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

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Presenter: Ms. Gerry Rogers, MHA, St. John's Centre

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

Chairman Wells: Ms. Rogers thank you for coming and we're happy to hear from you.

Ms. Rogers: Good morning. Thank you for the opportunity to be here on behalf of the New Democratic Caucus to present our concerns regarding the current Access to Information and Protection of Privacy Act as amended in June 2012 by government's Bill 29. And I also want to congratulate the committee on its commitment to openness and transparency and it's always a better environment to work in. Access to Information and Protection of Privacy Legislation must balance too often conflicting rights, the public's right to government information versus the rights of individuals and sometimes government and businesses to privacy and working towards establishing that balance is I'm sure why we are all here today.

There were problems we all know with the Province's Access to Information and Protection of Privacy Act before Government introduced Bill 29 in June 2012 but Bill 29 destroyed any balance the original legislation may have had. With Bill 29 we feel that Government damaged its own credibility and it undermined public trust and it also added to the democratic deficit experienced within our Province. In our opinion this legislation is in need of re-drafting. The egregious and restrictive amendments brought forward by Bill 29 must be removed and other changes must be made to make this legislation more balanced.

We hope this committee will consider some of our suggestions on re-drafting the ATIPP Legislation to better serve the people of the Province. This is an opportunity to get things right. We will outline our concerns with the Act as it now stands, illustrate those concerns

with some practical examples of unwarranted Government secrecy we have encountered as a caucus and offer recommendations on how to possibly strengthen the Act.

Our main objections to amendments included in Bill 29 and in some cases existing sections of the Act are some of the following: number one, the amendment specifically making Ministerial Briefing Paper secret, section 7(4).

Expanding the definition of cabinet confidences to cover practically any information Government decides must be kept secret, section 18.

Permitting a Cabinet Minister to keep formal research and audit reports secret for up to three years, section 21(b).

Enabling bureaucrats to block the release of anything they want to keep secret, section 21(c).

Increasing secrecy for businesses that deal with Government and that are contracted to provide goods or services paid for tax by tax dollars, section 27.

Barring the publication of natural resource royalty information specifically except when that information is non identifying aggregate royalty information, section 27(2).

Introducing a frivolous or vexatious clause, section 43.1(b) which allows Government to reject any ATIPP request so deemed without any guidance as to what the term encompasses.

Weakening the powers of the Information and Privacy Commissioner and maintaining the two year term of the information and Privacy Commissioner.

Some of these issues have seriously hampered our ability as opposition MHAs to perform our roles in the House of Assembly as critics and have interfered with our role to debate public policy and have even curtailed our ability to perform our duties as MHAs on behalf of constituents. The point of this exercise is to make recommendations that will make public bodies accountable to the people that they serve, allowing the public all information except that which would affect individual, or in some limited cases, Government or businesses right to privacy.

Privacy once breached can never be restored. It is important that it is protected. The challenge is to decide where that balance lies. We will discuss each of these in turn but first I would like to make a quick comment on the introduction of Bill 29 for debate in the House. When Government tabled Bill 29 in June 2012 we were shocked. The reaction from the opposition parties, the media and the general public was immediately and strongly negative. I can remember receiving the Bill on a Friday; on Friday evening at 05:00 o'clock sitting in our offices in our caucus as we begun to understand some of the implications of the amendments saying, "Oh my God, this is serious."

With this Bill, Government granted itself the ability to keep secret practically any information it wanted to keep secret. Government reduced the power of the Information and Privacy Commissioner. Government paved the way for businesses who deal with Government to keep more information about their dealing secret. Government reversed court cases it had lost. As this Province is the only jurisdiction in North America lacking a properly functioning legislative committee structure, the legislation came to us as a complete surprise. We were given this substantive and sweeping Bill only days before debate in the House.

There was little doubt that as an opposition party the only option left to us was to try and stop this legislation from being passed and that meant conducting a filibuster. Even though we know we couldn't stop it, we could heighten public awareness about the importance of the legislation that was being placed before the House. The implications for the people of Newfoundland and Labrador of these regressive amendments were profound. With Bill 29 the Progressive Conservative Government broke its own commitment for greater transparency, accountability and freedom of information which it once claimed was the hallmark of its Government.

Government also damaged the public's trust.

Repeal Bill 29 became a popular rallying cry and a focal point for people's anger at what they saw as an arrogant, out of touch and secret Government. This was the impression that was left. We would like to outline some of the objections we have with the Access to Information and Protection of Privacy Act as it is currently written and we will list them numerically as they appear in the current ATIPP Act. While doing this, I will also offer practical situations where we as

opposition MHAs and as people elected to represent our constituents have been stopped from performing our duties by the increased secrecy Government has granted itself with the amendments contained in Bill 29.

Number one: amendments specifically making Ministerial Briefing Paper secret which is Section (7.4). The then Minister of Justice said in June 2012, when Bill 29 was introduced to the House, that part of the reason Government brought in this amendment was to address the chill that releasing such notes would create for officials advising their ministers.

Ministerial briefings are designed to be a thorough and frank assessment of a Government department at a particular period in time. They provide invaluable information to opposition members, the media and the general public. It is a chance to see how Government is performing and the challenges that are set out before departments. Review Commissioner John Cummings said in his 2010 report, "The purpose of the Act is not to make things easier for civil servants." He also noted that providing information to the public is as much a part of the civil servant's responsibility as everything else that they do.

Most other jurisdictions in Canada managed to operate without the restrictions outlined in the current iteration of the ATIPP Act. Our recommendation is that Section 7.4 should be repealed. This Section could also be re-drafted with provisions to protect sensitive information contained in briefing papers while allowing the bulk of the information to be released. The power to decide what constitutes sensitive information when there is a disagreement

should be placed back in the hands of the Information and Privacy Commissioner.

Number two: expanding the definition of Cabinet Confidences to cover practically any information Government decides must be kept secret, section 18. The expansion of the definition of Cabinet Confidence was problematic before the introduction of Bill 29, as was witnessed by the Auditor General Wayne Loveys' frustration and accessing infrastructure spending information. In January 2012 Mr. Wayne Loveys submitted his annual report on departments in Crown agencies focusing on Government's five billion infrastructure strategy.

He noted in his report that Government would not provide the information he requested to conduct his review and how those billions of dollars were spent. Mr. Loveys filed a formal complaint with the House of Assembly citing a denial of access to information. He noted that Government was using a definition of Cabinet Secrecy wider than has been seen in recent memory. Less than six months later Government would enshrine this expansive definition of Cabinet Secrecy in legislation with Bill 29. With the passing of Bill 29, anything Government deemed a Cabinet Confidence became a Cabinet Confidence.

The principle of Cabinet Confidence is an important one which has evolved in line with our form of parliamentary democracy. While it must be preserved, it must not be abused and we need safeguards in place for that. One example that I would like to use is Family Violence Intervention Court. Government decided to cancel an innovative and a progressive new court system, the Family Violence Intervention Court, which was one of the most effective programs

that dealt with the root causes of domestic violence. The court was praised by everyone. It was praised by the judiciary, by the legal community, by the police, by Child, Youth and Family Services, by Victim Services, by prosecution, by defense. It took a long time to convince all stakeholders about the benefits of the court and the court was working well.

So the court was praised by everyone involved and was doing a great deal to address a serious public problem in this Province, the high incidence of domestic violence which is almost exclusively perpetrated on vulnerable women and children. We asked Government after the cancellation of the court, we asked Government to provide information and why it cancelled this new court which was doing such important work. We requested a copy of a departmental assessment we understood had been written on how the court was functioning.

Our ATIPP requests were refused on the grounds of Cabinet Secrecy. We were informed by several stakeholders that the Family Violence Intervention Court was operating fully, it was achieving its goals and it was ready to be expanded and instituted as a permanent program. Why were we refused this information? It is these reports that Government supposedly uses as a basis for its decisions. This was an internal review and a report to assess how the court was doing.

The definition of what constitutes Cabinet Confidentiality must be clearly defined. Government's reach should not extend to withholding information which simply…by the fact that it may embarrass it. This court was cut in a very…on budget 2012/13 in a rash of very quick budget cuts to the Department of Justice and we are still asking… that the Government has given us three

different…on different occasions, three constantly evolving excuses for why the court was cut but we cannot have access to the actual basis, the empirical evidence or basis on which the court was cut.

Muskrat Falls, perhaps one of the most outrageous results of the amendments brought in by Bill 29 was the cloak of secrecy the Progressive Conservative Government has been able to throw over all parts of their Muskrat Falls hydroelectric project. Without question this is a single biggest investment in the history of the Province. In our opinion, Government passed Bill 29 to ensure no substantive information regarding this project can be released without its permission. In effect, people who are locked into paying off this project over the next 50 years will be kept in the dark regarding anything about the project which Government doesn't want them to know.

While Nalcor is specifically excluded from ATIPP by provisions in the Energy Corporation Act we did attempt to get information on what 664 million dollars Government granted Nalcor in 2012 by way of the Department of Natural Resources would be used for. We were refused under Section 18, Cabinet Confidences and Section 20, Policy Advice or Recommendations. I also asked a number of times in the House when Government just recently privatized a number of group homes that were taking care of some of our most disadvantaged youth and our youth with the most complex needs. The homes were privatized and handed over to a private corporation who were hiring staff at $13 an hour rather than continuing on with staff who had extensive experience, who are well trained. I continually asked Government what was the basis on which they made that decision and also whether there was a transitional protocol for the protection of transferring these youth from one system of care to another.

I did not get any answers. We did not file an ATIPP. We've come to the point where we believe that it's pointless in terms of getting information. Our recommendations are that the committee should make recommendations to repeal this amendment as appears in Bill 29 and return to the original draft extant before Bill 29. Cabinet Confidentiality is well protected by case law and parliamentary practice. Where there is a disagreement, we recommend the Information and Privacy Commissioner be given the authority to rule on whether information falls under the definition of Cabinet Confidentiality.

This would remove the risk of undue political interference from the decision to deny the release of information.

Permitting a Cabinet Minister…number three: permitting a Cabinet Minister to keep formal research and audit reports secret for up to three years. This Section states that, 'The head of a public body may refuse to disclose an applicant information that would reveal the contents of a formal research report or an audit report that the opinion of the head of the public body is incomplete unless no progress has been made on it for more than three years.' Formal research and audit reports are done to review Government operations and make recommendations for improvement of services. Their contents can inform public debate.

It is a duty of every opposition MHA to keep Government accountable for its actions. To deny opposition MHAs the information they need specifically in the form of formal research and audit reports paid with public funds is to deny them the ability to

debate public policy effectively. Without this information, meaningful public debate is hindered. I also…another example of that is the Residential Tenancy Act. In the Province we are currently facing a housing crisis province wide. Government commissioned a review of the Residential Tenancy Act in 2012. We keep asking for the report of that review and we have absolutely no access to that at this point.

Chairman Wells: And is this the basis on which access is refused, that it's incomplete?

Ms. Rogers: Yes. Leaving the release of a report up to the head of a public body allows too much latitude for political manipulation. We also know that there was a thorough report…research and report done on sexual exploitation of youth and human trafficking here in the Province. Again that report has been withheld. There was another report on housing and homelessness, that report too has been withheld and these are issues that have great effects on the people of the Province. Our recommendations are that Section 21(b) should be repealed. The entire Section 20 should be re-drafted to better clarify what information should be exempt from access and why. And once again any disagreement should be decided by the Information and Privacy Commissioner where it belongs.

Number four: enabling bureaucrats to block the release of anything they want to keep secret, section 21(c). The Section allows the head of a public body to refuse to disclose to an applicant, information that would reveal (c), consultations or deliberations involving officers or employees of a public body, a minister or the staff of the minister. As if the expansion of the definition of Cabinet Confidence was not bad enough, this amendment allows a sweeping definition of what

can be kept secret. A consultation or deliberation could constitute anything. This Section alone allows Government sweeping powers to keep any information they may find inconvenient or embarrassing secret from the public.

Our recommendation is that this clause should be repealed and replaced with a more narrow exception to access of policy advice or recommendations. We further recommend in the event of a dispute the Information and policy, a Privacy Commissioner be authorized to rule on whether or not the contested information should be kept secret.

Number five: increasing secrecy for businesses that deal with government and that are contracted to provide goods or services paid for by tax dollars, section 27. With Bill 29, Government permits businesses to be more secretive about their dealings with Government. The commercially sensitive information of businesses was already well protected in the original ATIPP Legislation. The Supreme Court of Canada issued a ruling on exemptions in the Federal Access to Information Act protecting third party commercial information in the possession of a Government institution from disclosure.

Referred to as the Harm's Test, the Supreme Court provided guidelines for exemptions from disclosure where such disclosure could cause material or financial loss to the third party, prejudice its competitive position or interfere with its negotiations.

These guidelines are perfectly adaptable to the Provincial ATIPP legislation as the original legislation reflected. There is a balance

between the right of a business to protect its interest and the right for the public to know how businesses conduct themselves. A clear example of the importance of ensuring this balance is in place in legislation in the fracking debate in western Newfoundland. Our caucus has serious concerns, the current Access to Information and Protection of Privacy laws will allow government to block public knowledge of the chemicals that would be used should hydraulic fracking go ahead in the Province.

If the definition of proprietary information includes fracking chemicals used by oil companies, then the public would be denied information on what chemicals were being injected into the ground where they live. This is a serious public health issue as these chemicals can find their way into the ground water. From an occupational health perspective, were an accident to happen without this information, emergency responders would not know how to respond in a manner that protects the health and safety of workers. This could also hamper disaster response.

The decision regarding whether to allow fracking can only occur after an informed public debate. This cannot occur without knowing exactly the implications of hydraulic fracking which includes knowing what chemicals would be used in the process. Any issues concerning public, occupational or environmental health cannot be kept secret to protect so called third party proprietary interest. In another example, the Newfoundland and Labrador Supreme Court is currently considering whether the price of office supplies bought by Memorial University is off limits for public scrutiny.

The business that was successful in winning the contract is attempting to argue this information as proprietary. We see no

reason why the cost of items purchased with public funds should remain secret. The cost of doing business with Government should include having to accept the fact that public has a right to know how its money is being spent. Our recommendations are, we want to see the imbalance in this legislation as it currently exists, fixed. The Supreme Court of Canada offers excellent guidelines and should provide an excellent starting point. This could be remedied by repealing the amendments made under Bill 29 and returning to the original wording of the Act.

Number six: barring the publication of natural resource royalty information specifically except when that information is non identifying aggregate royalty information, section 27(2). The public has the right to know what value they are deriving from contracts Government makes on their behalf with companies that profit from the extraction of publicly owned resources. It is outrageous that the public is denied knowledge of what value they are receiving for their resources especially in the case where those resources are non-renewable. Our recommendation is that Section 27(2)(b) repealed and the original Section 27(2) re-introduced.

Number seven: introducing a frivolous and vexatious clause, section 43.1(b). Allowing Government to reject any ATIPP request so deemed without any guidance as to what the term encompasses. There is no definition as to what constitutes a frivolous or a vexatious request. So the language of this clause is vague and permits great latitude in interpretation and what would be the legal definition of a vexatious request for information.

The recommendations, this clause Section 43.1(b) must be repealed or strong definitions of how the words frivolous and vexatious apply

must be added with the power to decide on the issue once again given to the Information and Privacy Commissioner.

Number eight: weakening of the powers of the Information and Privacy Commissioner. The Information and Privacy Commissioner's power to control how information is released was curtailed by Bill 29.

Solicitor-client privilege: the commissioner took the Provincial Government to court for the right to view documents Government said were protected by solicitor-client privilege. He won the case on appeal. Bill 29 in effect reverse that decision through Section 52(2). The concept of solicitor-client's privilege…solicitor-client privilege, the right of a lawyer to keep any information given to him or her by a client strictly confidential is a cornerstone of our legal system but like Cabinet Confidences, a cornerstone of parliamentary democracy, it must be clearly defined to prevent the possibility of abuse or misinterpretation. The legislation as currently written opens the possibility for an abuse of this privilege. Recommendation 52(2.2) be repealed and that the original 52(2) which was in the Act before the Bill 29 amendment be re-instituted.

The power to order the release of information: when a disagreement arises between an applicant and Government regarding access to information, the decision of what information can be made public should be made by the Information and Privacy Commissioner. As the legislation now stands, the Commissioner can work to resolve a contested information request informally. If that fails the Commissioner may issue a report with recommendations. If that fails the Commissioner may try going to court. We believe the Commissioner should have a larger and more powerful role in handling the request for information. In our view the Information

and Privacy Commissioner is the best person to arbitrate contested access to information issues. We recommend strengthening the Commissioner's powers, including his ability to issue directives rather than to only commit…recommend the release of information.

Our recommendations: the Commissioner should be given the authority to rule on whether information falls under the definition of Cabinet Confidentiality. The Information and Privacy Commissioner should be given the power to order the release of information.

Number nine: maintaining the two year term of the Information and Privacy Commissioner. The current commissioner Mr. Ed Ring and his office has, in our opinion, done exceptional work during his tenure. Section 42.2(1) provides for a two year term for the Commissioner. This is an exceptionally short leash for a person in his position. Other equivalent positiosn such as the Citizen's Representative, his position is six years or the Auditor General; his or her position ten years have longer terms. There is no reason for this short term and this Section should be amended to extend the term of the Information and Privacy Commissioner for a period of at least five years.

Our conclusions: we would like to conclude with a few practical observations regarding the Access to Information and the Protection of Privacy.

Earlier this year the newly minted Progressive Conservative Premier Tom Marshall decided to address the overwhelmingly negative public opinion about the Bill 29 amendments brought in by this Government. His strategy was to strike this committee a year ahead of the legislative five year review and this is why we are here today.

Clearly Bill 29 was a political misstep. Government is now working hard to project the image of openness and accountability but achieving a balance between Access to Information and the Protection of Privacy is not a public relations exercise.

There is a difference between the volume of information made available by Government and the quality of that information. Government may make available reams of reports and statistics on a wide variety of issues, but using an expanded definition of Cabinet Confidence to hide from public eyes information regarding matters of important public policy, is neither open nor accountable. There is a difference between appearing open and accountable and actually being open and accountable. Government's role is not to protect itself from its citizens but to serve them to its best ability.

Our hope is this committee understanding this difference will make recommendations to amend the legislation to better establish the balance between openness and the protection of privacy. Making Government accountable is a part of the point of the legislation. We do have some privacy concerns. Our success as an opposition party in getting information from Government since the passing of Bill 29 has been uneven. We have even seen Government responses to our request for information run from the petty six pages of toner where all six pages were just complete black toner to prompt and professional responses with many responses following…falling anywhere in that spectrum.

While not directly related to the legislation. We would like to offer examples that speak to the culture of secrecy and control of the current Government.

In making ATIPP request we have experienced frivolous procedural delays, outlandish expense quotes for the gathering of data and illegal delays and responses, the legislative 30 day requirement for response by Government is sometimes ignored. When we do get a successful reply, it is also on the last day of the required 30 day or the 60 day requirement. Another barrier to our ability to work on behalf of our constituents is Government's unwritten policies dictating all requests for assistance or information on behalf of our constituents go through the Minister's political staff.

We believe that this comprises the inherent right to privacy of our constituents. There is an unwritten policy now when I, as an MHA, need to access information on behalf of a constituent whether it be through income support, whether it be through educational information that I am now required or health information, I'm now required to go directly to the Executive Assistant of the appropriate minister which is a political appointment thereby endangering the right of privacy to my constituents by placing their personal information, some of it which is so incredibly intimate and personal before the eyes of a political appointed Executive Assistant bypassing the appropriate worker who is working on the ground, in the field who actually has the relevant information.

Sometimes our requests are simple, simple in terms of we need to know what is the new timeframe for when the information that the constituent needs or what can be done to help a specific constituent with a need. So that lays their personal intimate information again before an unnecessary set of eyes. Another barrier to our ability to work on behalf of our constituents again is Government's unwritten policy dictating all requests for assistance or information to go

through the Minister's political staff. That is what we are forced to do.

We believe this compromises the inherent right to privacy of our constituents. Frontline workers are properly trained to deal with many constituent complaints, political staff often are not. Although Government denies this policy exists, in practice this is the case.

In 2002 the ATIPP legislation was debated in the house. The minister at the time said part of the reason for the legislation was to remove the barrier of having to go to court. With the amendments through Bill 29, the barrier to access to information is reinstated and the burden on the average citizen to appeal to the courts is in most cases insurmountable.

Bill 29 has added to the incredible democratic deficit to this Province. While we cannot legislate a change in culture, we hope that the committee will see our point and make recommendations that would promote the prompt and professional response to request for information.

On behalf of the NDP Caucus, I'd like to thank you very much for the opportunity to present to you to today and thank you for your dedication to this cause. And we certainly look forward to your final report and to your recommendations and I would be happy to answer any questions that you may have.

Commissioner Stoddart: On behalf of all of us, thank you very much for this presentation. I'm interested in many things in your

presentation but I'm particularly interested in the last point you made about when your constituents write in to you requesting help and then your attempting to get help for them in various branches of Government that there is a de facto policy that it has to go through the relevant minister's political staff. I was just looking in the Act and seeing where there was an exemption for members of the House of Assembly to deal with that. That's perhaps it's because some people write in to and get in touch with you and so on but I don't know how that exemption could apply to the political staffers. I don't know if anybody has ever discussed this. I mean do they…people usually write in, in my experience about very delicate issues, their health issues, their pension issues and so on and I don't know how political staffers looking at this would be allowed to do so in light of the Act. What are you told on that?

Ms. Rogers: We are told that this is simply the way it is and if we do not …that field...workers in the field, workers on the ground who we were able to deal with before are no longer permitted to speak to us nor speak to our constituency assistants that in fact it's just the way it is and in order for us to be able to get help on behalf of our constituents we have to follow this unwritten protocol and policy.

Chairman Wells: Well I need you to clarify something for me. Can I just pick up so I don't lose it … when you were delivering your presentation you said Government denies that this situation exists.

Ms. Rogers: No, that we've asked for the written policy and they say that there is no written policy.

Chairman Wells: Okay, so they deny that there is a written policy but they don't deny that the practice is followed…

Ms. Rogers: Yes sir.

Chairman Wells: All right, that clears it.

Ms. Rogers: Well that one minister had denied that there was a written policy; however still within that minister's ministry it was still required that we go through the Executive Assistant. And I believe did we do an access to information on this as well? Yeah, so it places a great risk for privacy of our constituents what…and ministers will say, well the reason we are doing this is to streamline the process so we can make sure that…but also what it does is that it creates undue delays because it has to go through…first through the Minister's Executive Assistant. It's an appalling appalling non policy policy.

Commissioner Letto: Yes, you've put a lot of trust in the role a Commissioner can play in determining whether something should properly fall within the exemptions. Would that process work the same way as it does now with the kind of timelines that are in place or are those timelines necessary? I'm wondering if you can kind of consider that whole process when you put in a request and how much time elapses and then when the Commissioner would get involved let's say under your (inaudible).

Ms. Rogers: For the most part the information we will get when we do put in an ATIPP request is the information would come on the

30th day or sometimes there is… do an additional 30 day exemption and for…and then we would get the information on the 60th day.

Commissioner Letto: What do you think of that kind of timeline even to respond to you …

Ms. Rogers: I think it seems extraordinarily long and unnecessary.

Chairman Wells: How long do you think a minister would have to wait if he requested the same information?

Ms. Rogers: I would say he would get it pretty darn fast perhaps with people working overtime.

Chairman Wells: I would guess that you're right.

Commissioner Letto: So you would trust the Commissioner to kind of look at documents that public body says you shouldn't have and to determine whether or not a real exception should apply there?

Ms. Rogers: That is the role of the Office of the Information and Privacy Commissioner, as a watchdog as someone who has been entrusted with that role and again if the Commissioner's term is expanded that would at least expand over a political term of office.

Commissioner Letto: Is that the key to your say, five years at a minimum?

Ms. Rogers: At least, yes but also it takes a while to… I think to get your feet under you if you are new to that position and we know that that position is so very important and I think that we must see that office, hold it in absolute…it should be resourced properly and that we should treasure that office in terms of the place, the home to ensure that our access to information and the protection of people's privacy, that it's seated there. And for those reasons I think that it's the place where we should be able to rely on the expertise and the objectives and the goals and the mandate of that office to decide on these issues. Where else would we go?

Chairman Wells: Ms. Rogers, your whole presentation is almost totally consistent with what we've heard from others yesterday and the day before and there is not a great deal of differences on most points except on this one. Most that we've heard from suggested a longer term of five years, a 10 year term and suggested no re-appointment after a 10 or 12 year term. You've not done that, you've recommended a five year term and have not suggested that there be no re-appointment. Is there a reason for that difference between what you recommend and what others recommend and if there is, would you tell us?

Ms. Rogers: Yeah, our recommendation is just the absolute minimal in terms of where … I have no objection to a 10 year term, I have no objection to re-appointment or non re-appointment but at the very least it must be at the very least a five year term.

Chairman Wells: Is a…okay, so you're not recommending that there be opportunity for re-appointment or that it be 10 years?

Ms. Rogers: I am not…

Chairman Wells: You would accept?

Ms. Rogers: I would accept, yes. I would…

Chairman Wells: Would it be acceptable to you if it were say a ten year term with no opportunity for re-appointment?

Ms. Rogers: I would refer at this…defer at this moment to the exploration of best practices and what would seem most appropriate in our Province but at this point our recommendation is simply at the very minimum, a five year term.

Chairman Wells: Well let me just explore with you for a moment the pros and cons. You've explained your reasons for concern about the two year appointment with succeeding two year appointments and opportunity for re-appointment and how at the very least this can greatly adversely affect the perception of the independence of the Commissioner…

Ms. Rogers: That's right.

Chairman Wells: … if not the reality of it. And the reason for the 10 year appointment is it gives some security, ability and clear protection to a Commissioner to make the decision that he or she thinks fit in solely on the evidence before the Commissioner and the reason for non…no re-appointment is you can't have an expectation of re-appointment and you can't therefore cause a perception of making a decision that hopes for or expresses a hope for re-appointment. So those are the reasons for it. Do you have any concerns along those lines?

Ms. Rogers: Those are very interesting reasons and again I don't…at this point we have not discussed a very specific recommendation but I think that those recommendations and those arguments are very interesting.

Chairman Wells: Okay.

Commissioner Letto: You talked about the…being refused access to Ministerial Briefing Books and I think you're prepared to allow some information to be withheld and have the Commissioner decide what should they…in the absence of these briefing books, how else are MHAs to understand what the pertinent issues are in the department and where the pressure points are? Is there any other avenue as an MHA that you have explore that apart from asking questions in a question period?

Ms. Rogers: People within…aside from question period and as we know a question period isn't necessarily answer period, aside from ministers who are permitted to speak with us, other staff are not permitted to speak to opposition members aside from pre-ordained

briefing on bills that maybe come before the House, the only way we would have any information on what is happening within a department is when we submit an access to information or in Estimates as well.

Commissioner Letto: So if you were in the…let's say on behalf of a constituent to find out information about one of the Provincial drug plans I think there are two of them but…and you wanted to talk to the Director in the Department of Health about this or whichever department is in…what would happen if you called that person up?

Ms. Rogers: If I call a director, some departments they will say, "I'm sorry I'm going to have to speak to the Minister to see if I can speak to you."

Chairman Wells: Really? This is not just hearsay on your part, this is real and you have experienced it? If you wanted to know because a constituent called you, if a certain service program was still in place or when it was to become effective if it was proposed, you couldn't call somebody in the public service and find out?

Ms. Rogers: Sometimes we can get that information without having going through…without going through the Minister's Office but on many occasions, many occasions when I've attempted to meet with or speak with either junior frontline workers or senior officials I am told that this has to be cleared with the Minister first.

Commissioner Letto: I would like to get back to the briefing book for a minute because I think the impression that gets created when you

read the legislation is that somehow the briefing book is equivalent to a Cabinet document and I think you're saying from your access to previous ones and having seen what's in them that there may be some information that if you would speaking of strategy and direction might reveal some discussion and deliberation involving Cabinet but a lot of it has nothing to do with that at all. It's as objective an assessment if somebody can of the activities and duties that their department undertakes.

Ms. Rogers: Yeah and I think well the potential of the briefing books again is to give…it's a…perhaps not a thumbnail sketch, perhaps the whole hand sketch on the health for the certain department, on the priorities of a certain department on the challenges and all these affects service delivery and where the Province is going. What are the future directions of a certain department and those…that's important information in terms of our role as opposition and as elected officials. As elected officials I believe that in order to do our job, we also need to know what is happening in a certain department. What is the future direction? What are the challenges?

Chairman Wells: I take it you wouldn't disagree, then hearing that, you wouldn't disagree with redacting from that anything that was clearly an assessment of policy options open to the minister on a particular issue or anything?

Ms. Rogers: Well I think we are in a unique situation because we don't have standing committees. If we were to have standing committees, we would have a greater understanding or a greater knowledge, more information in terms of the directions that we may…and options and policy options that would be considered in

terms of major issues that are before us as a Province but because we have…we don't have that, we have no access…

Chairman Wells: Do you think that that justifies memorandum that a political issues dealing with or expressing the alternatives of the…policy alternatives that a particular political party maybe may bring forward or recommendations that you should have access to that as opposition members because you don't have committees in the House?

Ms. Rogers: No, I do respect the exploration of different politically motivated policy discussions but I believe that at Cabinet, in terms of looking at specific departments … so a briefing book that is about the Department of Health and Community Services for instance I do not believe that that's the place where political policy decisions are made but policy decisions that speak specifically to the department and to its mandate and how it's to serve the people of the Province.

Chairman Wells: Well maybe I didn't express my question adequately. Most of those briefing books would lay out the department or the state of the department and so on and that's the kind of information that you should have. Assuming that that was available and that wouldn't be excepted. Most of those would also say, the Government considered this point at that time and came to this conclusion and now that's come up again and those are the policy options summaries. Do you think he should have that too?

Ms. Rogers: I do because they are the basis on which decisions are made.

Chairman Wells: Okay.

Ms. Rogers: For instance if we were to look at the issue of…

Chairman Wells: Not everybody would share that view. They would think that that's Cabinet Confidences and policy guidance for Cabinet Ministers.

Ms. Rogers: Okay, for instance if we were to look at the issue of childcare in the Province and how the Province is going to address the issue of childcare, if there is a discussion about whether or not it should be simply in the hands of the private market or whether there should be a Provincial publicly funded, publicly administered childcare program that's universal, if that discussion is happening within the department I would believe that would be very important information for the public to know that this is…

Chairman Wells: Of course it is and I don't think that we would disagree with you but is it…you're not asking just for that information alone, you're asking for the Government's consideration of the pros and cons before it develops its policy on the issue and that's what I have a serious question about. I mean I don't see how Government can develop effective policy options and do its assessments and make its decisions or bringing these proposals forward until it's had a healthy debate within itself before it can then report…

Ms. Rogers: Absolutely.

Chairman Wells: This is our policy and we are going to bring a proposal to the House of Assembly for that purpose.

Ms. Rogers: Yes I respect that.

Chairman Wells: You were saying?

Ms. Rogers: Yes I respect that.

Chairman Wells: Okay.

Ms. Rogers: Yes.

Chairman Wells: Okay, all right. That's what I'm talking about.

Ms. Rogers: I guess for me the delineation would be that within a certain department that I wouldn't expect that there would be political decisions, political discourse about policy but rather that the discourse would be focused on what is the best option for the people of the Province in the time now.

Commissioner Stoddart: Ms. Rogers, you gave us some very interesting examples of how the law is currently interpreted to withhold reports. One of them I believe you said, sorry, reports or decisions. One the cancellation of Family Court was claimed to be

covered by Cabinet Confidentiality, another report that you understand exists on the Residential Tenancies Act is apparently incomplete.

Ms. Rogers: That's right.

Commissioner Stoddart: So that exemption was used. Was it used once or has it not yet been three years now?

Ms. Rogers: I have not filed an ATIPP request for that but this is questions that I have raised in the House. At this point I suppose we could file an ATIPP request but I doubt that would result in the release of any information.

Commissioner Stoddart: Okay, but you've been told verbally in the House that it's incomplete yet?

Ms. Rogers: Yes.

Commissioner Stoddart: Still, I mean. And what about these two other reports, Sexual exploitation in youth and sex trafficking and homelessness.

Ms. Rogers: Yeah these…

Commissioner Stoddart: Did you file an ATIPP report for these…

Ms. Rogers: No.

Commissioner Stoddart: Or were you told they were…

Ms. Rogers: That the sexual exploitation report was being withheld for the safety of some of the informants in the report although informants in the report do not have a problem with the report being released nor the women's community across the Province and organizations across the Province that work in this area who've also been asking for the report to be released because there are some very strong recommendations and they are a very clear expose of the problem.

Commissioner Stoddart: Did you ask that these parts that it's alleged would put informants into danger be redacted so that…

Ms. Rogers: Yes.

Commissioner Stoddart: And what was the answer?

Ms. Rogers: That the report is not going to be released.

Commissioner Stoddart: Okay and the report on homelessness.

Ms. Rogers: So far it hasn't been released.

Commissioner Stoddart: And again…

Ms. Rogers: It's not been released yet.

Commissioner Stoddart: What is the answer you're giving?

Ms. Rogers: That it will be released in a timely manner.

Commissioner Stoddart: Okay, thank you.

Commissioner Letto: You're the second person to appear today and the second person who said that you've come to the point where you believe it's pointless to file an ATIPP under Section 18, the Cabinet Confidences. How does that affect your ability to do your job as an MHA?

Ms. Rogers: I believe that it really affects…it curtails our ability to be able to do our job. That any member, any elected MHA has been elected by the people of the Province to serve their constituents specifically and without access to information that perhaps is a basis for Government's decision making, without accessing to information that gives us research and information on what is happening in the lives of our constituents, how government will respond to some of the great needs particularly some of our most vulnerable people that it curtails our ability to do our work absolutely.

Commissioner Letto: What's your opinion about the…if you were the body of information that's exempted under Cabinet Confidences, the size of that body of information?

Ms. Rogers: Could you ask that again please?

Commissioner Letto: Yeah. What's your…what thought do you have, Section 18 prevents people from giving access to any number of things and it's a very specific list but it's in some ways a very broad list. I'm just wondering what your opinion is about the…if you will the scope that's covered by that exemption.

Ms. Rogers: I believe it's untenable. It has no limits. It has no bounds. And I believe that it affects the general population's trust in Government. I think it has eroded the general population's trust in Government, its perception of rightly or wrongly, its perception of Government's secrecy. I believe that the exemption allows for frivolous and vexatious withholding of information. I truly believe that perhaps that's the best way to apply the terms of frivolous and vexatious and that is in the unbridled ability to use Cabinet Confidence exceptions.

Commissioner Letto: And I want to clarify something under Section 27(2) and this had to do with the royalties that they had to be expressed in aggregate numbers rather than…so would you like to know then what each individual company actually pays in royalties? I want to just ferret that out with you.

Ms. Rogers: Yeah I'm not…I can't speak to actual specifics but I know that the existing legislation doesn't give the Province…the people of the Province a really clear picture of the royalties, a really clear picture of resource development and extraction and how that is proceeding. It's not a particular area of expertise but it has been identified as a concern within our caucus. I don't know. I don't know if there is anything specific.

Mr. Morgan: We just think people have a right to know what's being paid for their resources

Ms. Rogers: That's right.

Commissioner Letto: I think it's expressed I guess as a line item in the budget, offshore royalties is a certain amount…

Ms. Rogers: That's right.

Commissioner Letto: Mining royalties is a certain amount, there is no delineation.

Ms. Rogers: And that the people of the Province have a right to know what is happening with their resources. They have a right to know where the royalties are coming from; they have a right to know how…particularly in areas of non-renewable resources who is benefitting from that and how they are benefiting from that, where the benefits are going, how that's being paid for.

Chairman Wells: I've got just a couple of quick points. We don't have a lot of time for lunch break. You mentioned your concern with Section 27 and the protection of business interests and you cited the example of the business that was successful in winning a contract as attempting to argue the…that the information is proprietary and that issue is presently before the courts. Yesterday Mr. Hammond from the Canadian Federation of Independent Businesses was here and he emphasized that this was not the view of all his members. His members felt it should be open access to this information. Are you aware of that?

Ms. Rogers: Yes and I believe that what we are stating is similar.

Chairman Wells: But I think what you're stating is quite similar but I just wanted to make sure you weren't of the opinion that this was the opinion of business generally. I think there are one particular business is asserting this.

Ms. Rogers: Right, yes.

Chairman Wells: But apparently the view of the members of the Canadian Federation of Independent Businesses is that it should be wide open and it should be expected if you're going to be bidding on public…if you're going to be tendering in the public tendering process what you do is ultimately open to the public after the tendering process is complete.

Ms. Rogers: And we were really happy to hear that yesterday as well. We were very pleased to hear that.

Chairman Wells: The other question that I had asked is you just make an absolute assertion that there shouldn't be frivolous and vexations at all, frivolous…and you've explained your reasons on certainty as to what it means. Frivolous and vexation is a well-known term. The law strikes out court cases on the basis of their … one of the basis on which they can do it is, it's frivolous and vexatious. That there is no known basis in law for maintaining that kind of an action or somebody that just issues one statement of claim after another just as one is struck out, another one goes in, a slightly different wording and so on and ultimately to keep the process fair and clean, an order is issued in the courts, you don't accept another claim, a statement or claim from that litigant or proposed litigant without a court order. So it's not unusual so that's…bearing that in mind if a person were just persistently making the applications after the Commissioner has looked at it and said, clearly this shouldn't be released for whatever reasons and they just keep coming in and coming in at a point they are frivolous and vexatious. Why shouldn't there be a process to deal with that?

Ms. Rogers: I believe that what we had recommended was that there be a greater definition of that within the context of the ATIPPA but also that it would be left to the commissioner to determine if a case was frivolous or vexatious.

Chairman Wells: Yes I saw that part of it.

Ms. Rogers: Yeah to not…

Chairman Wells: But subject to it being left to the Commissioner you've got no quarrel with…

Ms. Rogers: no quarrel with that at all, none whatsoever. Yes.

Chairman Wells: On the other note that I had is you talk about the right of a lawyer to keep any information given to by a client confidential. Solicitor-client privilege is not a privilege of the lawyer. The lawyer has no right to claim or assert the privilege but the lawyer does have an obligation…

Ms. Rogers: Obligation.

Chairman Wells: On behalf of the client. So it's not a right of the lawyer.

Ms. Rogers: Thank you.

Chairman Wells: It's in the context of an obligation. A lawyer has no such rights.

Ms. Rogers: Thank you.

Chairman Wells: And it's to protect the client's interest it's done.

Ms. Rogers: Yes.

Chairman Wells: Okay.

Commissioner Stoddart: If we have time and perhaps a brief answer, I'm just wondering about the concerns that your constituents may or not bring forward about the use or the access to their personal information which is in the hands of Government. Do they come to you about this?

Ms. Rogers: It's… perhaps the concern is … I have concerns about it. We have information…a release of information forms for our constituents to sign when we do work on their behalf, different ones for different departments and we explain that we will have to speak to an Executive Assistant of the Minister in many cases. Sometimes I have had occasions from constituents, very rarely, who have said, "Well I just don't want to go further with this because it's hard for my information to be shared." Or sometimes what we'll do is that we'll withhold some information which makes it then a little more difficult to be able to access the help that a constituent might need.

Commissioner Stoddart: Okay, thank you.

Chairman Wells: Ms. Rogers thank you very much for doing us the courtesy of preparing the presentation this morning. You were very clear, it was well laid out. A bit late getting it to us to in detail but it

was well laid out and we appreciate the explanation just in it. It will assist us in our work and we thank you for it.

Ms. Rogers: Thank you very much. Thank you.

Chairman Wells: Yeah. We are adjourned until 02:00.