unacceptability of my friend who sits on my right. It is something that I'm doing in the course of my work here. Isn't that the responsibility of the employer? If, in the carrying out of his duties, expressing an opinion is a normal part of his duties and that happens to be the way he expressed it, if that causes harm or adverse consequences isn't the employer just as responsible for that as for the physical acts?

R. THORNE:

Yes. And the reason that we highlight this particular aspect of opinions I think is more perhaps to do with the issue of e-mail than other types of records. So in developing submission, preparing

memos and drafting correspondence and so on, we would expect that employees are doing the work as directed or as is expected of them by their supervisors and ultimately by their head and by the public body.

We do think, though, that there is a sphere, even within a public employee's employment which is private, there are certain expectations that employees, quite rightly, expect in terms of their privacy. And we find that in e-mail in particular, it tends to be an informal sort of communication. And as I point out later on in a discussion about section 20, the content of e-mail is often, as we put it, raw and unfiltered. Not reviewed by a supervisor. And so that there are occasions when, particularly in the e-mail, opinions that are expressed by an employee in no way reflect the position of the employer. And so we are simply asking you to consider that in the treatment of opinions that there be some recognition of that sphere of privacy and that there are some, I guess, competing principles at play when we are looking at opinions that are expressed by employees. And so, yes, I agree, absolutely agree. And it may not be

apparent but I'm absolutely committed to the principles of accountability and transparency that are imbedded in this legislation, and I'm fully supportive of it. But also as the privacy officer in an organization seeing that and recognizing and supporting our employees who also have, and quite rightly expect to have, a certain sphere of privacy that they too have within their jobs. And so in highlighting this point, it is just perhaps to present a fuller picture of opinions.

C. WELLS:

It's really the technology revolution that's caused this concern. And what people employees might otherwise have been a private oral exchange between them has now become sort of an e-mail exchange.

R. THORNE:

Yes, that's right. The water cooler.

C. WELLS:

There is no real thought given thought to it before they just dash it off and that's what causing the concern.

D. LETTO:

Let's assume that the e-mail exchange, though, is between two colleagues who were on a hiring board

involving a third person they and decided to have a full and frank discussion through e-mail about this person. Maybe they never favored that applicant in the first place and some of that is revealed. So, it's possible that there is this kind of inadvertence, benign stuff that can happen between people, but sometimes there can be very deliberate, if you would, display of real opinion and feeling. It could be that the person who didn't get the position had felt there was some of that bias there at the start. In that case, if they wanted to challenge the hiring these records would be of huge value.

R. THORNE:

Absolutely. And if you look at our appendix, and that appendix notes the requests that we received for one particular fiscal year, but I can't tell you that apart from what is in that particular one, we do receive requests from unsuccessful candidates. And whether that's for promotion or for senior academic appointment or any sort of benefit, I guess, or employment that yes, we do receive those requests and we do endeavor and we do conduct a complete line-by-line review of all of the records. We

receive all the records, the e-mails. The good, the bad and the ugly.

D. LETTO:

It would seem, though, at the moment, if you would, to make sure that none of that stuff makes it into any kind of records that's provided is that people don't do it in the first place. And that they practice good e-mail etiquette and civility, which I know can't be legislated.

R. THORNE:

That's right. And I will say, as well, that section 30 of the Act has a comprehensive harm's test and it is, I believe, and I think that others looking at this would agree with me, there is more deference given to individuals having a right of access to their own personal information. And personally, I certainly do also attempt at all times to maximize the disclosure of records to ATIPP applicants and I recognize the rights and concerns of applicant who perhaps have not been successful in a particular competition and who would like to have access to the records.

J. STODDART:

Ms. Thorne, I understand your concern about the

responsibility of the institution for what individuals may write in e-mails, but you do know that if, for example, what I say in e-mails spills over into comments that could be taken as allegations of, for example, racial harassment or sexual harassment, then the qualification of that information is the opinion of one person. The personal information of one or the other is not relevant to the investigation that might result.

And that, secondly, certainly in cases of harassment, it seems to me that the employer is still formally responsible, may have some recourse against an employer, I'm not sure but. So that whatever was done about the issue, and I think it is a legitimate issue, about whether if I express opinions of somebody else, if it is that person's personal information or my own, I think this is a serious problem and I thank you for raising it. But, changing that would not change the liability of the institution for employees.

R. THORNE:

Ms. Stoddart, and I hope not. And so, I absolutely agree with you.

C. WELLS:

It just exchanges the disclosure requirement.

R. THORNE:

And I think that it would change the characterization perhaps of certain types of information. I would hope that it wouldn't and I believe that there are other provisions in this legislation and in other instruments as well that would into play in the event of the allegations of the type that you refer to. So I would hope that a change, and I don't think it would, a change in how personal information is defined would impact on those sorts of investigations and the responsibility of the employer. And certainly that's not something that I would ever been in favor of.

J. STODDART:

I would like to come back to the context in which you're making your submission. And I'm going back to Appendix A and you said we agreed that the majority of the requests to you are requests for personal information. That more are made by faculty than by students.

R. THORNE:

Yes.

J. STODDART:

In the 17 requests that you've listed, very helpfully, I only see a maximum of four that are requests for what I'd call nonpersonal information, factual. It may be only two but I'm not quite sure. And I contrast this, just take an example with Minister Collins' submission of yesterday which would be available on the website, and in which the minister has, very helpfully on page 27, broken down the number of requests the departments by applicant type, and whether it be before 2012 or after 2012, individuals are only 31 or 30 percent of the requests. And that's requests for factual information or requests for personal information. It is not broken out here. And then there is media. There is business. There are legal firms. There are researchers and so on. Nowhere have we heard in either the documents that have been submitted to us or in the testimony, that there is a public body, the majority of whose requests come from their own employees. So I'm just suggesting that the particular context in which you administer ATIPPA seems to me quite anomalous compared to what we've heard from other bodies.

R. THORNE:

It may be and that may well be the case and I don't know. I was interested as well yesterday and I haven't had a chance to look at it, but I did note that there are statistics provided in the minister's submission and that I will certainly look at them.

I think the fact that we receive a lot of questions from our own employees speaks to the decentralized nature of the institution. I still feel that this is not picking up my voice. You will tell me if it isn't?

C. WELLS:

You've been pretty good lately.

R. THORNE:

Oh, excellent.

C. WELLS:

Very good. It's working. So keep doing whatever you're doing.

R. THORNE:

I learn fast. I think that it's a function of the decentralized nature of the institution. And I think as well and, if I may, I would like to highlight this because I think it is pertinent not just to this

question but to a number of other questions. We have a lot of different constituencies, if I may describe them that way, at the university. It's a large institution. As some people describe it, as a small town. And so there are a lot of employees. There are approximately 5,000 employees and between 800 to a thousand faculty. I'm assuming and believe that includes per course instructors and so on. The 800 figure include course instructors and others, I'm not quite sure on that.

M. COOPER:

No, it is a broader number of teaching. (Inaudible) if we knew the people who teach people session like at the university.

R. THORNE:

But in any event, about 5,000 employees. When we are responding to ATIPP requests, and I bet this is the only thing that I can speak to, and in terms of the privacy work that our office does, we are not only considering the rights of the requester or the ATIPP applicant. That is of primary consideration and one of my primary considerations are the rights and the needs of the applicant. But there are other rights as well to be considered, and those are the rights of

other employees, the rights of faculty, the contractual obligations, if they are involved in some way in the requests, and collective agreement obligations and so on. So given the nature of the institution, and perhaps it's similar in other universities in Canada, I don't know, but I think it is probably no surprise that a number of the requests or the majority of the requests come from employees or people who are otherwise members of the community.

J. STODDART:

Okay. I just realized that I'm not distinguishing between employees who are faculty members, part of the teaching core generally, and other employees who may be administrative employees. So if we go back to the complaints that are made to you, and from year to year there are overwhelmingly requests for personal. Could you give the breakdown again? By faculty, how many employees that are non-faculty and then how many are students, roughly?

R. THORNE:

I don't have the statistics in front of me. I wish that I had brought them. And I can certainly provide them. If you are interested, then I would be more than happy to do so. Of the requests that we receive

from employees, the majority are from faculty. We do from time to time receive requests from other staff, administrative staff.

J. STODDART:

Okay, thank you.

C. WELLS:

It is fair to say that you have virtually none from outside the university community?

R. THORNE:

No, I wouldn't say none from outside the university community but what I will say, and it goes back to some of the remarks I made earlier which is contained in our discussion on time limits. As I said, the majority of requests for information that are made to the university, we release it. And warts and all, and it is part of the culture. And so when we have received ATIPP requests for a copy of a report or for a copy of a letter, or whatever it happens to be, the first thing that I do, apart from assessing whether these are records that are in our custody and control, is ascertain whether or not that information can just simply be provided.

The formal process under the ATIPPA is arduous, I

think for everybody involved. So where we can provide the information easily, we do. And so perhaps that's why it is not reflected in this list, simply because this list is those requests that for some reason or another required us to process it formally under the Act.

J. STODDART:

Could I come back to Mr. Wells' comment. In the 17 requests last year, which ones were from outside the university community?

R. THORNE:

I don't have this noted. If you'll bear with me.

J. STODDART:

Okay. Well, could I suggest that you look at Nos. 3, 4, 13 and 14, which on the face of the description are the only ones that don't seem me to be about uniquely personal information, so.

R. THORNE:

Yes, 3 was from outside; 4 was not from -- well, it was from member of the community but not an employee, if I can put it that way. So it was from an interest group based within the university, a student society.

J. STODDART:

So it is from students, basically?

R. THORNE:

Yes. No. 13 was from outside. That was a media request. And I guess for those, I don't know if you want that. That was a media request for all records relating to student academic offences.

J. STODDART:

And No. 14?

R. THORNE:

And No. 14 was also a general information request from outside of the institution.

J. STODDART:

By what source? An individual outside the institution? The media? Business?

R. THORNE:

An individual. We have no idea. It was an individual who filed the request from another province.

J. STODDART:

Okay, thank you.

C. WELLS:

So that's three out of 17 were from outside the university. Not really surprising.

R. THORNE:

It's a different kind of environment and I think it

does, as I say, it reflects that the institution is an interesting place to work.

C. WELLS:

I've been getting signals for the last 10 minutes that I'm supposed to be calling a mid-morning break. Thank you very much. We will take a break for 10 minutes and get back, if you don't mind.

R. THORNE:

Not at all, thank you.

C. WELLS:

Thank you.

(Morning Recess)

C. WELLS:

Okay, Ms. Thorne, whenever you're ready.

R. THORNE:

Thank you. I think in respect of the time allotted for our submission this morning, I believe we are probably past time now, and so I'm wondering, there are still a few things that we wanted to talk about - the time limits and section 20 and section 30.

C. WELLS:

You go ahead and proceed and take the time you need.

I don't want to reduce time on you. You take the time you need. We can expand it and adjust for others. Matter of fact, we are talking steps now to adjust one scheduled for this afternoon at a slightly later time. So you feel free.

R. THORNE:

Good. Okay, thank you.

C. WELLS:

No impairment of your time.

R. THORNE:

Thank you. So I guess then to proceed, if you wish we can move on to time limits for responding to ATIPP requests.

C. WELLS:

Right.

R. THORNE:

It is the view of the university and my office that the time limits that are currently set out in the ATIPPA are appropriate and we would like to see them remain in place. One of the changes that was made when the amendments were done in 2012 was to give the Information and Privacy Commissioner authority to authorize a further extension beyond 30 days in certain circumstances. We have used that a number of

times since the amendment and in each occasion the Commissioner has given us that authorization. And that flexibility is of great assistance in managing the requests and in meeting the timelines. Sometimes requests are for a particularly large volume of records and sometimes the request is not as clear and it takes some time to clarify with the applicant exactly what it is that they are seeking.

C. WELLS:

One of the things that we've been asked to do is make an alteration such that there could be no extension without prior discussion or approval of the Commissioner. In other words, if you were down, getting close to 25, 26 days, you knew you couldn't complete in the time, you'd have to go to the approval instead of just unilaterally. I suspect that many of these concerns are driven by perception rather than real problem. The perception that a public body can just simply arbitrarily say well, I will give myself an extension. It is not a good perception in terms of public confidence in the fairness of the system. So there's been frequent recommendations that this be adjusted and that any extension of time be with the prior approval of the

Commissioner. Would that cause university undue difficulty?

R. THORNE:

No. I mean we do submit and, again, in light of the fact that we process informally and as quickly as possible requests for information and, so, therefore, the only requests that get processed formally under the Act are those that are contentious for some reason, or requests in which I believe that the rights of the requester and the people affected by the request need to be protected within the ATIPPA environment. And so, therefore, with respect to the time limits we believe that the current flexibility that is in the Act works for us. Most of our requests tend to be for a large volume of records and, as I say, we endeavor to respond. The timelines work for us. In respect of the Commissioner having authority to authorize any extension, we have not discussed this, they have no particular view on it. And I think the only comment that comes to my mind is that when the Commissioner gives prior authorization to extend, what happens then to the applicant if they have a complaint about that, because right now if the public body extends the time because of volume of

records or need for third party consultation the applicant has a right of review and can file a complaint about that extension of time with the Commissioner, but if the extensions are already authorized by the Commissioner then I don't know if there is a more informal means of review of that decision by the applicant. So that's the only comment.

C. WELLS:

That's the case for the second extension anyway, isn't it?

R. THORNE:

Yes. Yes.

C. WELLS:

So what difference does it make? I doubt that that would cause a major problem.

R. THORNE:

So that's the only comment.

C. WELLS:

Thank you for your comment.

R. THORNE:

So again, I guess, the points that I want to make about processing ATIPP requests is that there is not one huge database of all of the information that a

requester might seek that we can dip into and produce quickly. Records come in a variety of formats. They are located in a wide variety of offices. They can be e-mail, they can be Microsoft Word documents. They could be an Adobe PDF or an Excel file or any countless other formats.

When we receive them we review all of them. We identify what might be missing. We, through reviewing them, identify that there may be other offices or employees having records. There is a lot of work that goes into reviewing the records, arranging them in chronological order, and then scanning them into the software that we use to do the review and redactions.

The legislation does not allow a pause. It doesn't stop the 30-day clock while we are waiting for clarification from an applicant. And I noted in the submission, and I will note here as well, just as an example. Recently we waited four weeks and, so, for clarification. And so despite numerous e-mails and telephone calls, it was a full 28 days before we had sufficient clarification from the applicant that

enabled us to then go to the offices that had the records and say okay, this is what we need you to find and bring to our office. And bearing in mind that we need to then give them at least a minimum of seven days to then look for and retrieve the records to provide them to us before we can even begin the process of review.

So we do submit that the time lines are appropriate. The line-by-line review can be particularly labor intensive, particularly if you're talking about thousands of pages of records. And we do have an obligation and we do fulfill it in terms of doing that line-by-line review.

And in respect of identifying information that may be subject to a discretionary exception to disclosure, we take very seriously the obligation to actually conduct a proper exercise of discretion then in respect of making decisions as to whether this can or cannot be disclosed.

So the process involves correspondence, discussions with the applicant, with any affected

third parties, with other employees. So I wanted to highlight for you that it is not a quick process. Sometimes it is. Sometimes the records that are being sought is a copy of a report. For instance, a year or so ago we received a request for a copy of the Environmental Impact Assessment Report that had been completed on The Battery property that had been acquired by the university. And it was two volumes. And so I made contact with the appropriate people and I think either the same day or the following day, just sent the report off to the requester. So that's an example of a very quick process. But for the most part, for us, the requests are contentious and voluminous.

As I said before, the other point that I want to emphasize is that we take the needs of our requesters very seriously. But equally we need to consider the rights of other employees who are affected and other affected third parties' contractual obligations and so on.

I'm just looking here to see if there is anything else that I need to say on this. Probably not. So

unless you have any other questions I will simply say --

C. WELLS:

No, no, you please move on.

R. THORNE:

Yes, okay. I'm now on page 13 of the written submission and I would like to talk for a minute about policy advice. And that's the discretionary exception to disclosure for policy advice, recommendations, deliberations and analyses. We submit that that wording, as it is, is appropriate. And in addition, we feel that it better reflects the reality today for public employees. We would like to note that records of policy discussions are increasingly found in informal electronic communications as well as in traditional briefing notes and memos.

Technology enables employees to have informal discussions and to create numerous drafts and redrafts via e-mail, often with only minor changes but constituting, nonetheless, for ATIPPA purposes new records. The many drafts and redrafts and copies of drafts that reside in multiple user accounts are

responsive to an ATIPP request, unless, of course, the applicant expressly says they want only the final version. And so Memorial University respectfully disagrees with the position of the Information and Privacy Commissioner, that the wording in the exception for policy advice should revert to the wording that was in place prior to the 2012 amendments.

We submit that protecting advice and recommendations only and not deliberations and analyses risks public employees and officials avoiding the creation of records. And I would like to refer to Donald Savoie who is a respected Canadian Public Administration Scholar. In his book, Power: Where is it?, he quotes a senior government official, who said, "We are now all sitting ducks ... It is possible now for someone to ask for all exchanges, including e-mails, between senior official X and senior official Y. We can no longer blue sky ... We no longer have the luxury of engaging in a frank and honest debate." "Savoie goes on to suggest that the fear of committing ideas and analysis to paper leads to less disciplined thinking as strong memoranda give

way to PowerPoint presentations" and Savoie suggests, in fact, "that the process has in fact become less transparent than it was once". This "oral culture" as he describes it, has created the problem that is noted by information and privacy commissioners and many others that decisions are made without any supporting documentation. And we submit that making important public policy decisions without supporting documentation undermines the quality of decision making, the effectiveness of internal and external audits, and the value of historical records. And we submit that the importance of recordkeeping cannot be overstated, and a narrow protection for policy advice will directly and inescapably lead to an oral culture and reluctance to record important discussions and decisions.

The second reason that we believe section 20 should remain as it is currently worded, and I have alluded to this earlier in discussing opinions, is that e-mail discussions in particular often contain raw information that has not gone through any kind of a filter, consideration or review process. It is a medium that's usually not vetted by a supervisor,

contains no sober second thought, and may never make it into the official record of an institution. And accountability for the kind of tentative and unfiltered information contained in an e-mail may be meaningless.

And finally on this point, we would like to note that the current wording of the policy advice section 20, which is to protect advice, recommendations, deliberations and analyses, is aligned with the similar provisions in access and privacy laws in Prince Edward Island, New Brunswick, Manitoba, Alberta, Saskatchewan, Nunavut, Yukon and Northwest Territories.

Next I would like to speak about section 22.2. This is a discretion, well, actually, it is not a discretionary, it is a mandatory exception to disclosure that was added to the ATIPPA when it was amended in 2012. And the exception contains a mandatory exception to disclosure to an ATIPP applicant of information that would reveal the substance of records collected or made during a workplace investigation. Section 22.2 also contains

a provision that a public body must disclose the substance of records to a party to an investigation - that would be the complainant or the respondent - and must disclose to a witness in an investigation information that relates to the witness's statements in the course of the investigation.

And at Memorial University workplace investigations are conducted under the Sexual Harassment Policy, Respectful Workplace Policy, Protective Disclosure Policy, among others, as well as academic misconduct and other investigations carried out in accordance with provisions in relevant collective agreements.

The Information and Privacy Commissioner, in his submission dated June 16th, recommends two changes: 1) that substance of records be replaced with "all relevant information created or gathered for the purpose of a workplace investigation"; and 2) that the mandatory exception to disclosure of information to an applicant who is not a party or a witness is adequately covered under section 30 and need not be included in 22.

On the first point about the changing the wording of substance of records, we're of the view that it should not change. All relevant information created or gathered is, we submit, too broad. The records that are, and ought to be available to the parties to an investigation, are those records on which findings and decisions are based which we submit constitutes substance of records.

Requests for incidental records of investigator's notes, e-mail and drafts may be sought by a party to an investigation but should be considered in the light of other exceptions to disclosure, including advice, recommendations, solicitor-client privilege, and the exception to disclosure of personal information in section 30.

Next we would like to talk briefly about section 27 which is on page 16, I believe, of the written submission. Section 27 is the mandatory exception to disclosure of information that would harm the business interests of a third party.

And at Memorial University, we engage in a number of different types of contracts and there is a very wide range. And just to offer you a few examples of the types of contracts that we may enter into, they range from professional services, food services, credit card services, office supplies and equipment, international affiliation and exchange agreements with universities, academic program reviews, contract with sponsors, of research, software service agreements, clinical fieldwork, education agreements, and many others. And so the point that we would like to make to you is that at times outside organizations are competing for Memorial University, or excuse me, for Memorial University business, but other times, in other cases, it is the university that is competing with other universities and other organizations for a contract. And for example, for major research sponsorships or offshore training contracts. And so, therefore, as such, we are aware, very much aware that both as the public body having records responsive to an ATIPP request and the needs of a third party, but also when the university is a third party and another organization receives requests and so the university then is seeking, perhaps, and I say

perhaps because often it is the case of that's no problem. We don't mind. Release it. But there is always the potential that it is the university that's protecting confidential information.

C. WELLS:

Without dealing at all with the specifics of the case that is presently awaiting decision I believe by the Court of Appeal or by the Trial Division, I have forgotten which.

R. THORNE:

The Trial Division.

C. WELLS:

The Trial Division. Without dealing with that specifically but dealing with the principle involved, the university does control the expenditure of very significant sums of publicly provided money. While in the ordinary course of carrying on its operations, the university invites proposals or bids for supplies and goods and services and so on, it makes a decision. Is there any reason why it shouldn't provide the detail of that information merely because the third party wants to protect its position? Third parties doing business with government, it's been suggested to us that third parties doing business

with government agencies and public bodies generally ought to expect that they have to disclose these things. That's normal price of doing business with public bodies.

R. THORNE:

We agree.

C. WELLS:

You agree?

R. THORNE:

We agree.

C. WELLS:

I don't need to ask you anymore because I don't want to trespass on the court decision, but I'm glad to have your expression of agreement with that.

R. THORNE:

And so the only thing that I would say to qualify it and it is not a qualification per se, it is just an aspect, I suppose, of sections 27, 28 and 29 together, and together with section 64, the burden of proof, and so that is the other thing that we would like to draw to your attention and ask you to consider, as you carry out your work.

First of all, like section 18, having the

confidences, and section 30, personal information, section 27 is a mandatory exception to disclosure. And so it says that basically the public body is prohibited from disclosing information that would harm a third party's business interest. And so just as a matter of course, we would say well, then, obviously the legislation intends the public body to assign some particular importance to mandatory exceptions to disclosure. Section 28 then requires that when the head of a public body is considering giving access to a record that they has reason to believe they contain information that could a harm third party's business interests, the third party must be notified and given an opportunity to make representations.

If the third party's position is that the information ought not to be disclosed, then the public body has a decision to make. They either accept the third party's representations and deny access, or they say notwithstanding your representations we've decided we are going to give access regardless because we're not persuaded that your business interests will be harmed.

If the university or the public body proceeds under the first option and the applicant then requests a review by the OIPC, the burden of proof is on the public body to show that this third party's business interests would be harmed by disclosure. And that, for a number of reasons, puts the public body in a very awkward position because for one, and given the scope of the types of contracts that a public body would enter into, we cannot and should not, and should not use public resources to be experts in whatever particular entry or field or sector that that third party operates in.

C. WELLS:

On mainly the observation it would seem logical that it would be the objecting third party who would have the burden of proof. Doesn't it?

R. THORNE:

Yes.

C. WELLS:

And that's the position the university is submitting?

R. THORNE:

That is where it does put us in an awkward position. And so for reason it puts us in an awkward position because we have to make a decision, is this person's

representations about the harm to their competitive position persuasive? Are we persuaded? Well, how are we supposed to know?

C. WELLS:

And not only that, you may be of an entirely different view.

R. THORNE:

As well.

C. WELLS:

So, yes. I can see your concern. And in the ordinary course, the ordinary principle of law is that the party that asserts a position has the burden of proving it. And this appears to be contrary to that.

R. THORNE:

I suspect, too, that many third parties would prefer that the burden of proof lie with them and not this publicly-funded organization that knows nothing about they're particular industry. They would rather hire their own lawyer or their in-house counsel to represent them in this manner.

C. WELLS:

They are not much bothered by preferring that so long as they have the right to intervene, which they do.

R. THORNE:

Yes, that's true.

C. WELLS:

So they have the right as an intervenor.

R. THORNE:

That's true.

C. WELLS:

But your suggestion is that it should be the third party that has the burden in the first instance?

R. THORNE:

I think so. And the other thing, a couple of other points about that is that if the public body has that burden of proof there is a question, I think, that needs to be asked about not only can the public body fairly weigh those competing interests of the applicant and the third party, but there are ongoing contractual obligations. So there is a contractual relationship between the public body and the third party. And depending on the nature of the contract, it could mean that representatives of the third party are in very close regular contact with members of the university and they have a working relationship in fulfilling their respective obligations under the contract. And so I don't even know if the public

body can fairly weigh and make a decision.

C. WELLS:

It seems that all so common sense.

R. THORNE:

That's right. And we could, of course, make a decision that notwithstanding the third party's representations that we are going to disclose regardless, and regardless of whatever business or contractual relationship we have, and the OIPC in a previous decision did note --

C. WELLS:

Is there a requirement that you allow the third party 10 days to appeal --

R. THORNE:

Yes, 20 days.

C. WELLS:

Twenty days to appeal to it.

R. THORNE:

Yes.

C. WELLS:

So you can't just arbitrarily make a decision.

R. THORNE:

No, no, absolutely not and they are given 20 days. And it's actually interesting, and it was only very

recently that I noted this in the ATIPPA. They are given 20 days to seek a review of the decision of the public body, excuse me, to seek a review by the OIPC and it doesn't actually provide them an avenue to go straight to court to seek a review. So their first and only step is to go to the OIPC and only then can they proceed to court. I think that we could, in fact, shift the burden to the third party by making a decision to disclose up front. I don't know that that would necessarily save us from being involved then in a court case, should it go there. And I don't know that it would do much, that it would benefit the contractual relationship that exists and needs to continue to exist between the public body and the third party.

So those are our thoughts about section 27 and the burden of proof and I hope that you will think about them as you deliberate.

The final point then that I would like to make on behalf of Memorial in our submission is with respect to section 30. And so I'm referring you now to page 18 of the submission. And I would like, as we did in

our submission, I would like to begin with a quote from an employee who said to me, "It blows my mind that someone could request information about me and it could be provided by the university without me ever knowing about it".

Our concern with the current wording of section 30 is that it doesn't make an allowance for third party consultation in respect of personal information. And we submit that like the comparable legislation in British Columbia and in Ontario, the ATIPPA should be amended to provide for notice to a third party when a public body is contemplating disclosure of information that it reasonably believes may be a violation of the third party's privacy.

And if I may, it is just very short. The provision in Ontario's statute, for example, reads, "Before a Head grants a request for access to a record, that is personal information that the Head has reason to believe might constitute an unjustified invasion of personal privacy for the purposes of clause 21(1)(f), the Head shall given written notice in accordance with subsection (2) to the person to

whom the information relates."

And if I may ask you to perhaps change the lens, and I don't want to assume that you are viewing it through a particular lens, but I would like to suggest that we maybe change the lens through which we are viewing this question and this recommendation that we are posing, which is that third parties have an opportunity to have some standing when a public body is making a decision to disclose information that could be a violation of their privacy.

When I deliver privacy training at Memorial University, and in respect of other presentations and so on that where I've had occasion to speak about this, when we talk about a privacy breach in accordance with policy at MUN and in accordance with best practices in respect of privacy, when it is shown or when we know that there has been unauthorized access to somebody's personal information our position is and best practices are that the people affected by that breach are notified and given an opportunity to consider the harm that's been done to them. And the principle that underlies

it is that they are the only ones who really can know whether or not they are harmed by this breach. Although we think of identity theft as being one of the biggest risks, the other risks associated with a breach could be harm to reputation, harm to relationships, harm to opportunities for employment or other types of opportunities. And so, it is only the individual who really can say with any certainty what their harm may be or what harm may be caused to them by a particular privacy breach. And so if you look at it through that lens I think that and I hope that you will give some consideration to our request that there be an amendment that allows for notice to third parties so that they themselves can at least have some ability to address a potential disclosure of personal information about them by a public body.

That concludes the sections of the submission that I wanted to highlight this morning. I thank you very much and, obviously, if you have any questions at all, please do.

J. STODDART:

Yes, thank you very much for the continuance of your presentation. On your last recommendation on section

30, I don't really understand what's happening. The quote from the employee suggests that you are releasing personal information about employees. There are very few exceptions in which you may disclose this and they are laid out in section 39. So, and I presume you are following that very strictly so I am not quite sure what the issue is.

Secondly, is there anything in the Act that prevents you from going to that employee and saying we've had this request for information and, again, I'm not sure whether it is personal information or it is information in which the employee thinks that he or she has some kind of interest. What stops you from consulting them now?

R. THORNE:

There is nothing to prevent a consultation with an employee. There is no provision. I mean it does provide that with the employee's consent you can disclose but if the employee, for a reason known only to them, if an employee decides that they do not consent and they expressly don't want the public body or the university to disclose the information, we have to tell them we're sorry, we have a differing

view. We feel that this is not your personal information. That this is information that is permitted to be disclosed and ought to be disclosed, and then we would go ahead and make the decision to do that.

I think that in making the recommendation that there be provision to allow for consultation is not meant, and I am sorry if it suggests that it does, it is not meant to suggest that employees need to be consulted on every decision in respect of information about them. And I think that would grind the system to a halt. So that's not what we're proposing. It is simply to say that in assessing whether or not something is or isn't personal information, there comes a point in respect of certain types of information where it's not immediately clear. And despite the comprehensive test in section 30 there is some question in my mind, for example, as to where does it cross the line? So is it personal? Is it not? Is it work product? Is it not?

C. WELLS:

Can you identify the exception listed in subsection (2) that concerns the university? Basically,

subsection (1) prohibits the release of third party information. Then it provides a disclosure that would be an unreasonable invasion of third party personal privacy. Then subsection (2) provides that disclosure in certain circumstances and not considered an invasion of the third party personal privacy, and it lists 10 or 12 exceptions. Is there any particular exception that you're concerned about?

R. THORNE:

We have not identified a particular part of section 30 that has sparked this recommendation. There have been some issues that we have dealt with that certainly have caused us to believe that there ought to be some provision for third party consultation. I don't know and, indeed, I have not studied and I don't know the history behind Ontario and British Columbia adopting that sort of provision and whether there are other provinces that do. They may be only one two. For us, we have had occasions where it was not clear. So, notwithstanding all of the guidance that is in section 30, there have been some occasions for us where it was not clear whether the information ... and so, in deference, as I say, and attaching importance to the privacy and dignity of individuals,

we believe that there are occasions when the consultation is appropriate and that as a third party the employee have the ability to then perhaps seek intervention by the Information and Privacy Commissioner or otherwise have some ability to make representations.

C. WELLS:

As Ms. Stoddart suggests, you've got sort of 30 days and if you really think there is a potential in this particular instance that you're thinking about doesn't fit clearly, there is nothing that prevents you from making that consultation. And then that helps inform your opinion that it would be an unreasonable invasion. If you do that, you can refuse it.

R. THORNE:

Yes.

C. WELLS:

And if the applicant wants then he can go to the Commissioner and say hey, Commissioner, here is what I did. And here is why we did it.

R. THORNE:

And in making this suggestion, it is not a complaint about section 30. We were very pleased when it was

added in the 2012 --

C. WELLS:

You thought it might work better the other way.

R. THORNE:

Well, I think that, as I said, there are occasions when we would like to see the ability for the employee affected to be able to have some standing themselves in respect of how the decision is made. And I guess perhaps --

J. STODDART:

Sorry, did you say, I'm not sure I heard you.

R. THORNE:

Sorry.

J. STODDART:

You would like the employee to have some standing.

R. THORNE:

Some ability under the Act. So in the same way that a third party business --

J. STODDART:

Contests your conclusion?

R. THORNE:

Yes.

J. STODDART:

Yes, okay.

R. THORNE:

And I think that it reflects, too, if we go back to the sort of environment of the public body that I work for, where there are, as I said earlier, different types of constituencies. And so the rights of individuals are important to be protected and this kind of a provision could assist them. Now we put it there for you to consider as you do your deliberations and analyses, and you may have better access to resources in terms of comparative work that's been done of legislation in other jurisdictions, and so we put it there as something to consider. And it may be that overall, and broadly speaking, it is not something that you would like to recommend but we wanted to get it before you to consider.

C. WELLS:

I would draw to your attention that you have the option to give the employee standing by consulting them. And if you did that and the employee objected, I cannot imagine any Commissioner or any court that would not accord standing as an intervenor to such an employee. The information is about that employee.

R. THORNE:

That's true.

C. WELLS:

It just wouldn't happen, that that Commissioner or a court wouldn't accord standing.

R. THORNE:

Yes, true.

C. WELLS:

It doesn't appear to be a major problem but we'll take into account your representations.

R. THORNE:

Thank you.

C. WELLS:

Do you have anymore questions?

D. LETTO:

No, I'm good.

C. WELLS:

Well, that does it for us and we thank you very much. You look like you expressed a sigh of relief.

R. THORNE:

It was a sigh of relief.

C. WELLS:

I apologize to you if our carrying out our function has caused you any discomfort.

R. THORNE:

No, not at all.

C. WELLS:

But I want to thank you and Ms. Smith and Dr. Cooper for the effort you've made in preparing this presentation and in explaining the university's position to us. And I hope you understand the thrust of our questioning is focused on trying to come to the right conclusion, weighing all the disparate factors that bear on this issue. Thank you again very much for your presentation.

R. THORNE:

You are most welcome.

C. WELLS:

I appreciate it.

J. STODDART:

Thank you.

(Off the Record)

C E R T I F I C A T E

I, Beverly Guest, of Elite Transcription, of Goulds in the Province of Newfoundland and Labrador, hereby certify that the foregoing, numbered 1 to 110, dated August 20, 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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