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

Date: Thursday, August 21, 2014

Presenter: Ed Ring, Information and Privacy Commissioner
Sean Murray, Director of Special Projects,
Office of the Information and Privacy Commissioner

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

Chairman Wells: Good morning Commissioner, Mr. Murray

Mr. Ring: Sir.

Chairman Wells: Thank you very much for being here and for readily agreeing at the onset that you would come back on -- after all of the hearings had concluded and make a present -- make a further presentation so that you could let us have the benefit of your views as to what we've heard and that would be most helpful for us. There's still the possibility of some further views being expressed in written submissions between now and the end of August which is the cut off date and I would ask another favor of you if you don't mind, if you would monitor those submissions once they are put up online, once we receive them and they go up online. If you would monitor them and if you find anything in them that you think it would be helpful for you to provide us with the benefit of your advice, we'd greatly appreciate you doing that too.

Mr. Ring: No problem sir, it'd be a pleasure.

Chairman Wells: Thank you very much. Okay, Mr. Ring we are looking forward to hearing from you.

Mr. Ring: Thank you very much. And good morning to you all and I'd like to thank the panel for the opportunity to appear before it once again in what we believe to be the final presentation to the committee. Although I say that because I think as the committee has been doing its work it appears that there's been generally more momentum gathered and the scuttlebutt and talk on the street is about the committee and its work so I'm not surprised that you are getting more presentations or I'm sorry submissions to the panel. We are very grateful for the initial opportunity to speak to the panel and for the amount of time that you so kindly allowed us to do so and to make our presentation.

We are going -- what are we going to do today? There are several things. Firstly we will -- we were asked during our initial presentation to have a look at look at several issues and come back during our other opportunity to present to the committee with some comments on those things that we were asked to look at once more in little bit more detail. Secondly -- so we are going to do that, secondly we will make some comments or offer some comments on -- based on some of the points that were made in the other presentations to the committee. In most cases if not all, most of the points that we are going to touch upon today have been ones that have already been

covered in our initial presentation and in our submission to the panel. So you'd be glad to hear that we don't plan on representing our initial presentation today but to generally speak in a more, I won't say superficial, but in a way that will hopefully provide some clarification on some of the points or emphasize some of the recommendations that we feel we would like the panel to consider in their deliberations.

Again, we are not going to go into an in-depth critique of any of the other presenters nor their -- the organizations that they represent but -- and we do recognize although there were some points of view that were expressed and some recommendations made to the committee that we do not necessarily agree with but we do value the fact that all of the presenters took the opportunity to put their point of view forward from their perspective. And if we agree or not we hope that all the comments provided are constructive and helpful to the committee to look at the various perspectives of some of some of these particular issues.

So we do respect that and as I say we don't always have to agree but the fact that people are coming out and making their views known to the committee is very positive. So we are going to comment on some of those issues and thirdly we will address

any questions that the committee may have to put to my colleague and I, but I expect as we go through our point point point submissions presentation that you may wish to ask questions as we go before we go on to the point and that's perfectly fine with us.

Chairman Wells: Yes, that seems most orderly way from our point of view of giving the topics together.

Mr. Ring: Exactly, yeah. Finish off a particular subject before going on to the next one. And then finally any questions that we have not presented or any issue we've not presented on that committee we have any questions on or observations or wish to make further commentary we are more than happy to do that. I am going to ask my colleague Mr. Murray to cover the issues that we actually followed up on as the result of our initial presentation and we will both address the -- and make commentary on the issues that were raised by other presenters that we want to cover today and we will both answer questions as they rise from the committee.

But before I call on Mr. Murray I will -- I'd like to address a couple of issues that were raised -- one issue specifically that was raised by Mr. Wells in his first presentation and that was concerning

the Ombuds model versus the order-making model. As you know we currently have the Ombuds model in this province and we feel that it works well for us in terms of our jurisdiction. We indicated in our earlier presentation that 75% of request for review are resolved informally by our office and that there is a reasonably good compliance rate with the -- excuse me, with the recommendations that we make to public bodies.

There is either a full compliance, a partial compliance or in some cases there is a lack of compliance and that raises other issues which may ultimately result in taking the matter to court. In some cases we have -- when we conclude our reports we have no recommendations to make because -- and these are usually surrounding issues that concern privacy breach and once we conduct our own investigation we are convinced that the public body involved or custodian, public bodies that were involved has taken the appropriate steps to remedy the particular situation that has resulted in the breach. However we -- under the Ombuds model we do have the option of going to court with the applicant's permission regarding the public body's non-compliance with -- or only partial compliance with -- the recommendation from the OIPC.

We do not take that step lightly and normally the issues that we go to court on are ones that we consider to be show stoppers in terms of jurisdiction and for example I'm referring to Section 5 in that particular issue. And basically the OIPC not having authority to review the decision of the head of the public body when the public body decides that the matter is an issue that's -- or a subject that's covered under Section 5. There is really no way of verifying if that decision by the head of the public body is appropriately made and ultimately we either just -- the office would just walk away or resort to the courts for a decision in terms of interpretation of the issue.

Section 21, solicitor-client privilege has been significantly -- has been a significant problem for the office and our -- and specifically our lack of ability to review Section 21 claimed records by public bodies. Section 18 is cabinet confidence, again the same situation occurs and there are some other -- also another issue that I think is problematic for us and that was the -- it hasn't developed into a significant problem so far but I think the perception in terms of the spirit, purpose and intent of the Act is the Section 43.1 where frivolous vexatious and in bad faith where the decision -- initial decision can be made by the head of the public body. We feel that's problematic because it adds more -- although there is a mechanism where the

applicant in this case can make a complaint to the OIPC it is -- significantly adds to the amount of time that is able to process the issue and get to the bottom of it.

So the difficulties and delays are significant and again I will add that it has not been a significant problem but I think there is damage to the Act on the mere perception that the head of the public -- the buck stops here even though there is a recourse or a mechanism. And so it's Section 5, Section 21 and Section 18 and 43.1 all problematic because it gives perception that the OIPC has authority to oversee a portion of the Act but not other portions without having to revert to the courts. Which I think a big step backwards and goes back to the old freedom of information Act that we are the only oversight who was going to the courts and has been discussed many times in this room between the panel and some presenters that that is extremely frustrating, costly and problematic for the average citizen to be able to go down that route in any way.

The -- having said that as a bit of a background, I want to say that the question that was asked by Mr. Wells during the initial presentation by myself and Mr. Murray was, why haven't you considered, words to that effect, the notion of adopting the order power model? And having said what I just said about

the other significant problems that we see with the Act that hopefully will be addressed that we didn't pursue the order power at that time because we wanted to emphasize what we saw to be more issues that were of higher priority in terms of the working and the operation of the Act. Again I think we mentioned in earlier presentation that the legislation is fairly young.

It's been around since 2005. It's nine years old and it's going through it's second review and I think it would be helpful to have a piece of legislation in place for a period of time so you can work through it, develop your processes, procedures, establish any position you may want to take on a particular section or issue in the Act and then as it evolves and matures the order model might be something that could be considered down the road. However, having said that, we have looked at the order power model and believe that it could work as equally as well here in Newfoundland and Labrador, as it does in Alberta, Ontario and British Columbia.

There are some advantages to the order-making model and that is first of all what we consider to be a huge tool in the OIPC tool box right now is the informal resolution process where we resolve the vast majority of our access requests that way and

sometimes complaints. That would not be compromised by having order-making power. We would still strive to achieve and to surpass the level of informal resolutions that we currently achieve in the office. So that's an advantage that will not be comprised in any way, shape or form.

Another advantage I believe, that order-making power will provide a strong incentive for public bodies once we get to the formal investigation stage to provide a strong, comprehensive and detailed submission to the OIPC that would clearly state the case of the public body and allow full and accurate consideration by the OIPC. That is not always the case today; in some cases we receive the initial comments from the Department during the informal resolution process. And when we asked -- we actually move on to the formal process if we can't resolve it informally and then sometimes we get – well the information that we provided initially is all we are going to provide which in some cases is deficient in -- with the burden of proof resting on the public body.

If that burden is not met then the OIPC has no option but to rule in favor of the applicant when the public body has not demonstrated that the information should be withheld or would cause the harm that they suggested would cause in the

first place. So I think that would be a strong incentive for public bodies to put more effort where required into their submissions to the office. Thirdly, if the OIPC order is challenged by the public body, I'm speculating now if the type of model that would roll out. If it is challenged by the public body them there is an option to file with the courts and to seek clarification and final determination of the issue.

Again, this removes the burden from the applicant to go to the expense and frustration of having to go to court. Hopefully the resorts to court would be on a rare occasion, if at all, and in saying that I'll remain the eternal optimist here. The disadvantage I think would be the -- for the OIPC to lose the current ability which we have is actually to go to court on behalf of the applicant if under Section 16(1) if the public body refuses to adopt the recommendations then we would go on behalf of the applicant. But I think the order-making power would -- it's -- it would offset that and it changes the owner's burden in terms of going to court.

Commissioner Letto: Mr. Ring could you move the mic maybe just so that it points more toward your face, I realize you've got paper, just point it toward your mouth, yeah. Yeah that'd be useful. Thank you.

Mr. Ring: Thank you. I thought I had that conquered from the beginning. So having said that without getting into any further analysis between the two models, the OIPC would support a recommendation by the panel if it chose to recommend the order-power making for Newfoundland and Labrador. I'd like to ask Mr. Murray if he has any comments on that prior to --

Mr. Murray: No, I think you covered it.

Mr. Ring: Okay, thank you very much. Any questions from the panel on any of these or -- I'm about to move on other sections.

Chairman Wells: I think you've identified a critical difficulty with the order making power. It removes the ability or opportunity for the OIPC to initiate an appeal process and it leaves the entire burden and presumably cost of that to the individual applicant. That's a clear -- you've identified a significant problem --

Mr. Ring: And that is the greatest problem I would see there sir, yes.

Chairman Wells: Well, I think you've covered -- unless do you have anything?

Ms. Stoddart: Yes, thank you very much for tackling that issue right away, it's clearly one of the key questions that's been in the air during our review. Some people who've appeared before our committee have talked about different types of order-making power in different stages in which this order-making power could be deployed, I don't know if you or Mr. Murray have thought further on how the order-making power would be used and to what extent because --

Mr. Ring: I don't know --

Ms. Stoddart: You know there are many ways of characterizing it and situations in which it can or cannot be used. Have you been able to think further on that?

Mr. Ring: I don't think we've got -- had the opportunity of going to a great analysis on it but I would hope that whichever model is chosen we have to think about that this is a small jurisdiction and we need a model that's going to work here. You know one of the challenges with order-making power, I guess comparing for example how our office functions now versus how it might operate under order-making power. Currently we have several analysts who can deal with inquiries when they come in, just

general inquiries, they can accept new files and work on informal resolution. They can then proceed on to work on their formal complaint investigation -- formal investigation and drafting of reports and that function would have to be separated.

And when you have a small office then you divide that group into two and you'd have one group that worked on informal resolution perhaps, I'm just speculating on how this might work now. And of course we'd have to look at some of the offices across the country and another group that might work on the formal stage. And of course we have PHIA to oversee as well. So we'll have to -- whatever model we adopt we want to be careful that we don't divide our office up so finely that if one person is missing that we have a big problem so we'll have to be cognizant of that. And also it's my understanding regarding order-making power that there are models where the order is rarely – it's rarely required to issue an order and that when you get to that stage that if you get compliance you don't necessarily need an order.

So I guess how -- I'd be interested to look and see how that might work from a practical standpoint. Like do we have to go to court to register the order with the court or and will we do

that every time, routinely and things of that nature. And this is -- these are aspects that we really haven't had a chance to consider because really our thinking on this has evolved as we've considered the questions from the committee as well as the comments from some of the presenters.

Commissioner Letto: Yeah somebody I think put it reasonably bluntly a few days ago in front of the hearing. Said that the current Act there is no stick in it, there is no way to enforce what you think is the right decision unless you go through the process that ends up taking you to court.

Mr. Ring: And any consideration of changing the model for the province would -- and I will mention that a bit later, is the requirement for a complete and accurate assessment of resources that will be required to staff an office that would have another function associated with the terms of intake. So there's a lot to be considered in terms of that but fundamentally the principle of order power does have advantages and has disadvantages. And the other -- the final comment I'd like to -- two comments actually I'd like to make on order-making power is that I believe under the current legislation order-making power would be difficult with a severe -- significant restrictions that are based on the

Commissioner's Office now in terms of reviewing Section 5, Section 21, Section 18. There is a huge amount of information that could be there that would kind of cancel out the benefits of having order power when the office is precluded from reviewing documents. So I think --

Ms. Stoddart: Mr. Ring I'm getting old and I have a problem hearing you. I'm sorry.

Mr. Ring: I guess just to recap is that there would be a requirement I think prior to order-making power or significant disadvantage to operate under an order power making regime with the current restrictions that are in the Act with regards to the Commissioner's ability to review certain documents. I think that's all part and parcel of the same line of consideration that I believe the committee will look at.

Chairman Wells: And the order-making power would absolutely require that because you couldn't make an intelligent decision without it. You couldn't make a decision that a court could adequately review because you would not have considered all of the issues.

Mr. Ring: Exactly sir. That's it in a nutshell for sure. The other thing I would say is that there seemed to be a number of presenters that were very adamant that order-making power was the way to go and again, I don't know how much research or in-depth their thought was but there seemed to be a trend in terms of the presentations in the last couple of sessions anyway as opposed to this week.

So, I'll move on now to make a few comments on Section 5. Again there's been lots of discussion and commentary made on this particular section as it relates to the inability of the Commissioner's Office to review these documents to confirm if the head of the public body has appropriately made the -- made an appropriate decision to go that way.

This in our view is a serious flaw in the Act and we strongly urge that the review committee to address this strongly in their deliberations and in their subsequent submission to government. There must be oversight in order to ensure that the Act works in the spirit in which it was -- for which it was designed and also as it was mentioned a number of times during the committee's work to ensure that there is an appropriate level of public confidence in the Act and the oversight of the Act to ensure that there's accountability and

transparency. The inability of the OIPC to review documents has presented significant problems for the office in terms of having to revert to court action and a number of -- this has occurred on many occasions and has been basically a huge distraction from -- for a small office to get on with the day to day work.

I think other things have compromised -- have been compromised for example our ability to do more in terms of public education about the Act, about the rights and about the office. So at one point and I'm just going by memory now, we've had at least four court actions or maybe five ongoing at the same time in various stages of the process and now not all dealing with ATIPP. For example we were pursuing two offense investigations under PHIA. At the same time we've had a number of cases that we were in the factum stage, in the brief stage. So it's -- it -- we could potentially have four of our -- or five of our seven analysts tied up with these significant matters at the expense of other things that could have been doing. So again, if -- and in most cases it's dealing with jurisdiction and our inability to actually review documents.

Chairman Wells: That however is something that would diminish overtime as you got court decisions giving pretty definitive direction.

Mr. Ring: Yes, that's correct sir. And just we've been in court on several occasions now with regards to Section 5 jurisdiction. And the first case that we went to court on was one that Judge Fowler in his deliberations basically said that what we have here is a conundrum. We have a Commissioner that's tasked with an oversight function but has no ability to review documents. He said that is clearly a conundrum but he said -- he went on to say and I'm going by my memory now, I don't have Judge Fowler's decision in front of me. But he went on to say that it's an issue that should not be solved by the courts but should be solved by the legislation and I think this is the opportunity that Judge Fowler was referring to and we are starting to make the recommendation to the committee that --

Male Speaker: That's a normal response by a court to such issues because the court has no ability to legislate or change the law where it sees conflict. All it can do is identify them and leave it to the legislature to exercise its jurisdiction to overcome the conflict.

Mr. Ring: Yes, exactly, understood. So I will to call on Mr. Murray in a minute to go through some of the points that we have followed up on but I just want to briefly talk about Section 21 and Section 18. And again much has been said about this and I have no new information but just some few points that I want to emphasize. Again, I feel the Act is flawed due to the inability of the Commissioner to review records claimed on either of these sections. We believe that in our submission we have made a strong case to have the Commissioner's position to review these documents restored as it was prior to the amendments that were made in 2012. I would be remiss if I didn't mention the very strong Court of Appeal decision that dealt with the Section 21 and prior to the enactment of Bill 29 which clearly stated that the Act as it was read prior to Bill 29 clearly gave the Commissioner's Office the ability to review claims of solicitor-client privilege records.

Chairman Wells: And that had been the practice prior to --

Mr. Ring: Prior to the challenge by Attorney General of --

Chairman Wells: And the challenge of the Attorney General started in what year?

Mr. Ring: 2009.

Chairman Wells: 2009?

Mr. Ring: Yes.

Chairman Wells: And in 2008 was the Supreme Court of Canada decision in Blood Tribe?

Mr. Ring: That's correct.

Chairman Wells: So presumably it followed on --

Mr. Ring: Yes sir, that's correct. Again, I made a small point there that the public perception of the Act -- the oversight aspect of it I believe it suffers because of the inability of the Commissioner's Office to do a complete review of all documents that fall under the ATIPPA. Just to underscore a small example of Section 21 issue and the inability of the office to review the records. In September 2012 there was an application made to a public body and it worked through the system refusal by the public body, there was an appeal to our office and so on and so forth. Anyway the matter ended up going to court and so the submission or the application was

made in -- sorry the request for review was made in September 2012, the decision from the court was made and this was solicitor- client privilege claimed records.

The Judge Marshall gave an oral decision on July the 18th 2014 and subsequent week there was written decision by Judge Marshall to follow up. So it was 22 months, we were in court when we found out that the documents in question was a two page correspondence from a lawyer which the Judge clearly stated was solicitor-client privileged records. It cost the OIPC $10,500 for representation to deal with that case and I expect on the other side it would have been comparable amount, public money. And at the end of the day if the Commissioner's Office had the ability to review that document we could have finished that file in 15 minutes and gone back to the applicant and said, 'We've reviewed this, it's clearly solicitor-client privilege record." So again just an illustration of --

Chairman Wells: Of what the present system causes.

Mr. Ring: Yes sir. On the theme of the Commissioner's ability to review records, I must say I was heartened yesterday by the presentation made by the Nalcor representatives Mr. Keating and Ms. Pennell. And I will say that I was also heartened by

what appeared to me in their presentation to be a serious attempt to achieve compliance with ATIPPA in what was described to the committee. I take particular pleasure in hearing Mr. Keating say that Nalcor would welcome a review by the Commissioner of records claimed under the Energy Corp Act, Section 5.4 I believe where he or she could review the documents even though it's been stated by the C.E.O. that it's a record that has -- could impact the commercial interest of the corporation and if that was even ratified by the Board of Directors. It was good to hear that there would be an openness to have the Commissioner's Office review these and for him or her to be able to make their own determination. Ultimately at the end of the day the C.E.O. still has the authority but in the spirit of openness and access I think that would be a very positive and constructive move.

Chairman Wells: It could certainly avoid the kind of circumstance that Justice Marshall was writing about, the two page lawyer's letter that the Commissioner would clearly have seen to have been solicitor-client privilege document and avoided all of this.

Mr. Ring: Yes, that's correct sir. And I guess all of these together I think would add to a -- and contribute to a smoother more

functional system that will be able to react to the needs of the citizens in a more speedy and proactive way.

Chairman Wells: And less costly.

Mr. Ring: At less cost and much less frustration. The one thing I will just mention though it's just not the cost in terms of dollars here, sometimes we deal with applicants that are -- this is the most important thing in the world to them. The level of frustration and emotion it's significant and if that kind of process is prolonged I think it's problematic and somewhat sad. Are there any questions on any of this so far? Because I'm about to ask Mr. Murray if he would --

Ms. Stoddart: Yes, I would have some questions. Thank you for telling us your position on Section 5. Commissioner Ring is it fair to say that you would be for restoring the ability of the Commissioner to look at documents, whatever their qualifications, cabinet confidence, solicitor-client privilege, confidential business information and so on without restriction simply to check whether or not they rightly fall within the exemptions that is quoted?

Mr. Ring: Uncategorically, yes.

Ms. Stoddart: Okay, thank you. It's come to my attention in the little study that I have been able to make so far of the regulations that there maybe cases in the regulations in which this legal technique is used, i.e. an official says, "I issue a certificate whereas this happens and this shall not be questioned." Have you looked into those powers in the regulations? Do you think that if I brought a complaint against -- I am taking the example of something in the Aquaculture Act, if I bring a complaint about the certificates that have been issued on request in certain circumstances, should you be able to look into whether that certificate was properly granted and the exemption then is properly used?

Mr. Ring: Exactly, I totally agree with that Ms. Stoddart and I guess it's a question of degree and anything is better than nothing. And when you can't review documents an affidavit will at least will provide some information for you out be able to at least consider superficially the issue. But in order for the Act to work as it's meant to work, in my view there needs to be the ability of the Commissioner to review all documents that are in the custody or control of the public body.

Ms. Stoddart: So the Act and its regulations as they stand in your opinion would best be subject to an untrammeled review power to review to see whether the discretion was properly exercised?

Mr. Ring: Yes ma'am.

Ms. Stoddart: Of the commissioner.

Mr. Ring: That's great.

Ms. Stoddart: Thank you.

Chairman Wells: Memorial University was here yesterday and this is similar to the question that Ms. Stoddart has raised. But they recommended as well that a sworn affidavit or declaration from a public body should be adequate when the public body determines that the records are not in the custody or control of the public body. So it's a 'take our word for it' kind of thing and not that they would misstate it, that's not the point. Does it provide even in that circumstance the level of oversight that's needed to make sure that people have confidence that the Act is working the way it's intended.

Mr. Ring: I will respond to that by saying I would say – give the exact answer to this as I just provided to Ms. Stoddart that I believe that records in control and custody of the public bodies that are subject to the Act should be subject to review by the oversight body.

Commissioner Letto: And any declaration that they are not in the control of the body because this is the distinction they were drawing.

Mr. Ring: Let us have a look.

Chairman Wells: You would want to have a look regardless?

Mr. Ring: I want to have a look.

Chairman Wells: Fair enough.

Mr. Murray: The Commissioner already has the ability to compel a production of records that we believe is relevant to an investigation so if there was an assertion that records were not in the control or custody of a public body if we felt that what they were saying was -- that there was any question on that point we could compel production of the records.

Chairman Wells: Yes.

Mr. Murray: And if they -- if the public body resisted that through some court action I guess it could be tested at that stage.

Chairman Wells: I don't see that as a major problem. If they are not in fact in their control they can't give them.

Mr. Murray: Exactly. They can't to anything about it. The control and custody thing has not come up in that respect for us. It's --

Chairman Wells: But you can order production?

Mr. Murray: We can.

Chairman Wells: And the court can back you up?

Mr. Murray: Yes.

Chairman Wells: So if you have reason to believe that it's not being honestly asserted that they don't have custody or control then you can use your powers to enforce.

Mr. Murray: Exactly. Yes.

Chairman Wells: And that's there now?

Mr. Murray: Right. And I believe that's --

Chairman Wells: If they don't have it they can't produce it?

Mr. Ring: That's right. And I believe that's important for the perception of the public that there is adequate and reasonable oversight.

Commissioner Letto: But just to be clear the idea of a sworn affidavit or declaration is not on as far as you are concerned.

Mr. Ring: That's correct.

Commissioner Letto: Fair enough.

Mr. Ring: If there is no other questions I'd like to ask Mr. Murray now to go through --

Mr. Murray: Okay, all right. Thank you sir. I'll just give you a moment to finish your writing there.

Ms. Stoddart: Thank you.

Commissioner Letto: Very considerate.

Mr. Murray: One of the -- so we are just going to go through these in no particular order. I guess I'm going to start with the ones that came up during previous presentations and when we made our presentation and questions that arose out of that. One of the issues that -- one of the questions that was raised was whether we'd given any thought to the inclusion of biological samples within the definition of personal information. That was raised by Ms. Stoddart and we have done a little bit of research on that and we will provide you with a copy of our research once it's finalized along with our other comments summarizing what we've got to say here today.

But essentially where we've gone with it is certainly information that is derived from -- recorded information that is derived from or are associated with biological sample would already be protected by what the appropriate statute whether that would be a ATIPP or PHIA. But I guess the question is what about a biological sample itself, and the thing is that the technology

exists today that to identify a lot of information from a biological sample all by itself even if there was no name or identifying number on it at all. And from what we've read the technology is moving in such a direction that it's going to become easier and easier to identify the individual whose biological sample that is either using other information that may be available or other sources or perhaps even in theory from the sample itself depending on what type of sample it was or where it was located and other contextual things.

But basically where we've gone with this is that there maybe at some point, a need for legislative recognition and privacy protection for personal information contained in biological samples. Our view is that in this jurisdiction at this time that the most appropriate place to being that consideration would be during the first statutory review of the Personal Health Information Act which is mandated to the current 2016. We are of the view that very few public bodies subject to ATIPPA are currently engaged in the collection of human biological samples with the possible exception of law enforcement.

And furthermore given that very few jurisdictions internationally have developed legislation and none federal as far as I know -- sorry national, across the country aims specifically at this area.

There are still too many questions as to how best to approach this issue from a legislative standpoint. We will commit however to revisiting this issue during the PHIA review in 2016 and to update our research on this area to incorporate any new developments and we thank Ms. Stoddart for raising that issue.

Ms. Stoddart: Okay, thank you. As a side bar I believe the Royal Newfoundland Constabulary was excluded from the purview of the Act in 2012. As you say they are the public body likely to be collecting biological samples in the course of their investigation. As you say these are very telling in terms of the personal information. Could I ask you if you are on record as the complete exclusion of the police force from access to information and privacy legislation as rather remarkable?

Mr. Murray: I don't think that they've been completely excluded. Section 5(1)(l), a record relating to an investigation by the RNC if all matters in respect to the investigation have not been completed. So once the investigation is completed Section 5 would no longer apply. So they do fall under the Act and certainly in relation to all of their administrative records that nothing has changed there.

Ms. Stoddart: Okay, thanks, I stand corrected.

Chairman Wells: And the subject to the test as to whether it contains personal information or matters that could be harmful to --

Mr. Murray: All the other exceptions would have to be considered.

Chairman Wells: All the other tests would have to be considered.

Mr. Murray: Exactly.

Ms. Stoddart: Is there -- because we are on the topic of personal information which is of course key to the functioning of a police body and trying to do their function. Would you be in favor of returning then to the more -- the broader coverage of the Act 2012?

Mr. Murray: We did talk about that in our discussions. I guess we've -- as you may recall our submission was I believe 90 pages in length and I guess it did -- it was up for discussion and it just didn't make the cut of priority areas that we wanted to bring to the committee. And there could be a good argument for looking at that and as to whether we should revert to the

previous version but it's -- I guess it wasn't a high enough priority for us.

Ms. Stoddart: It isn't a major issue for you.

Mr. Murray: It hasn't been a major --

Chairman Wells: The two changes were excluding -- the Act does not apply to a record relating to an ongoing police investigation and is difficult to make a case for.

Mr. Murray: Yeah.

Chairman Wells: You are not going to demand information from an ongoing because it can so easily compromise the investigation and so easily taint the reputation of innocent persons.

Mr. Murray: Exactly.

Chairman Wells: Because of the role of the police.

Mr. Murray: One difference I will reference though is section 22 which is the Law Enforcement Exception already -- had already protected the identity of confidential sources of information.

Section -- but 5(1)(m) they not only do they have that protection in 22 but they added 5(1)(m) which ensures that a record relating to an investigation that would reveal the identity of a confidential source or reveal information provided by that source is not subject to the Act. So why there was a need to take it from being an exception where they actually -- they didn't actually take it out of Section 22 they left it there but they also added removing the record. And one I guess possible effect of removing the record is there could be -- because Section 22 refers to information. So you might have a record where there is one line containing information relating to a confidential source but the rest of the record might contain other types of information.

Chairman Wells: Well, honest treatment would require redaction of that, would it not?

Mr. Murray: It would but in M I guess it's up for debate whether you redact anything with M because M is about records as opposed to information. So if the record in court -- if on or just --

Chairman Wells: Wouldn't honest application of the severance rules required for M too?

Mr. Murray: I guess we'll have to see what a court says about it if we get to that stage because someone could argue that because 5 is oriented towards protection of entire records as opposed to the exceptions which apply to information. It could be argued that --

Chairman Wells: The entire record.

Mr. Murray: The entire record would have to be kept out and in terms of the spirit of the Act I think we would probably take an opposing view. But on a strict reading of -- there must be a reason why the legislature chose the word record for Section 5 and not information and that may be an issue if ever we went to court I suppose so just to highlight that.

Chairman Wells: Well, Section 5 of course deals with records.

Mr. Murray: Yes.

Chairman Wells: It is.

Mr. Murray: It is about records.

Chairman Wells: This Act applies to all records except --

Mr. Murray: Yeah, exactly. So that's one difference that could be significant at some stage. Another issue that we noted I think and there was some talk about during our presentation and there's been other discussions about it was the timeliness of responses by public bodies to access to information request. And one of the things that we did in 2012 shortly after the Bill 29 amendments; we began to notice an increase in the number of complaints to our office that the timelines were not being met. That people were not getting access to information for three or four or five or six months after they had filed their requests. And normally our experience from 2005 is you get one or two of these a year.

Just every now and again a public body completely blows it and that's just life and we'll deal with it and if we can resolve it informally we will, if not we'll issue a report and draw attention to the errors of the public body and make recommendations. But in 2012 they were really starting to pile up and we were wondering what was going on and so it became a serious enough issue that in January 2013 we issued a news release in conjunction with a report on one of these cases and I believe we had 12 or 14 files piling up of what we call a deemed

refusal. Because the Act says that if they do not provide the response within the time allotted by the Act they are deemed to have refused to provide -- they are deemed to have said basically no to the access request and so we call it a deemed refusal.

But once we issued that news release we engaged with the ATIPP office, the minister responsible for the office of Public Engagement and senior staff and they committed right away to getting the message out throughout government that they've got out be a completely different approach to the timelines, we've got to have much better compliance and aiming for 100%. And over the course of the next several months we finished some investigation, issued a few more reports on files that we had already accumulated.

But by February 2014 which was just over a year later, we issued a follow up news release indicated that the issue had been resolved from our point of view and no further request for review or complaints about that late -- people not getting a response until after legislated timelines. No further complaints have come into our office. So currently we are not experiencing that issue, now if it's possible that some applicants are getting late replies and not coming to our office,

we don't know. But I mean the statistics from the -- presented by the Office of Public Engagement show that their records anyway show that they are at 100% compliance in meeting the legislated timelines. That would be the 30 days or the extended timeline. So I'll just -- we just wanted to throw that out there that --

Chairman Wells: And a couple of the comments we've had in presentations to us have indicated a greater level of satisfaction with timeliness and in the last year or so.

Mr. Murray: And I think this is an opportunity to I guess raise the -- make a comment I guess about the importance of political commitment at the highest levels to access to information. Because no matter what happens with any amendments to the legislation, if there is no commitment from the highest levels of government to make this a priority and ensure that -- for example we talked a lot about training for Access and Privacy Coordinators but quite often well really under the Act they are not making the decisions. And we've often heard from Access and Privacy Coordinators when there have been issues with delay, it's sitting on the Deputy Minister's desk and things like that and we wonder how long it's sitting there. So I think that maybe there could be some emphasis on bringing the --

ensuring that people like the Assistant Deputy Minister, the Deputy Minister and Ministers have really bought into this whole concept of a culture of access and a culture of openness. And we've seen great strides from this government in terms of creating the Office of Public Engagement and the ATIPP office there in terms of their whole open government initiative.

As we've said the timelines have improved so much, it's been great to see all the progress been made and the new manual that they issued which was an updated version of a previous manual which we had the opportunity to review and provide lots of comments and feedback on. And they incorporated almost all of our comments and feedback. We've had a great working relationship with them lately but could that change at some point in the future if the priorities of government change? And I don't know whether there is anyway to address that from a legislative standpoint but it might be helpful for the committee to really underscore how important it is to incubate that culture of privacy, not only at the service level of the Access and Privacy Coordinators but at the higher levels as well.

Mr. Ring: If I can just jump in and make a quick comment on that there -- what Mr. Murray has said about the leadership, taking a leadership position we had two cases actually with large public bodies where we had meetings. And in fact one department as a result of our meeting signed a specific Assistant Deputy Minister who would be the initial contact point for the ATIPP Coordinator to ensure that they -- that the chain of command was fully in the picture and how access request is -- requests were evolving and being processed in that particular organization.

There is another example where we had a large public body, not a government department but a large corporation that as a result of a similar kind of meeting came up with -- developed a set of criteria that must be followed within that particular corporations and we find that this has worked very well. Again, you can't underscore the fact that when you are in charge, take charge and provide the leadership necessary for this kind of work.

Commissioner Letto: I guess the saying that you can't legislate behavior, but I presume that the legislative framework can certainly influence behavior.

Mr. Ring: But it's all just part of the evolving culture and we are just snipping away at the iceberg now and as time goes on I think access and privacy will mature in this province as it has in others that have had legislation that have been around for a much longer period of time.

Commissioner Letto: But the continuation of my point perhaps there was that politics, governments, there is an ebon flow that happens and at certain times there is a reason that you don't want people to know what you are up to and so on and so that can all be affected. Part of the discussion that we've been having with various groups is that you need all the pieces in that access puzzle to be playing their role. And I think that people who've -- and you've argued for restoration of the role of the Commissioner and the powers of the Commissioner and I think part of what informs people who suggest that you need to have the stick in your hand and you've explained that you don't always have to use it. It's possible that simply having it is enough to influence behavior.

And I think it's worth reminding everybody that the whole package is what makes the system work and part of I guess again what we have to balance is what are those parts and how do you make that access system work properly, not adequately,

properly, and effectively. And Mr. Ring your office I think people have singled out as being that oversight body if it doesn't have the authority that it needs to enforce the Act, the Act simply won't work and people won't have the confidence.

Mr. Ring: I agree, yeah. Correct.

Mr. Murray: There is also a difference in making people do what you want them to do and people being committed to the whole concept and idea of doing it right in the first place. And I guess that's what I'm trying to hit at here and I think that even if there is no legislative amendment that you can recommend I think it would be helpful for our government to hear from the committee about the idea of -- about encouraging that culture of access to information.

Chairman Wells: Hear the importance of it.

Mr. Murray: Yes.

Chairman Wells: But there is not much else that can be done -- you can do.

Mr. Murray: You can't legislate a culture or an attitude.

Chairman Wells: Yes, it's got to develop or it doesn't, there has to be a commitment. And short of that it takes the presence of a stick just held in place of some kind. It may not be a terrible cudgel. At least something is different.

Mr. Murray: Something no one wants to get hit with.

Commissioner Letto: You were both here yesterday when Mr. Keating from Nalcor presented and he talked about the role that he plays in the access to information request that comes through Nalcor. Separating whether the requesters are happy with what they ultimately get but I'm interested to know your take and what you heard from him and whether the way he oversees that is a model that perhaps should be spread.

Mr. Ring: I strongly encourage public bodies to adopt that particular model. I mean Mr. Keating is clearly in a high position of responsibility and trust and for him or people in similar positions to take the interest in this particular legislation and I got the flavor from Mr. Keating that it was a sincere willingness to try to serve the people of the province who actually request information in the best possible way. So concerning my own -- my former background in the military you lead, follow or get

out the way and I think Nalcor has shown that, in the presentation that we had yesterday that they are serious about this and you may not always get what you want or agree with what you get but the fact is if the system is working not all information is legitimately released. There was information that deserved to be protected and I think that if the exceptions in the Act are strong enough to do that then it's a good working Act.

Chairman Wells: And sufficiently limited is not to incurrent encompassing broad scopes.

Mr. Ring: Exactly, it has to be specific.

Chairman Wells: Mr. Ring I intended to do this a little later because you haven't mentioned anything about the power of audit that you mentioned to us earlier and I was going to raise it with you but the discussion about the stick makes it appropriate for me to do it now.

Mr. Ring: Yes sir.

Chairman Wells: You had suggested that it should have the power; your office should have the power to audit any public body's performance.

Mr. Ring: Exactly, yes.

Chairman Wells: Under the Act and there is a lot of sense to that. I had assumed and maybe incorrectly and you can correct me if I'm wrong that, by that you meant that you could, on a random basis select a public body and do an audit as to how they perform. Presumably you would be going in after the fact one, two or three years and auditing to see how they performed but that's all after the fact. And thinking in terms of achieving both audit, reducing the cost of having to have a staff to go round to the departments to do, that being effective at the moment and perhaps leading rather than looking at and criticizing afterwards, might that audit be in the form of an ability for the Commissioner to place any public body where the record of complaints or the Commissioner's Office and the Commissioners observations of how they've been performing, justified placing the public body on watch and requiring the public body to report every time a request -- report to the Commissioner.

There's only -- I mean we were talking about one a day to report to the Commissioner every time a request comes in and if there's only one public body it might only be eight for the whole year, to report the request, report what they did within the 10 days to identify and advise the requester of the plan of dealing with the request and then report what they did 15 days after and what progress they were making periodically and report within -- in something less than 30 days as to whether or not they were going to meet it and if they weren't, were they weren't?

Mr. Ring: Yeah.

Chairman Wells: And if -- and make it known to the public that that public body is on watch. Isn't that the big stick that doesn't hurt? It creates an impressive or a strong incentive to avoid being placed on watch and have the ignominy or the stigma of having been placed on watch by the Commissioner's Office. Wouldn't that provide a rather strong incentive to the process?

Mr. Ring: I think it would provide you a strong incentive sir, but at the end of the day it gets you to the same place we would be with an audit and that is hopefully to be able to monitor and comment upon the operation of the public body in terms of its

application and processing. But what you suggest it is proactive and it's like it would be an ongoing audit of a file that just starts from the very beginning and work its way through the system. It would get us the --

Chairman Wells: Well only to those that are on watch.

Mr. Ring: I agree and but it would get us to the same place at the end of it where we could be in a position to make commentary, to make recommendations, to make observations on deficiencies and hopefully improve them.

Chairman Wells: I think it gets you somewhere else. At least more importantly it gets the public body somewhere else where it's got a massive incentive to perform, to avoid the stigma of being placed on watch by the Commissioner's Office.

Mr. Ring: Exactly.

Chairman Wells: And it doesn't do anybody any harm and it creates that --

Mr. Ring: Can I --

Chairman Wells: It's more – it might be more – somewhat more of a carrot than a big stick.

Mr. Ring: Yes.

Chairman Wells: But the stigma aspect of it is kind of a stick to -- but there is a big incentive to never be placed on watch by the Commissioner's Office.

Mr. Ring: And I expect that at the end of the day if there was a public body that was under achieving there would have to be some sort of a public report or something that would indicate that and instead of a stick it's probably the embarrassment factor that would be significantly --

Chairman Wells: Yes. Well that is a soft stick, I don't think that's the word but it's a --

Mr. Murray: Well that's a --

Chairman Wells: It smears a bit.

Mr. Murray: Can I -- just to be clear, just on that -- at that topic though I mean an audit as well or an audit result -- and this is

our experience with oversight is, sometimes it's nice to be able to say that a public body has done a good job. So sometimes you might want to do an audit in a situation -- more of a random situation where you haven't received any complaints but you might want to do an audit of say three public bodies and maybe one of the three or two of the three or three of them have actually done well and you can report on that and because really we want to report on how well the level of compliance. So we might find that there's been excellent compliance and to be able to give credit where credit is due is also a great thing to be able to do as an oversight body.

Chairman Wells: I don't disagree with that Mr. Murray and there's nothing with having this on watch system.

Mr. Murray: No, there's nothing --

Chairman Wells: That would preclude you doing that.

Mr. Murray: Okay, fair enough.

Chairman Wells: You can still do that if you thought it appropriate and in particular circumstance but we have been specifically requested to provide advice and guidance as to what would

make the operation of the Act more effective and provide more timely and more efficient access to information and hopefully less costly. A formalized auditing structure like would be carried out by an Auditor General can be an expensive and time consuming and it's often two and three years after the fact.

Mr. Murray: Right.

Chairman Wells: The on-watch system is current and it's an incentive and I would think -- and that's why I want your view on it. I would think it would constitute a rather significant incentive for any public body to perform in such a manner as to avoid if at all possible ever being placed on watch by the Commissioner.

Mr. Murray: And we also of course would want to be able to audit the privacy practices of public bodies.

Chairman Wells: Of course. Well, privacy and access.

Mr. Ring: I just had one more comment on that is, any opportunity for the OIPC and the staff to interact with public bodies is a good thing because with the ability to be able to evaluate or

review a public body that is a high achiever and then providing good service to the public and with good process and procedures, that kind of information can be shared with others and overall with the effect of improving the process across the board.

Commissioner Letto: Can I ask one more question about timelines? This came up in the context yesterday of Nalcor's submission and the chair brought to everybody's attention that Nalcor's processes they've kind of created a graphic chart that gives timelines for when things ought to be done. And it certainly serves as notice to everybody inside the organization that this is day 10 and this has to be done and is it done and so on. Can you tell us what your knowledge is about whether this kind of process is widespread or is it a looser kind of system in most public bodies?

Mr. Murray: I know that -- I've seen for example, I believe the College of North Atlantic has something along those lines as well. I couldn't say for sure whether other public bodies do. I mean the manual is there which certainly spells out how the process should work but I can't say for sure whether that it's in exactly the same type of format. However -- and I've only heard it described. I didn't have a copy of the Nalcor

presentation yesterday and I understand it's online but I haven't had a chance to look at it yet this morning. So it sounds like anything that could be, I think, put in a succinct -- it could be described in a succinct way like that, the process is set out in a graphic format, would probably be helpful to coordinators and to the public so that they can understand how the process should work so I would support that.

Mr. Ring: There is a similar program with Newfoundland and Labrador Housing Corporation that has a checklist and one of the public bodies I referred to earlier that has provided a checklist to make sure that every stage of the ATIPPA process is on time and it's reported to the right people and so on and so forth. So there are some models out there. I wish that the municipalities had something similar that would be of help to them and I'm very pleased to hear the commitment made by the Office of Public Engagement and the ATIPP Office that they would -- I think it was at a discussion that you were -- as a result of a question you asked Mr. Letto that they are prepared to do something in the short term to address what I believe is a significant void in terms of information and assistance to those smaller public bodies.

Chairman Wells: There are indications of high degree of misunderstanding at the municipality's level as to what is actually required and what's the appropriate approach, and it would be nice to have that cleared up and you are right they did indicate they would be doing that.

Mr. Ring: I think even some simple tools of up front will help; a template and a model, a checklist that you can follow. And again the ATIPP Office OPE are there to consult and assist as we are in the OIPC. That's all.

Commissioner Letto: Along those lines, the municipal council handbook under the Department of Municipal Affairs recommends that municipalities develop their own ATIPPA procedures and we didn't have a chance during the hearing but I asked one of the officials to find out the extent to which those handbooks have been created. The quick response was they probably have not been created and I went to various municipal websites to see if I can find anything about access and wasn't able to. So it sounds that at the local level as well it could be extraordinarily helpful to people who want to engage with their local council on the access issues.

Mr. Ring: Exactly. I think there is a similar situation that arises with the smaller custodians that are going to pass out the information like where that particular Act requires every custodian to develop its own policies and procedures. And many of the smaller custodians -- it could be one or two people working day in and day out in their small massage therapy clinic for example that have had not had the wherewithal or the resources to put together policies and procedures and it would -- I think it falls on the major governing bodies to provide some sort of a template that can be fashioned to the unique requirements of a small clinic. Same thing with the municipality if they --

Commissioner Letto: Or maybe your office.

Mr. Ring: Well, possibly.

Mr. Murray: Well the issue is, we've had a lot of interaction with municipalities and we've issued a number of reports in relation to complaints about municipalities and one of the issues that we've encountered and we've heard from presenters on -- during this process is what -- the process of tabling documents at public meeting of council and what's happening is that certain information is being severed from the document

before it is tabled and there is an interaction between the municipalities Act and the ATIPPA that needs to be looked at closely. But ultimately with the ATIPPA because the municipalities Act that says that certain types of record should be -- that once they are tabled they are public documents.

But the ATIPPA says that only information that is necessary for an operating program of a public body -- only personal information necessary for an operating program of a public body should be disclosed. So the analysis that has to happened really is for each type of document, what types of information is necessary to be in -- to go before council and to be tabled and therefore release to the public in order for the – for example an appropriate scrutiny by council and the public. For example if you have an individual who is applying for something, for some sort of application and they include some sort of personal information in that application and that document is going to be tabled. There might be some sort of personal information that you might want to sever from that document. On the other hand if a development corporation wants to develop a subdivision, really there is nothing about that corporation that should be severed you would think. So, but what needs to happen I think is some -- is that if each different municipality -- what's happening now is each

different municipality is just taking their own approach and the guidance that's in that guideline right now is telling them to continue to do that.

Everyone, you should all develop your own guidelines, but our view is that what needs to happen is the Department of Municipal Affairs, the organizations that represent municipalities in the province, the ATIPP Office and ourselves, we are certainly willing to take part in that. And in fact we have already had a plan as a result of hearing from some of the complaints earlier in this process. We were planning on initiating something like this after this week but we heard that the Deputy Minister responsible for the Office of Public Engagement say that she was going to initiate that and I had a chat with her after and I mean we are willing to take part in that.

But basically what needs to happen is we can't dictate to municipalities what they should -- what is necessary for them in their processes or not. We need them to be -- I don't know who's going to take the lead, whether it will be the ATIPP Office or Municipal Affairs, but the people that are knowledgeable about municipal processes need to be a key element of this. And we can certainly be part of it but we don't want to be in a situation of doing that unilaterally. And

so that's -- well we want to participate in that process and I think that's going -- it seems like the will is there to get it under way.

Chairman Wells: That brings me to another question that has to deal with the role of your office in education generally. ATIPP coordinators need to be operating on a consistent and standardized basis and normally the ATIPP Office deals with that. But public servants generally need to be educated and informed and the public generally needs to have fuller information and certainly municipalities and municipal managers and so on. Is there not some responsibility on the Commissioner's Office to --

Mr. Murray: And we do do that. We have a newsletter that we issue and we provide it to all public body coordinators and we have -- we are the spearhead for an annual conference about Access to Information and Protection of Privacy that we invite all public bodies to attend. Now, the public bodies have to decide whether they are going to fund their access and privacy coordinators to attend and that has been an issue in the past.

Mr. Ring: And we've also encouraged senior management to attend as well.

Mr. Murray: And that has also been an issue. We haven't gotten very many of those attend these conferences so we --

Chairman Wells: So you've been initiating these conferences?

Mr. Murray: We have and we've gone to look for speaking engagements on a number of times. We've gone across the province trying to do presentations on the ATIPPA and not gotten much response. We certainly will never turn down an opportunity to speak to any group about the ATIPPA. We've gone -- we've been invited on a few occasions to the ATIPP Office training seminars that they've given to access and privacy coordinators and which appear to be oriented towards the coordinators within government departments and agencies and not municipalities. I think that's -- part of our issue is I think there needs to be a greater outreach to municipalities. We have tried to find ways to get municipalities more engaged in this, but I think one of the big steps that needs to be taken is the one we just referred to is, I think municipal coordinators need some special guidance for them. And we are prepared to be full partners in developing that guidance.

Chairman Wells: And it looks like a Deputy Minister in the Office of Public Engagement is going to initiate that.

Mr. Murray: Yeah absolutely.

Mr. Ring: Yeah and we have significant challenges with geography in the province so people can't be travelling and it's not cost effective and so on. And so whatever develops in the end would be some sort of online -- hopefully online training or online program that municipalities could link into and --

Chairman Wells: … regionally administered to reduce the travel?

Mr. Ring: Yeah, that's right. You could do it regionally as well but the conference that Mr. Murray referred to; we've got one planned for the first three days. I believe December this year and we -- it's the seventh annual that -- and so -- but it seems to have waned in its participation so we're inserting new life in it this year and --

Mr. Murray: It's going to be the best one yet.

Mr. Ring: It's going to be the best one yet and we're going to be reaching far and wide for good interesting speakers. Maybe

someone from the panel might be invited who knows, but as well as Mr. Murray said; our initial attempt back in 2008 was do a bit of a road show in various communities regionally with very little success in terms of numbers showing up. So what we've done since then is we've been more targeted. We've tried to have ourselves lined up with other organizations like Municipalities Newfoundland and we've presented at their annual conference on few occasions. The Canadian Bar Association, the local branch and other … NTAs. So we've tried to capitalize on where there is going to be an audience that we can tap in and get the word out that way so. And we've had up to some years, 50, 60 different occasions where we've been able to do that which I think is pretty reasonable for the size of the office that we have.

Mr. Murray: So to anyone who is watching this webcast, if you'd like a presentation on access to information of protection of privacy in this jurisdiction, we'd be happy to provide it to you.

Commissioner Letto: And it's free.

Chairman Wells: That's shameless promotion

Commissioner Letto: Can I ask --

Mr. Murray: Yes of course.

Commissioner Letto: I mean what you've talked about is kind of reaching out to the public bodies to engage them but the other part of is obviously the public.

Mr. Murray: Yeah.

Commissioner Letto: And I think that our eyes were opened during one of the presentations this week when the Chair held up the copy of the access procedures manual and the CBC was presenting, they'd never heard of it or never seen it. And in order it seems to me they have a robust access to information system, people have to know how to use it and they have to know the rules of engagement. And it was told us yesterday that they thought – I think this was Nalcor again, it would be a proper role for the OIPC, for your office to develop guidance and education materials along the lines of what we see from the Office of the Information Commissioner in the UK. Very substantial guides on how certain parts of the Act can work and simply how it functions so that users on both sides have a consistent view of how it works. If such a thing were suggested, would that be a practical thing for your office?

Mr. Ring: I think anything is achievable if you have the resources to dedicate to it, to do it properly and I'd rather not do it at all than pick away at it and not achieve a good result. I think there is a scope for that if we were -- had the resources to do so and as well I think there is an opportunity for good partnership with the Office of Public Engagement and the ATIPP Coordinator's Office to do that.

Mr. Murray: And regarding the manual, I think if you have a close look at some of the discussion about some of the exceptions to accessing the manual for example, you'll see that they cite some of our reports and our rulings. So we wouldn't want to just duplicate that. Of course it would have to be something more than that if we were going to do something like that. Our specific legislative mandate is for public education, but we've never refused any opportunity and we welcome any opportunity to be engaged in and educating public bodies as well.

Commissioner Letto: What about coming out from you to the public? That's what I'm getting at because I think that when we talk about speeches in conferences, it's a very defined group of people who would go and a lot of people go because their

organization is part of that organization. And they may not go even for the part on access; they're going on the part about --

Mr. Murray: Right. Something else whatever.

Commissioner Letto: Regional economic development or something like that. And if what I'm thinking is that if people see the OIPC as not the advocate for the requester of the public body but the advocate for knowledge and spreading that knowledge about the Act that that is -- there is a value that you can't put a value on, if that makes any sense.

Mr. Murray: I did see a user manual developed by one jurisdiction for applicants so that might be an interesting approach to it.

Commissioner Letto: Yeah because certainly one of the disappointing things, the Chair read the access manual thoroughly and I think all the parts are highlighted and yellowed and so on.

Chairman Wells: I thought I was an impressive document.

Mr. Murray: Yes we agree,

Commissioner Letto: And so the sad part of all that it's an impressive document but nobody really knows about it apart from public bodies.

Mr. Murray: Well, unfortunately there was -- no news release was issued when they published it. It just appeared on their website one day and as an Nalcor Access and Privacy Coordinator noted, she just happened to look at the ATIPP Office website and found it there. So I agree that perhaps we should put a link to it on our website and talk about it a bit more. It's not our document but we certainly have reviewed it and provided input on it and support it. So we should all be doing a better job I think of promoting what resources are available.

Commissioner Letto: Yeah it's like one tree falling in the forest and there's no one there, it doesn't make a noise.

Mr. Ring: No one there to chop it up.

Mr. Murray: And certainly if a news release was issued, CBC would have no excuse for not knowing about it.

Mr. Ring: I certainly agree with the Chair that it is a very valuable and useful document and I guess whatever any of us could do the OPE, ATIPP Office or our office to encourage its use would be helpful. Good points.

Chairman Wells: Murray this might be a convenient time. I'm getting the nods from the operations desk.

Mr. Murray: Okay.

Chairman Wells: It might be a convenient time to take a midmorning break. We'll break for 10 minutes I guess it is. 10 minutes to --

Commissioner Letto: 15.

Chairman Wells: 15, okay great. I'm giving new instructions in 15 minutes.

BREAK

Mr. Murray: The next topic I wanted to address which is one that -- which came -- which has been up for discussion is -- and again I think it was related to how quickly public bodies particularly those within the line departments of government I guess, how

quickly they were able to respond to access to information request and whether there is another model that should be considered in terms of how they are oriented. And particularly there was a notion of centralizing the access to information process within government so it's --

Chairman Wells: So it's one --

Mr. Murray: One idea.

Chairman Wells: One wild thought that was -- yeah.

Mr. Murray: Well I want to -- there wasn't -- it's not that wild because they were doing it out in BC so I wanted to just talk about.

Ms. Stoddart: That's wild.

Mr. Murray: Yeah okay, BC is a bit wild anyway. So I just wanted to --

Chairman Wells: Not the committee's view but Ms. Stoddart's

Mr. Murray: No, I know. Yeah okay, fair enough. I just wanted to -- I made a phone call I guess just to the Office of the Information

of Privacy Commissioner in BC and had a chat with one of the people on staff there just to get a sense of how things are working out there with that model and what the genesis of it was and what their experience with it was. And essentially it came about when the Commissioner in BC was noting significant problems with public bodies particularly government ministries as they were more commonly referred to there. Ministries were not meeting their legislative timeframes and it came about I think through just I guess frustration with that situation and as a result they created an agency under the -- called the Information Access Operations under a department, under a ministry there.

And basically how it works is when an access to information requests comes in, it can come in to the public body, to the ministry or it can be sent directly to this information access operation or organization. And but as soon as a request comes in it is forwarded to that body, that central body. And what they will do is, they will look to see -- the request would probably specify what public body -- you know they are requesting the information of anyways but they would also look to insure that the records were likely -- records in the control or custody of that public body.

They would then contact and it's -- there's a point of contact I believe that's supposed to be in the Deputy Minister's Office in each department and they would request that -- they would provide a copy of the request and request that the responsive records be forwarded to the central agency. So that would happen, the records would be searched and the group, the centralized agency may provide some direction as to where the things -- what types of searches should take place and things of that nature but I think there is a fair amount of expectation that the public body itself would be able to identify those records. And so once the records come back they are -- the staff of the centralized agency will go through the process of considering exceptions and identifying information which should be considered for severance.

This will then be forwarded back to the Deputy Minister's Office where somebody there will review what's been proposed by the Information Access Office. And no doubt there is a -- a conversation would have to occur because a lot of the exceptions are harms based and of course it's only the public body that -- it's the public body that's the best place to consider what harms might result from disclosure of information. Furthermore there is the issue of discretion of the exercise, the discretion as many of the exceptions are

discretionary. So the exercise of discretion would have to come from the public body itself.

Chairman Wells: Not the single office?

Mr. Murray: Not the single office and as well the final decision or final approval comes from the Deputy Minister who has delegated the authority of being the head of the public body for that purpose of making final decisions on access to information requests. So there is quite a bit of back and forth and I think what their experience was -- and of course and also if it goes to review, the Commissioner's Office deals with the central agency almost exclusively we are told, except for occasionally the central agency if there's an issue for example with whether an adequate search was conducted, the central agency may say, "Well, go talk to the person who did the search if you need to," but and as well the applicant of course if they have questions. They are dealing with the central agency.

So again, I would think that there are situations where the central agency needs to contact the department and then get back to the applicant and perhaps the same thing may happen with -- in the review process. But what they found is that -- and this

has only been in place for three years and what they found was that in the first year there was an improvement in the timeliness of responses but as time has moved on and they have a necessity each year but I think there is an assessment underway right now, and it appears that the timelines are now worse than they were before this particular year. And but they don't know if it's due to -- there's been a hiring freeze in the central agency so they don't know what they can attribute it to.

But one thing that they've noticed is that in setting up this centralized agency, what occurred is that a lot of the access and privacy coordinators -- because these are a larger jurisdiction where there would have been permanent Access and Privacy Coordinator full time positions in all these ministries or most of them and these people were moved to the centralized agency when this process was set up. So at first it was great because all these people knew the systems in their departments that they had come from. They knew where records were likely to be found. They knew who the key players were and say, "Well, if you want this type of information it's going to be in such and such a division within the department." And so they knew right where to put their

hands on or right where to -- who to contact so you have things moving quickly.

And as time has moved on, some of the departments have been reorganized and divisions moved from one department to another, the personnel have changed, there's been natural attrition both within the departments and within the central agency itself. There have been changes in the way records are stored, in terms of different electronic systems have come into play. So even within three years they've noticed that the benefits that they noted at the beginning in terms of efficiency, were beginning to be lost over time to the extent that some departments have now created a position within the Deputy Minister's Department to be the full time permanent liaison with the centralized agency in order to establish some I guess continuity there. So well the result is that there's an additional bureaucracy has been created with no -- and there's no indicator -- I guess maybe three years is not long enough to assess and there's a lot of factors that go into it.

Chairman Wells: Or develop workable procedures.

Mr. Murray: And even with the procedures because of -- for example like I said the hiring freeze at the centralized agency it's hard to compare apples to apples and the comment to me was that, if you fund something enough you might -- either model might work well but either way it did not resolve. It was not the silver bullet for resolving the timeliness issue and it may have complicated the process somewhat unintentionally. So I just want to share that with you that I had that -- I did do that follow up.

Mr. Ring: If I can just chime in one comment on that. I know British Columbia is a large jurisdiction but the Central Office employs about -- approximately 105 people. So when you looked at the mass migration out of the line departments and large public bodies into this, there must have been a significant void left too, so just -- it's a big organization.

Chairman Wells: And it may well be just going back and forth as to the time too.

Mr. Murray: Yeah exactly because you have to wait for people to get back to you and you are not -- if you are in a centralized agency you're not there in the department.

Ms. Stoddart: Right.

Mr. Murray: So I just wanted to pass that along.

Commissioner Letto: Tale of caution?

Mr. Murray: And I guess we could add to that I guess that just to re-emphasize the point that we made earlier that perhaps if there are issues with timelines and we want to encourage timeline improvement, additional efforts to professionalize the access to information staff that are already working in the departments and agencies might be helpful and to provide further training and to the extent possible to make the -- to give them a greater role in the process because we've experienced it. Sometimes the Access and Privacy Coordinator is either a person that is obviously fairly middle management level who has a line of communication to senior decision makers. Other times they are not and sometimes our experience when it comes to us for review, sometimes we deal with Access to Information Coordinators who know the rationales for the decisions that were made and can talk to us about them and other times our experiences that the coordinator is more or less just passing on the message from somebody else and doesn't really know what the basis for the

decisions were. And so there could be changes like that I think that would -- they are small but I think they could be very helpful to improving processes both at the review stage and at the request stage.

Commissioner Letto: So would you recommend somebody at a reasonably senior level to have that role?

Mr. Murray: It's helpful I think if they are at least in the middle -- sort of a middle manager level or a legal counsel. I would like to move on unless you have any questions.

Chairman Wells: Please go ahead.

Mr. Murray: Okay. One issue that was touched on at one point was the posting of completed access to request on the ATIPP website. And we have heard from a couple of journalists that it is a challenge for them to -- it's a disincentive sometimes to invest in a story particularly if there is an involved investigative reporting they want to do, if they are going to have to devote significant time to a story with -- if they get to say a bankers box of records or just a file folder or two or three pages. If they get the response and within 72 hours it can be posted on the website, they may get the response but that may mean,

okay now we know, we need to request an interview with so and so. Or now we know what other request we need to make or it's triggered something else that they need to do. But if another media outlet gets -- can see that and can run with it, it sort of negates their work to some extent and their editor may say, "Well, just drop that story now because it's not our story anymore" and I think it could -- if one of the purposes of access to information is accountability.

One of the locus of accountability certainly with government but one of the facilitators of the accountability is the opposition and the media. And if the media are deterred from investing in the larger stories because the information is posted online, that quickly it may not be -- although we're looking at it as an open government thing, great, any access to information that we're giving out, we'll give it to everyone. In certain instances it may be counterproductive. And we don't -- we're certainly in favor of posting the results of the access to information request. We are just suggesting that perhaps maybe a full calendar week or something like that might be more appropriate to at least give journalists a reasonable opportunity to work with the information that they've received from their access to requests.

Mr. Ring: We were consulted by the Office of Public Engagement when this notion was first envisaged and we looked to other jurisdictions and got some guidance from British Columbia where we believe it was three days. So we went with that particular model but having heard what we've heard we know as Mr. Murray suggested, at least a calendar week or five working days to give the journalists enough time to do whatever they need with the information based on the investment that they've made in terms of time and effort and sometimes financial.

Mr. Murray: If I could -- well if there are any questions on that unless otherwise I'll move on.

Chairman Wells: It's clearly understandable but it demonstrates that the incentives for the news media is not to make sure that the public were informed; it's to make sure they have a program. I mean that's understandable, everybody has their self-interest.

Mr. Murray: Yeah that's right.

Chairman Wells: And you would think that we could be --

Mr. Murray: Unless you hear something different from journalists who have a different view or -- and I haven't heard -- although I've heard the journalist complain about the short length of time, I haven't heard them suggest a specific period that would be helpful and we're just proposing a week. I mean we don't want to go -- we don't want to make it too long but a week is just what we're proposing so.

The next topic I'd like to address is fees. Now in our original submission we propose that the fee schedule be amended and we took particular issue with the notion of being able to charge a fee for the time taken to consider whether to apply a particular exception.

But we've had a lot of discussion about fees and we've gone back to do further research and I think we've realized we've missed a piece when we did our research, our jurisdictional scan. And it may have been mentioned already I believe it was that in New Brunswick, the government there eliminated all fees and we've looked into that further and we've had some discussions with the representative of the equivalent of the ATIPP Office there as well as the Commissioner's Office in New Brunswick in these past several days. And so they've eliminated not only the $5 application fee but all of this search, the copying fees, the

computer fees, the mail and courier delivery fees, all of those, everything has been eliminated, no more fees of any kind. And in our discussions with people in New Brunswick, what we heard was that from the government's perspective the number of requests did go up about 20% and there were a few instances of very large requests. And there is a particular situation where there is one specific applicant who is filing a lot of requests to one particular public body and a lot of large request and that the reduction of the fees may have facilitated that.

But one thing that they don't have in British Columbia -- I'm sorry, in New Brunswick which we have here, in our Section 43.1 as Ms. Legault pointed out as in her words, "We have a lot of discipline built into our Act". Because of Section 43.1 you have frivolous and vexatious and those are the provisions but you also have the ability for a public body to come to the Commissioner's Office and request that they be able to disregard a request that is overly broad and we can do that. So and we've only received one inquiry of that nature here so far and once we touch base with the applicant having received the request from the public body to consider their request overly broad and then allowed them to disregard it, the applicant

conceded that that it was indeed overly broad and they withdrew their request.

Chairman Wells: So then the increase in numbers and the increase in quantum request experienced in New Brunswick might not occur here because of -- or if it did occur it could be handled through the present procedures in 43.1?

Mr. Murray: That's our conclusion. And again it comes from listening to everybody during this process and doing further research as a result of that. And I think the point has been well made that the return on the effort to deal with fees is just not worth it and is in fact counterproductive and it's delaying the process because if one of the purposes of your review is to identify ways to make the process more efficient, if we remove the fee process, the public bodies are taking time to do these fee estimates then to issue them to the applicant and wait to hear back to see whether the applicant is willing to proceed. And it's really a burden on the process so we're in support of elimination of fees.

One topic that came up is the process identified -- it was referenced I believe by a couple of the opposition members presenting that when they want to advocate on behalf of one of their

constituents, when they can no longer make the phone call directly to the service provider that the constituent is dealing with and they are being told to refer all inquiries to the Executive Assistant of the Deputy Minister who's responsible, one issue I suppose is that the Executive Assistant is not actually an employee of -- is a political staff person and even the information may not be in the control -- arguably may not even be in the control of the public body anymore once they receive it but there are many issues with it. And in terms of the privacy aspect, there is a point to be made there and in fact we received a complaint about that from one of the opposition members some months ago. And interestingly if you look at our -- under Section 44, our privacy powers, we couldn't accept a privacy complaint per se, we had to accept it under our general powers of Section 51 because it wasn't a complaint by an individual who's privacy has been affected, because we didn't receive the complaint from the constituent.

We received it from the MHA so we didn't accept it actually under 44, the privacy provision, the privacy complaint provision. We accepted it under 51 which is our general authority to oversee compliance with the Act. So we didn't issue a Commissioner's Report. We simply wrote a letter to the parties involved and one of those parties published the letter on -- the MHA

published the letter on their website. And essentially what we said was that, providing the -- requiring that the MHA go through the Executive Assistant is -- the result is that, the personal information of the constituent which is held by the public body that the constituent is dealing with, they feel comfortable sharing with their MHA obviously in order to get some assistance but they haven't asked that it be provided to this other party, this Executive Assistant.

Chairman Wells: Or haven't consented.

Mr. Murray: Or haven't consented and if they are told that this is the only way it's allowed to occur, consent is kind of meaningless. If they are told, "Well, the only way the MHA can help you is if you consent." It's like mandatory consent. You have to consent for the EA to review it.

Chairman Wells: That's not consent.

Mr. Murray: It's not really consent. So what we said is that on a routine basis -- and the examples were given were situations like somebody is hoping to receive some sort of assistance let's say it's some housing assistance or some special medical aid or something like that and the person they are dealing with let's

say a social worker is telling them that there has been a delay of some sort and the constituent is not sure -- doesn't understand the basis for delay, is concerned and worried about the delay, et cetera, they ask their MHA to find out more about this delay and can it be expedited. And the MHA cannot call the person anymore, the social worker and find out. They have to call the EA. So we're saying there is a privacy issue there because of the disclosure of that information but we're saying that there could be situations where you might need to bring the EA. If it's a big policy issue for the department, if it's an overall policy issue for the department that's at issue for the constituent, maybe the Minister may need to be involved. But most routine inquiries could be made directly to the office that's dealing with the constituent. And the other issue was that the response was raised that well one of the individual employee doesn't feel comfortable dealing with the MHA or the MHA staff or they don't know them and they feel like somebody is coming down from on high to talk to a front line worker in a department.

There is no reason why that person couldn't refer the inquiry to their supervisor if they personally felt they couldn't handle an enquiry from a MHAs Office. It could be dealt more -- with more expeditiously and we're hearing from the MHAs as well

that sometimes routine inquiries that might take one phone call from the MHA, now it's several phone calls because it's got to go the EA who's then got to phone the department, who then phones back the EA, who's got to phone back the MHA. So it's just not an issue for the constituent.

Chairman Wells: And you're suggesting that there might be a circumstance where it could be because policy might be at issue.

Mr. Murray: Right.

Chairman Wells: Surely a public servant would recognize that and say, "I'm sorry, I can't address it directly. There is a policy issue there."

Mr. Murray: And they can bump it up with the line.

Chairman Wells: And bump it up with the line.

Mr. Murray: Absolutely.

Chairman Wells: And so why you still don't have to go to the political assistant --

Mr. Murray: You shouldn't have to.

Chairman Wells: To administer that.

Mr. Murray: No.

Chairman Wells: But it doesn't seem right, but I mean that effectively negates the provision in the Act that enables the MHA to do it.

Mr. Murray: Precisely.

Chairman Wells: The individual if it were -- if he felt sufficiently confident to do it or they were in a city and could do it could go themselves and go directly.

Mr. Murray: That's right.

Chairman Wells: He wouldn't have to go through any Executive Assistant and in MHA.

Mr. Murray: Right.

Chairman Wells: As a result having a provision in the Statute enabling an MHA to carry out that activity on behalf of the individual is meaningless that you had to go through the MHA.

Mr. Murray: And this applies in as well to our privacy oversight because we wrote the letter to the Minister saying, "This is our finding on this," but it had no impact. So even if we could report -- even if this was a Commissioner's Report -- and it was publicized and it reached the news, even if -- and our finding was that this was not consistent with the privacy provision of the legislation so we couldn't make that finding.

Chairman Wells: But they are not -- that particular department is on watch.

Mr. Murray: Well even if they are on watch, I mean the MHA spoke about it into the news media and the legislature and publicized our letter widely. It was well known that this process was taking place and it had no impact. So unless we have the ability to -- and our initial submission was that we want to be able to issue a report in these cases which could then allow us to go to court. Now, the discussion has evolved to maybe we should have order power but either way there should be some mechanism whereby if we find that there is a violation of a

privacy provision there should be some way for us to do something about it if they decide -- if the public body decides they don't want to apply.

Chairman Wells: What we've been asked to do is recommend a Statutory Provision that would prohibit that --

Mr. Murray: Okay. Well and that's -- that would work for that situation as well.

Ms. Stoddart: Okay, on that –

Commissioner Letto: Go ahead, you are the policy person.

Ms. Stoddart: Okay, thanks. Well on that topic it seems that -- I think we all agree that Section 44, particularly in dealing with personal information but I would suggest also in terms of complaints under the access part should be re-done in order to give you the full suit of investigative powers both in access and in privacy to initiate where you have grounds I believe to deal with group complaints and so on. So I think that's a very interesting example of how limited your powers are particularly in personal information and in this day and age the reality is that people often don't know when there is a privacy

violation. So in my opinion you really need the power to -- when you get intelligence of something

Mr. Ring: That's right.

Ms. Stoddart: To go in and look at it on behalf of perhaps a group of people.

Mr. Ring: Well over and above the EA issue in terms of the security of privacy breach we believe that the current systems is very time consuming or when you look again at the geography in this province you've got a regional depot or service center where the local MHA, he knows who the director is there and he can pick up the telephone and call the director rather than having go through an EA who may have to make a phone call, try to get information. So it slows the system down significantly as well.

Chairman Wells: Mr. Murray, would it be possible of you to provide us with a copy of that letter that your office wrote with respect to this practice?

Mr. Murray: I was just going to offer it to you. So we were thinking alike yes.

Chairman Wells: Okay.

Commissioner Letto: I'd like to ask a question. When you look at the strict rules and practices around sharing of personal information in the public domain that public bodies hold, does it border on being illegal that you have to go through somebody who is not a public servant?

Mr. Murray: Well anything that is not compliant with the law I guess as well you could characterize it as illegal. So I mean we have a law and if it's not being followed then it's -- that's the term that you could use. I don't know.

Chairman Wells: But there's a specific provision for the MHA --

Mr. Murray: There is.

Chairman Wells: To do that. I've forgotten which number it is but there is a specific provision in the Act that enables the MHA to do that and enable or authorizes public servants to make the information available --

Mr. Murray: I agree.

Chairman Wells: To the MHA.

Mr. Murray: Yeah, so I think they have every right. Under the Statute it's quite clear that they can do this. There was some representation that MHAs were feeling like they could be subject to being sued or something.

Ms. Stoddart: It was something about a liability.

Chairman Wells: We received a letter from the Speaker on behalf of MHAs who were concerned about potential liability if a individual for whom they are acting turns sour.

Mr. Murray: Right.

Chairman Wells: They were unsatisfied and decided to complain that the MHA had their personal information.

Mr. Murray: Right. I don't know. We don't have any --

Chairman Wells: Except what we have to do is to consider that.

Mr. Murray: Yeah.

Chairman Wells: That's probably what you're speaking about.

Mr. Murray: It is and we haven't -- that's not an issue that has ever been brought to us and we haven't given it any deep consideration or anything so. So just one -- Section 18 issue has been covered but I just wanted to make one point. When the government presentation occurred there was just -- it was a reference that there had been no appeals to the court and I don't know whether that was -- that statement was made. There was no appeals to the court regarding Section 18, you know where there is a certificate from the clerk. So I just wanted to make the point that I think anyone looking at Section 18 in any detail would -- may be deterred from even attempting to file an appeal to the court because it appears that the court would only be reviewing the validity of the certificate and not the claim because the certificate is said to be -- I forget the word now but basically --

Mr. Ring It's determinative.

Mr. Murray: Determinative or conclusive of the matter. So I don't know if anyone would bother to go to court. So I don't think it should be read as assuming that people are satisfied when

they get -- when they are told that they cannot access information on that basis just because there haven't been any court appeals.

Mr. Ring: Before we go on to the next subject in terms of Cabinet confidences it was mentioned in one of the presentations that the government is more comfortable with the courts because they can keep their Cabinet documents more secure than the OIPC. I don't really understand the rationale behind that, security is security, and I just want to assure the panel that our office has multiple layers of physical security, electronic security and all of the measures in between that will ensure that the documents entrusted to us are as secure as they can possibly be.

Chairman Wells: I appreciate that Mr. Ring. There's also the fact that if they are really concerned about letting it out of their physical security you can go to the office and deal with it.

Mr. Ring: Exactly. It is correct sir.

Mr. Murray: Okay. picking up on the security topic, one of the representations that was made by the officer, the Chief Information Officer was about Section 22 (1)(l) of the ATIPPA

which -- and she talked about the provision that would protect information about the security arrangements of the IT system basically to ensure that nobody could file an access to information request about the protection that they have in place to protect the integrity of the information that they hold. And they suggested that some different jurisdictions -- and they suggested that it is a model that involves the reference to harm.

And I just want to point out to the community that Section 22 (1)(l) as it exists right now, it says that, "The head of the public body may refuse to disclose information to an applicant where disclosure could reasonably be expected to reveal arrangements for the security of the system, including a building or a computer system or a communication system." Now if we move to a harms test as what was suggested, so they suggested several different jurisdictions where the language is the public body may refuse to disclose information if the disclosure would reasonably be expected to harm the security of a computer system.

So in fact our system -- the version we have right now is actually more all encompassing than what they propose because what they are proposing is the introduction of language involving

harm in the exception. So to use the exception that the one -- if we move to one of the models they are proposing, if they receive an access to information request for information about their security arrangements, they would have to provide any information about their security information that there was -- that they could not establish that there was harm in disclosing. So they would have to ensure that to withhold the information, that it would meet the threshold of reasonable expectation of probably harm, otherwise they'd have to disclose it.

But our current provision right now in order for them to withhold it, all it has to do is reveal information about the arrangements for security. So they can withhold everything having to do with their security arrangements right now. And they don't have to go through a harms test. So I just wanted to point out there that what they're asking for would actually have the opposite effect of what they intend, in my view.

Ms. Stoddart: Thank you.

Chairman Wells: I didn't quite -- I don't quite follow.

Mr. Murray: Okay.

Chairman Wells: What's here now and this was added in 2012.

Mr. Murray: I don't know if it was added I think it was there before.

Mr. Ring: I think it was there before.

Chairman Wells: I thought that was one of the ones that was there or maybe it wasn't. I've never seen it before.

Mr. Murray: Yeah.

Mr. Ring: No I don't think that was there.

Mr. Murray: It was 22 (1)(l). This is there now and I believe it was always there and to use that exception, any information that would reveal arrangements for the security of the computer system --

Chairman Wells: Is it precluded?

Mr. Murray: Yeah, can be -- they don't have to release it, so all it has to do is be anything about their arrangements at all, but if they went to a provision such as they have in Nova Scotia for

example or one of the other jurisdictions they referenced, in order to withhold the information they would -- they can only withhold the information that would harm the security. So they -- so other information about their security unless they can establish that it would harm the security.

Mr. Murray: So -- for the other information about their security unless they can establish that it would harm the security, they would have the -- they could use the exception.

Mr. Ring: Was that proposed?

Mr. Murray: Yes, they proposed that. So I'm just saying that I think they should reconsider their proposal and perhaps you should consider it as well.

Ms. Stoddart: I think we're all quite sensitive to the fact that the attacks on security particularly cyber security installations and government holdings of information are continuous, we understand. I for one would think narrowing the exceptions to that is being protected information is perhaps not wise with the --

Mr. Murray: Agreed.

Ms. Stoddart: State of the universe as it is now.

Mr. Murray: Yeah. And I'll say as well that I mean we didn't have the benefit of having the presentation when it was being made and we received it yesterday afternoon. So we've -- actually that's not true we did receive a paper copy at the end of the day, but we received an electronic copy the next day. And of course we've been here all the time and haven't had a chance to really go through -- to read the presentation at all. It's only I just made a note on that particular one and I asked someone in the office to do some research on it. So that's why we've been able to come up with that on that particular subject. So there could be other things that we note when we've got the chance to read a few of these presentations from this week, that we may have to -- we may include on our written submission in our follow ups submission to you.

Mr. Murray: Okay.

Ms. Stoddart: That we may not have had the chance to address today.

Mr. Ring: Just one comment on this, this is the an example of a type of issue that public bodies and agencies. If they have concerns about this, in terms of the legislation, it would be ideal to get together and have a meeting and walk our ways through it. There's a couple of other examples that occurred with some of the presentations. We'll talk about one later, about the adoptions issue that came up that prior consultation, when the issue is alive and real one before an event such as this would go a long way in helping to separate the wheat from the chaff and come up with something that is concrete, reasonable and workable. We encourage public bodies to do that, at any time that there is any issue dealing with access in privacy.

Commissioner Letto: So you need an ongoing process in order to be able to vet this stuff?

Mr. Ring: Yeah.

Mr. Murray: We can give them some feedback basically; we're just offering to give people feedback and advice on issues relating to access and privacy. And then provision is there in section 51 for the Commissioner to do those things. So we're available on that front. Just a comment on section 27, Mr. O'Reilly one of the deputy ministers, referenced some -- he talked about

the idea of maintaining the current version of section 27. As opposed to going back to the former version with the three part test. But he was concerned I think about -- he didn't make a case for the procurement issue. He -- I don't think he disagreed that people should be aware of how much government is spending on things -- on goods and services. But he did make the point that he was concerned that certain outside companies may come in and wish to discuss with government. Making arrangements for some sort of aid or some assistance in setting up here.

Chairman Wells: Economic development.

Mr. Murray: In this province -- economic development.

Chairman Wells: Information they would -- it would be necessary for them to disclose in order to get economic development assistance.

Mr. Murray: Right. It's my opinion that the three part test would protect any information that these companies voluntarily provide in the course of about how they do their business. Their internal information about how they build their products, or do business, or do the marketing or what have

you. I believe that will all be protected by the three-part test, as it previously existed. It's possible and I think this is a repeated theme when there has been advocacy on about some of the exceptions. Is there's fears expressed that there could be a problem, but as Mr. O'Reilly mentioned there have been very few requests to his department for this type of information. And he could not actually name any specific examples where he felt that there was any impact on their relationship between the government and any particular company that they've dealt with. If I recall his presentation correctly.

Chairman Wells: From a public information point of view, one would expect that the amount of development would be something that the public would have the right to know.

Mr. Murray: Precisely.

Chairman Wells: Yeah.

Mr. Murray: Yeah, and once the -- once arrangements are made, if there is a loan provided or something like that, or a grant given to an outsider agency that type of information I think would be something that the public would be interested in. But the

internal workings and how they make their products and how they do their business I don't think is --

Chairman Wells: That would be protected under the three-part test anyway.

Mr. Murray: I think it would be -- it would be exactly. There were some discussions I mean Mr. Letto raised the idea of the UK model. I just wanted to go back regarding that, I wanted to go back to comments of Ms. Legault where she pointed out that the three part test is established -- very well established in Canada and she noted that early on, in the access to info -- in the access to information world here in Canada. The equivalent of section 27 nationally and federally and in other jurisdictions that were using that version. It was cre -- it was a cause of -- was one of the most used exceptions and it was one that went to court the most often. But that provision that the three part test has been around for 30-35 years now. And now she says that currently, it's not used nearly as often because the big commercial players out there know it, because the case law is so well developed around it. And the Supreme Court of Canada has ruled on it.

So in terms of even for example the comments about the guidance documents issued by the Information Commissioner in the UK. I think the Supreme Court of Canada has issued some excellent guidance on the interpretation of the three part test. And that's what we referenced in our submission. And so I would also take issue I think, with the comments of Mr. Keating from Nalcor that there was some -- there was a lack of clarity about what the three part test does or doesn't do. I think there is -- especially for organizations that have the benefit of legal counsel, there is excellent clarity available in my view in the case law that has been developed. Particularly again from the Supreme Court of Canada and some of the other Courts of Appeal across the country, about how to interpret the three part test.

I would again support reverting to that and regarding to some of the exceptions whether it's 27 or 20, there has been a lot of talk about from some presenters -- not a lot but some -- about well we want to be able to preserve advice and recommendations for example. We want to be able to protect business interest. I haven't heard any of the presenters give us an example where information that is currently protected based on the Bill 29 exceptions. Would not be protected under the former provisions -- the former versions say section 20 or 27. We've

heard fears expressed, but we haven't heard any concrete examples of if we went back to the old version what would happen. And I know that the questions were posed from the panel, but I never once heard an example where -- a specific example of a type of information that would be released if we went back to the old versions of these provisions. And that how it would cause harm to the operations of the government.

And those are one of the things that Mr. Cummings noted in his report. He was -- he talked about in his preamble and in some of the references to some of the exceptions, the fears were expressed that this, that, or the other thing might happen. But it would seem like it was more of a discomfort with the idea of access to certain types of information. And we even heard that from Ms. Hammond as well, who's concerned about releasing e-mail exchanges. And our view s that section 20 is there e-mail exchanges don't go out holus bolus. They don't just release tons of e-mail exchanges, you go through the exceptions and section 20 is there and is the one of the most commonly used exceptions before and after Bill 29. And it was there before.

Chairman Wells: Should there be a special a near absolute protection for information required by statute to be submitted?

Mr. Murray: That's a big question and I don't know if I can answer that off the top of my head. I guess there are different circumstances that might apply, but I don't know of any exceptions in any of the other access to information laws that are specific to that. Because you also got things like restaurant inspections so --

Chairman Wells: Yes, there are certain information that government collects specifically for the purpose of them being made public.

Mr. Murray: Right. So I think you still have to make -- assess that on a case by case basis and use the exceptions that are there.

Chairman Wells: Yeah.

Mr. Murray: And I think the --

Commissioner Letto: So would that be released under public health and safety?

Mr. Murray: No, it's released under the ATIPPA right now; recently the government has decided to put all those online anyways. But before they did that a year or so ago, journalists would file

access to information request for that. Now I have also seen access to information requests for inspections -- government inspections of facilities that process meat. And people want to find out whether that facility has passed inspection and is a healthy place to get meat from, meat cutters and what have you. So it's a public health aspect of this too, there is clear public interest and again you are not going to find out anything about the internal financial dealings of that meat cutting operation. You are going to find out what the result of the government inspection was.

Chairman Wells: Yes.

Mr. Murray: That's it.

Commissioner Letto: This could be maybe a good place to ask then the question about the public interest override, which I think the Center for Law and Democracy suggested be broadened in the Act to have a general public interest override.

Mr. Murray: Yeah.

Commissioner Letto: And I'm just wondering, you've heard what people have had to say about public interest and so on.

What's -- can you give us your thoughts on that and if they've been altered by anything that you've heard said before the committee.

Mr. Murray: What we -- our submission does recommend basically a beefed up public interest override provision that would be more along the lines of one of the better ones in Canada. Because right now, it's fairly narrow and its only relates to health and safety and the environment. There could be other considerations for public interest. I will give you an example, it comes from the Nalcor Provision in the Energy Corporation Act. Which was up for some discussions in section 5.4 and aside from the -- how section 5.4 works in general. It allows the Nalcor to withhold commercially sensitive information. And if you look at the definition in the Energy Corporation Act for commercially sensitive information, it means information relating to the business affairs or activities of the corporation including -- and it's a big list but it also includes financial and commercial information.

So any financial or commercial information that relates to the business affairs of the corporation. So basically, they can withhold a h -- what do they do that doesn't involve their business affairs that's commercial or financial. I think the -- so

in terms of a public interest test, that might be an interesting place for a public interest test to see whether -- just because something is commercial and it relates to their financial or it relates to their business interests, does that mean that it shouldn't be disclosed if it's in the public interest? We've heard from Nalcor that they have an excellent proactive approach to access to information under developing a great culture of access and they rarely use that provision. But in terms of public confidence and the idea that public interest should be considered as one place you could look at it. I mean --

Chairman Wells: But they can't absolutely refuse to do it if it were deals with their normal, local business, they can only exercise those rights in respect of their international contractual arrangements.

Mr. Murray: I think that only applied if they can -- he indicated that it didn't, that they -- that this provision didn't apply to Hydro. I don't know why -- which of their subsidiaries it applies to and doesn't all I know it applies to Nalcor.

Chairman Wells: Oil and gas a subsidiary I think.

Mr. Murray: Right, but even if it was only oil and gas, is there anything, that any information that they have that is commercial in nature, that would -- that there is a public interest in knowing that would not harm their interest in any way? Maybe there is something, I don't know, I would think that it's the definition of commercially sensitive is so broad. And I don't mean to pick on Nalcor I'm just using that an example, that there may be situations involving public interest that go beyond health and safety or environment. That -- which is in our current provisions (inaudible)

Chairman Wells: Well the salaries they pay their staff is not commercially sensitive?

Mr. Murray: Agreed. It's not commercially sensitive.

Chairman Wells: And that would be a factor that the public would have an interest in knowing.

Mr. Murray: That's true.

Chairman Wells: Rent, they pay to rent space in buildings, amount of money they pay to consultant companies, those would be --

Ms. Stoddart: Work place safety maybe.

Chairman Wells: Work place safety, they wouldn't be commercially sensitive. And wouldn't -- I would think be protective. What I think they're looking at is arrangements with their international business partners.

Mr. Murray: What about if Nalcor were to build a road in association with their Construction of Muskrat Falls, now that relates to their operations. What if someone asks how much did it cost to build that road, that's a commercial --

Chairman Wells: Why is that commercially sensitive?

Mr. Murray: Well it's financial and it relates to their business affairs.

Chairman Wells: The mere fact that it's financial, doesn't make it commercially sensitive.

Mr. Murray: By the definition in there I would argue that it does. Because it says just as for comer – for it to be commercially sensitive, it just has to be information relating to the business affairs or activities of the corporation. And it gives up a list of examples and financial. I think I would just recommend that

you have a closer look at that definition. And I'm only using that as an example, I don't want to pick on Nalcor but --

Ms. Stoddart: Well in fact Mr. Murray I was very interested in the exception for Nalcor because it's one of these blanket exceptions we just say this is the way it is and it is. So I've tried to look very quickly at what was done elsewhere and I took the example of HydroQuébec that to my knowledge has large international dealings, international contracts, like it has international suppliers I don't know. But it was pointed out to me that the issue or this section applied also or perhaps exclusively I'm not sure to oil and gas operations. On thinking of it, over the time elapsed since we heard from Nalcor I'm at a loss to understand what is special about oil and gas operations that needs a particular protection from release that is not true of, for example international hydroelectricity development ventures. And wondered if in your experience given that other provinces across Canada perhaps even the government of Canada maybe involved in oil and gas ventures. Do they require any blanket protection as section 5.4 of the CA?

Mr. Murray: I'm not aware of any involved in oil or gas, I'm sorry. But --

Ms. Stoddart: No example in Alberta?

Mr. Murray: This Hydro -- in our submission we referenced that I did check with Manitoba and Manitoba Hydro was covered by their provincial access statute. They don't have any provisional -- additional provision but I don't think I'm equipped here today to discuss to -- I'm not aware enough of their international operations and the risks that may be associated with that for me to comment on that.

Ms. Stoddart: No. But my question is, is there analogies? I made one quick check and I didn't see any jurisdiction, I'm more familiar with. That they're needed to be this special provision that they could avail themselves of the tests under the ordinary laws. So I just wondered if you knew of other jurisdictions where there was special protection added.

Mr. Murray: Not to my knowledge, no. Regarding the commercially sensitive bit though again, I guess I'm looking at that from the point of view of our office and let's say we were able to review a claim, that some of the information was commercially sensitive. If we were able to review that claim and let's say Nalcor wanted to assert a claim, let's say about building a road in Labrador, if we're stuck with the provisions that we have to

oversee. Not stuck with that's a bad choice of words basically but yes – yes. We have to work with we have. And if we were asked to do a review of a decision to deny access to information that about a road that was being constructed by Nalcor in Labrador we would look at the definition of commercially sensitive. And we would say well, is it information that relates to the business affairs or activities of the corporation or its subsidiary. I think it relates to business affairs they've paid to have the road constructed. And we go down through the list and one of them is, is it financial information? Yes, its financial information, so we would have to agree that Nalcor can withhold information about how much it cost to build that road. Even though --

Chairman Wells: The cost of buying a pencil is financial information.

Mr. Murray: That's true.

Chairman Wells: Well I think we're carrying it to a bit of an extreme. What Mr. Keating mentioned yesterday, was he was talking about the seismic information.

Mr. Murray: Different all together.

Chairman Wells: That's critically important. Where you may find some guidance Mr. Letto just mentioned to me is what does the federal government do to protect its Hibernia interest. In the Hibernia Federal Hibernia 8% interest because they have the same, they would have the same issue. So the federal government would be -- that would be a comparable situation. So it might be interesting to look at what the federal government does.

Mr. Murray: Yeah, fair enough, right let's move on if I can so this --

Commissioner Letto: Can I make a this suggest now when you do your follow up written submission; I think we're interested in the whole public interest thing. And to give us maybe a definitive view as you can of what you think. Because you've mentioned a beefed up public interest override but to add some definition to that.

Mr. Murray: Okay. One of the provisions that was referenced by the presentation by the minister and his officials was section 69 which is the directory of information. And there was some concern that all public bodies would have to do it and it would be a burden on municipalities and things of that nature. But, if you look at section 69 the way it's ordered right now, section

69 -- it's not being used right now and it has never been used since 2005 since the Act came into force. But subsection 5 says, this section or a subsection of this section shall apply to those public bodies listed in the regulations. So now there are no public bodies listed in the regulations in relation to section 69. However, if the core departments of government one at a time wanted to develop a list of their information holdings, and then designate them in the regulations one at a time, especially in conjunction with the open government initiative that's underway. I think there would be -- they would probably almost be doing it anyways with the open government initiative, but this would sort of allow it to be codified and occur under the provisions of the legislation which would sort of guarantee that it's going to be kept up.

But there is no -- there would be no requirements to designate each and every municipality in there. And perhaps we could say that, it could be in other medium to long term goal after we develop some guidelines for municipalities about ATIPPA itself. It could be another goal down the road of developing a template for them to help them put something online, bit-by-bit over time. But I think the priority would be the line departments of government, and I think it could be done in an orderly way without placing undue burden on any other public

bodies and they could be at it as I say bit by bit under regulation.

Chairman Wells: And reasonably easily kept current I would think.

Mr. Murray: Well nowadays with the electronic - they provided you with a paper copy from 2000 and nowadays I think these things could be added electronically updated and subtracted and we've actually given them examples from other jurisdictions where similar directory is actually in use at the provincial level. And there are different models and some going into more depth than others and it could be whatever is deemed appropriate as long as it's that.

Ms. Stoddart: Do you see a role for your office as you probably know that you UK Commissioner prescribes the model?

Mr. Murray: Right now, we don't have a legislative mandate to do that.

Ms. Stoddart: No.

Mr. Murray: So we would have to have that in order to -- I think insert ourselves into that. But secondly, I would say --

Ms. Stoddart: Do you think it would be a useful role for everyone in this process that an arms length body prescribed, what the classes of information be.

Mr. Murray: Well I mean the departments and agencies know best what information they have. I don't know if -- I mean there might be some argument in pro -- giving the Commissioner some oversight over the open government initiative or oversight. We would already have oversight over section 69 because it's in the act, and the Commissioner has powers to ensure compliance with the Act in general. So I think we would already be empowered to comment on how they're doing regarding their initiatives in relations to section 69. I personally -- I don't know if you have any different feelings but I don't know if we would want to be taking a lead on that.

Mr. Ring: No I agree, we would not. However, I believe that the office of the public engagement is very well placed to take the lead role on this. They administer and drive the -- many aspects of the open government initiative as well as their resources. I think there is something that could be done in conjunction with the office of the public engagement and the

chief information officer for the province in terms of developing these categories of information.

Chairman Wells: Two roles here though Commissioner, section 69 (1) gives that minister of the office of public engagement the responsibility for establishing it. No question where the responsibilities is. But the oversight and seeing that the government does it still rests with the Commissioner --

Mr. Ring: I know --

Mr. Murray: I think we could --

Mr. Ring: I know there is a role for the Commissioner's office in terms of the oversight but in terms of the development and rollout and administration and monitoring I would say no. But oversight purely yes.

Ms. Stoddart: You don't want to monitor it?

Mr. Ring: Oh, monitoring fine, I'm sorry I misspoke on that that.

Ms. Stoddart: Perhaps tell us again what you think your role should be?

Mr. Ring: An oversight, an oversight aspect of the directory to ensure it's updated and --

Chairman Wells: And that it's in fact done.

Mr. Murray: And it's done.

Mr. Ring: And it's in fact done, yeah.

Mr. Murray: And it's in compliance with section 69.

Mr. Ring: Yeah, yeah.

Ms. Stoddart: Have you ever commented on the fact that the regulations have never been published and this is not been done?

Mr. Murray: In our submission we have, and in our previous review submissions we made the same comment.

Ms. Stoddart: Thank you.

Commissioner Letto: So the bottom line is that you don't think that the mountain to create directories of information that you received has been suggested? And it doesn't have to apply to every single of 460 public bodies that you can start with direct government departments add subtract things as divisions. Get moved from one department to another and so on?

Mr. Ring: It's more of a question or writing the table of contents as opposed to writing the book. We had the categories of information there, the information could be retrieved and posted as required.

Mr. Murray: Okay. We wanted to I guess acknowledge but perhaps not going to great detail about the concerns that were referenced by Ms. Dulling with the government about the adoptions issue and the children in care issue. And regarding both aspects, these are things that we've just heard through her presentation. There are issues in the media now relating to it. We don't feel like we are in a position to comment in any depth about whether the legislation should be amended or not. In relation to those matters, we certainly acknowledge the sensitivity and it's something that could be looked into. Again it would probably be another great example of -- we would be available if they wanted to bounce some ideas off us

about what their concerns are and issues and perhaps they've already done that with the ATIPPA office but in terms of the adoptions one, there may be other perspectives that we haven't heard. And that maybe the committee hasn't heard.

We know that for example, the children are the highest priority and the safety of the children. We know that they've have one issue or one request that they've referenced, but we really know nothing from the adoptive parents point of view whose information they would be requested, they would be requesting information about them, about the clinical analysis of how they -- critical assessment of how they reacted to the adoption process and why they may have been turned down. And there are issues on both sides there, and which one should come out on top we're not prepared to make any call on that today.

Chairman Wells: Should that change in the foreseeable few weeks, would you let us have the benefit of your thoughts?

Mr. Murray: We will --

Chairman Wells: From a Commissioner's point of view?

Mr. Murray: We may – in case we don't though the reason would be that --

Chairman Wells: No we understand you may not.

Mr. Murray: Yeah, we may not, yeah.

Chairman Wells: I understand that its -- I can see your concern and the sensitivity on both sides in this. No ready answer obviously the person who've been turned down have an interest in knowing why.

Mr. Murray: Right.

Chairman Wells: But Ms. Dulling explained reasonably yesterday.

Mr. Murray: She had a pitch. And the same goes with the children and youth in care. It's our understanding that the legislation that exists now that is listed in the regulations, that the child and youth care act, takes certain provisions relating to information about children and youth in care, takes precedence over the ATIPPA and we were under -- it was our understanding that for the most part, there was some clarity there, particular with the recent legislation that was brought

in. So in terms of the protection of personal information of children and youth in care we were of the understanding that it was adequately protected. However, we remained open to discussions on that but we have nothing definitive to say on it.

Ms. Stoddart: Could I ask you or perhaps you were going to that, you had some very useful pages in your brief, page 84 and 85 about the whole issue of the exceptions in the regulations. And since we received your brief, heard your initial presentation, we've started to look at some of them a bit more closely. I … one … and it's a whole series of major, major exceptions to the jurisdiction of the ATIPPA law. And some of them predated it seems ATIPPA? And they were grandfathered in and some have been added since and it doesn't seem necessarily that you were consulted?

Mr. Murray: No.

Ms. Stoddart: I understand. I don't know if you and I personally find this quite concerning there is a huge number of regulations. There is a huge numbers of situations that are complete carve outs from ATIPPA. I didn't know if at this time you had any further comments on this whole issue.

Mr. Murray: I don't think we've developed any further analysis of this situation I think the concern that we referenced in our submission was that, we were not -- it was not clear to us that what level of analysis had gone into the decision to carve out these section by putting them in the regulations. And we do believe that there should be a more rigorous process and certainly for adding any new ones but really to go back and look at the ones that are there now. And we referenced to even the idea of maybe even a sunset clause or something at least that would require some analysis from time to time, on the necessity of having them there. And they don't all even seem to work very well either like you said some of the legislation predates ATIPPA so it wasn't drafted with the idea that it would be -- it was meant to be related to ATIPPA in any way.

Ms. Stoddart: It was just a status quo was preserved in spite of the ATIPPA and you don't remember from the adoption and the initial ATIPPA if there was any discussion.

Mr. Murray: Not when we were around I started to work with the office within a couple of months of the first Commissioner, well within a couple of months of the -- within probably six weeks of the Act coming to force, and I know there was no

discussions when I -- since I have been there. Presumably there were some discussions prior to -- when the Act was being developed. But I wasn't privy to those. It's probably like the review of the Act itself, it's a good idea to revisit these things from time to time and see whether it's still necessary or what.

Ms. Stoddart: Thank you.

Chairman Wells: Might there be a proper role for the Commissioner?

Mr. Murray: We can certainly take it on, but I think we would need to have some cooperation there and some willingness on the part of government. Because I wouldn't want us to do a pile of work if there was no intention of really engaging with us in any meaningful way. So I think there would have to be a commitment from government that our process was going to – that they were going to work with us on this.

Mr. Ring: Maybe even the joint efforts could be done by a member of the Executive Council.

Chairman Wells: When you look at the -- we've excerpt all of the sections that are applicable and I have gone through a list of

them and I've marked. Appears okay on some and question marks on others so but -- there had to be a detailed assessment of it to come to a conclusion. But clearly some of them --

Mr. Murray: Questionable.

Chairman Wells: Comes in mind.

Mr. Murray: Some are clear yes.

Chairman Wells: Yeah, there's I'm -- those are very private information and the child youth and really.

Mr. Murray: One of the thing we noted though is that -- there is one of the -- when they did review the child -- children and youth in care act. I can't remember the name of the Act now. But when they reviewed that, we provided some significant input on it and we volunteered ourselves to do that. We were not asked to do it, we became aware that they were ding consultation on it, so we just inserted ourselves or invited ourselves into it. And we -- but they were glad to have our input once we got into it and some of the provisions there. One of the provisions that we recommended that they actually

ended up putting in there was that, that there be an appeal mechanism internally. As well as to the courts for someone who is seeking access to information. Because previously, they were allowed to refuse access, but that was it. There was no appeal whatsoever so if you got a provision that takes precedence over our Act and we don't get to review that access decisions. I think all of the legislation should have some recourse to the courts at least for someone who is refused access.

Chairman Wells: Well that statute does have the internal review on that you require a minister to appoint a person to perform the internal review.

Mr. Murray: Yeah, that was our suggestion.

Mr. Ring: That was a significant piece of work but one of our analyst was dedicated for quite a period of time and at the end of the preparation of the documents, we were invited -- the analyst and I went with her to sit down with the senior officials involved. And we went through line for line and did the comparison of the Act and it was a very, very positive experience. Not enough for going around unfortunately.

If there is no other questions on that specifically, I've got to segue into another point that I think would flow very nicely from the discussion that we've had right now. And that's dealing with section 51 of the act, general powers and duties of the Commissioner. The number of duties are outlined over and above the ones respecting reviews and privacy issues. The Commissioner and that is the Commissioner may comment on the implication for access to information or for the protection of privacy of proposed legislations -- legislatives themes or programs of public bodies. These would prevent I believe some of the lack of education and knowledge that exist with interacting legislation if in fact the OIPC was able to fulfill this mandate. It says it may.

Commissioner Letto: Shall, you're getting at..

Mr. Ring: Should be shall I believe and it has improved over the last year or so, again with the introduction and creation of the Office of the Public Engagement we have commented on a couple of pieces of legislation. But I think what we need -- we need to be plugged into the legislative drafting process. Not in the early stages, but when it comes to consultations. I believe there's got to be a checkbox there for OIPC consultation. And it would be proactive, it would identify issues that could be

dealt with upfront as opposed to going forward with the piece of legislation or scheme or regulations that after the fact presents problems that need to be dealt with or lived with which is, you know. So if there's something that the panel could recommend to solidify this particular relationship and this particular duty more strongly it would be greatly appreciated.

Chairman Wells: So instead of commissioner shall do it. Should be asked to do it. The government should inquire for advice...

Mr. Ring: Yeah, I mean there are -- I'm not certain but I expect that there is a legislative drafting process all the way up the chain. At a certain point, there is consultation I would just suppose but experts at various levels I would place the office of the Commissioner in that category. And if there is a tick box there to say so you're involved in the process or you're intentionally not. So but when it's made, it's too sporadic and I think the office could play an important role here in ensuring that there is consistency with the interaction of the access laws with all the pieces of legislation that impact.

Commissioner Letto: When they were here, two days ago, the government talked about in a recent policy consultations,

privacy impacts assessments were I think in the draft stages and some of them and one had been entirely completed. Is your office involved in any of those?

Mr. Ring: Not with the -- not to the extent that was mentioned here. I think the office at ATIPPA office are involved in assisting with the primary privacy impact assessments which is I think the larger number that they referred to and they've completed one actual privacy impact assessment. We get involved on an invitation basis by a public body that is undertaking a PIA and they may ask our office for some advice or recommendations or if we have a guideline or a checklist that might be of use to them. But ordinarily we don't get involved with the PIA but we do comment upon them once they're brought to our attention.

Mr. Murray: But they are not routinely brought to our attention.

Mr. Ring: No. Not often enough.

Mr. Murray: Sorry yeah.

Commissioner Letto: Is it that --- there's obviously a way to check things before they become issues, isn't it?

Mr. Ring: Yeah, exactly I mean if I can just use an example of one initiative where I think there was great collaboration and in fact we relied on some documents that we received from Ms. Stoddart's office when she was the Private Commissioner for Canada. And that is the Royal Newfoundland Constabulary when they came with the initiative to put video cameras on George Street. There was great collaboration all the way through and the guidelines that were provided by the federal office was of tremendous assistance and we met with officials from the RNC and there was a balanced and measured approach. And I think all of the privacy issues were considered in terms of the positions of the cameras, the signage, where the video would be kept, who would have access to it, how long it was going to be there. So those kinds of collaborative initiatives normally end up in a very positive result and that's good one and we're really happy to have had the opportunity with the chief of police to get involved with that.

Ms. Stoddart: Commissioner Ring, how often are you called by a committee of the House of Assembly to comment on access or privacy provisions of pending legislation or legislation under study?

Mr. Ring: Sporadically and as I -- during my time in the office we've had the opportunity on two maybe three occasions to comment.

Mr. Murray: Not to the committee though.

Mr. Ring: Not to a committee. No no. We've never been invited by a committee and I'm not sure if --

Chairman Wells: In the government department before the legislation…

Mr. Ring: Yes. That's correct.

Ms. Stoddart: But do the committees call witnesses when they're --

Mr. Ring: No. Not I'm my experience. I'm not familiar with that kind of --

Ms. Stoddart: They don't call any witnesses?

Commissioner Letto: No. The committee legislations doesn't go before committees here

Ms. Stoddart: There are no legislative committees?

Mr. Ring: No.

Commissioner Letto: No … public accounts committee.

Ms. Stoddart: Okay. There aren't specialized committees --

Mr. Ring: For legislation no.

Commissioner Letto: No.

Ms. Stoddart: -- that would hear witnesses?

Mr. Ring: No.

Chairman Wells: No.

Ms. Stoddart: Okay. Thank you. So your input would be in writing to the government as it was proposing the legislation.

Mr. Ring: Yeah. Exactly. If we were provided with a draft, then we would scrutinize that draft in relation to the access and privacy issues and make kind of --

Ms. Stoddart: Okay. Thanks.

Mr. Ring: A bit section by section if necessary.

Ms. Stoddart: Thank you.

Mr. Murray: Okay. We're getting to -- getting down there. Some -- just wanted to comment and I'm not sure if this is the last actually of my notes but some comments during the presentation by Memorial University, I wanted to comment on. So one notion that was expressed was a discussion that opinions expressed in the course of performing services for a public body should be -- maybe there should be a revision of the Act to ensure that that is considered to be the personal information of the employee and I think we would strongly disagree with that position. They would -- there may be some -- maybe there are things going on in the university that would lead them to come forth with that idea but I think it would have massive unintended consequences across all public bodies and in fact even within the university. And I think it will be hugely counterproductive to the spirit and intent of the act. There was some discussion that for example --

Ms. Stoddart: Sorry. Can you give an example? I think this is a very important issue --

Mr. Murray: Yes. I will. I'll give you an example --

Ms. Stoddart: -- and I have been questioning the definition that is in this Act and these and other acts for years as to how -- why is that definition is -- so I would be very interested to know why you think that adopting man's position which is let's say I express an opinion as to a third party that remains my personal information because it is my opinion even though I do mention the third party. You reject that proposal and I'm very interested to know why you think this would be harmful.

Mr. Murray: Well, right now the way it would work is my opinion about you; you could get access to it. Right?

Ms. Stoddart: Right.

Mr. Murray: Again we're talking about professional communications within a public body. We're not talking about my opinion about my next door neighbor that I send out my government email address to my wife or something.

Ms. Stoddart: I agree but with respect that's not what's written in the Act is it?

Mr. Murray: No it's not because that's personal information.

Ms. Stoddart: The definition of the opinion varies on the context whether it's in a public body or whether it's a work setting or not.

Mr. Murray: So it's -- my point is that it professional communications. And in fact Memorial University does have a special exception that already -- that acknowledges their I guess unique -- their unique nature. And its section 22.(1) and this was introduces through Bill 29. 22.(1) allows a head of a public body to refuse to disclose to an applicant personal information that is evaluative or opinion material provided explicitly or implicitly in confidence or in compliance for the purpose of and (b) is specific to admission to an academic program of an educational body. (C), determining suitability, eligibility or qualification for the granting of tenure at a post secondary institution and (e) references -- teaching materials or research of an employee of a post secondary. So they do have a lot of coverage already for those types of opinions within the university context. And what they've -- I've heard

explained many times is that the university operates on a collegial basis. And a lot of decisions are made --

Ms. Stoddart: We heard that yesterday.

Mr. Murray: Yeah, so a lot of different decisions are made in a different type of format and they would be in another type of public body. So we don't take issue with that exception being there to deal with those types of circumstances that they would encounter there. But I mean if I'm a private citizen and I'm having some dealings with a public body and I've applied for something and what have you -- I've applied for some permit or something like that and I get turned down. If I know for example that I've got somebody -- I know somebody in there who's got a grudge against me I want to find out exactly what happened in consideration of my permit application. I'm going to file an access to information request for emails that went between these parties to see if they gave me a fair shake or whether they turned down my permit for a reason just because they don't like me. And that's one reason where you would want to have that type of information. To see that you have been treated --

Ms. Stoddart: But with respect, if this is happening, in the course of applying for a public grant or a license or so on, and you're dealing with the employee of the public body or the employee saying, “Well, we don’t want to grant a driver’s or a permit to this person because we know she’s a bad person or we think she’s a bad person”, surely those opinions are expressed in the course of their employment by these employees about their own work. And at the very least there may be exceptions but a public interest override would apply because --

Mr. Murray: Certainly not the public interest override that we have now --

Ms. Stoddart: This is in the course of their jobs.

Mr. Murray: I mean, Section 30 is there with all the harms tests and all the different factors that must be considered on each side. So we think section 30 as it is right now in conjunction with the definition of personal information works well. Memorial is the only public body to come forward and suggest this type of -- which amendment which I think would be quite significant because I want to go on to discuss some of the other things that they said that were suggested about this is that email correspondence between public employees -- presumably at

Memorial she said is often ill considered and unfounded opinions and that people shouldn't be able to -- these things shouldn't be captured in an access to information request. I don't know. I mean most of the --

Ms. Stoddart: No. I tend to disagree with that. I guess my concern which predates this particular review committee and certainly predates the testimony of MUN by several years is just this definition of opinions which is not unique to different land. It's the same definition that's in the federal legislation yet other jurisdictions have the proposed changes as the state of law and so it's just wrestling with the implications across a variety of situations that I'm raising a question not in the context of what was brought up specifically.

Mr. Murray: And I have to admit that we haven't looked at the question that you're asking in any detail because we were -- it was a one thing we were happy to get, and not the one, but one of the few things we were happy to get in Bill 29 was this amended section 30 and the amended definition of personal information. Because we felt that the old definition of personal information I don't think was --

Ms. Stoddart: It was difficult.

Mr. Murray: It was difficult to work with. In fact it was contradictory in its nature and so we were so happy to get that. We said, "Okay. We're good with that. We're going to look at some things -- the many other things in the legislation that we have concerns about and we didn't research that just to see are there any better models out there frankly. So -- yeah

Ms. Stoddart: Okay. Thank you.

Mr. Murray: Let me see. Furthermore regarding Memorial we were supposed to --

Mr. Ring: Excuse me sir. I have to go into the washroom put some medication in my eye. Do you mind if I --

Chairman Wells: You're excused.

Mr. Ring: And Mr. Murray you can just continue if that's okay.

Chairman Wells: Feel free.

Mr. Ring: I apologize.

Mr. Murray: One of the issues that was brought up was -- regarding the burden of proof for section 27 was raised by Memorial as well. And the burden of proof is referenced in section 64 of the ATIPPA. The burden of proof when there's access to information request that involves third party business information and the third party is notified. As was explained, the third party has the opportunity to object to the release of the information. And they -- can object in response to a letter from the public body notifying them about the request. The public body must then decide that even if -- even in the face of that objection by thee third party, does the information fit within section 27. Could -- must it be withheld on the basis of section 27 given even in consideration of what the businesses had to say. If the public body decides that despite what the public bo -- what the businesses said, we don't believe that section 27 applies therefore we intend to release it. They then notify the third party. If the third party wishes to -- decides to let it go, they don't have to appeal if they don't want to but if they decide they want to appeal that they have a time period which to appeal that to our office. If they launch that appeal, the burden of proof is on them. It is not on the public body.

Chairman Wells: Not on the public body?

Mr. Murray: No. It's only on the public body if --

Chairman Wells: If the public body doesn't decide or decides not to release it.

Mr. Murray: It -- well, it's on the public -- exactly. If the public body upon receiving of the request from the applicant, they notify the third party. The third party says, "Yeah. I'd rather you didn't release it." If the public body says, "Okay. We're not going to release it," then the public body has to carry the can. The public body has to – but our view on it is that the public body should not take that position unless they feel they have the information and the argument that makes them comfortable that section 27 applies.

Chairman Wells: Well, the explanation she gave though -- it was given. Was that they are apprehensive about subsequent suit in the face of the refusal of the third party to approve the release, if they go ahead and say, "We're going to release it anyway". And they do. Then in that circumstance, they would not have the burden of proof in the event of an appeal but they would have the risk that their concerned about of a subsequent suit against them for having done it in the face of a refusal. Is that --

Mr. Murray: But if they're -- I don't think that can happen because the public body has to notify the third party that having considered the representations of the third party, notwithstanding those representations, they intend to release it and they have to notify the third party of that intention and they don't release it for a period of time until the third party has the opportunity to file an appeal.

Chairman Wells: And the third party doesn't.

Mr. Murray: If the third party does not wish to file an appeal I don't -- and they decide to let the time for an appeal elapse, what do you think a court would be interested in --

Chairman Wells: I'm not prepared to offer legal advice --

Mr. Murray: All right. I'll stop seeking one. I was seeking a legal advice but I mean, they had their chance to appeal, there was a legislative time there for them to appeal

Chairman Wells: That's an argument that might be made, but it might only be -- have impact as to quantum of damages.

Mr. Murray: I'll put it this way --

Chairman Wells: They may not affect live determination of liability, it may have -- anyway those are pros and cons. I can understand some apprehension on the part of the university.

Mr. Murray: I'll put it this way. The burden of proof in our Act as far as I understand is the same as the burden of proof in every other access statute in Canada and they've all got a third party business interest provision. And the processes are all very similar. I have personally never heard of this circumstance arising that was described. Whether anyone -- whether its ever been tried on I don't know and I certainly can't profess to be aware of everything that has ever happened in the history of access to information. But I would suggest that if something like that happened, it would be a fairly significant event that will be discussed at annual conferences and would be news-worthy within the access to information world, that third parties were suing public bodies for following the act.

Ms. Stoddart: On a related issue that came out of the presentation of MUN, on reflection I was amazed and I still have questions about why teaching materials would be exempted from the act. Perhaps not research, but teaching materials in an age

where first of all, whether there is two issues. The justification this day and age for them being exempted from the act, secondly the fact that the jurisprudence, it seems to be followed or seems to be the bible in this is that they're not under the custody and control of the university.

Mr. Murray: I would debate that.

Ms. Stoddart: Well, just for -- I don't know how MUN operates but it seems to me now all universities are regulating when you have to get your class materials by, what format they have to be in, how they have to be provided to the students, whether they can be downloaded etcetera. Now that doesn't go to academic freedom. In my opinion it just goes to proving efficient services for the student body -- the users of the -- so I wondered if you had any further thought on whether teaching materials were under the custody and control of universities. If you've looked into this ---

Mr. Murray: Well, I think --

Chairman Wells: I think it's in the context of content ---

Mr. Murray: No. I think on their face, I think they are within their control and custody. The assertion that was presented yesterday that teaching and research information is not within their control of the custody of the university is a very recent position of Memorial university. And there's an evolving movement within the academic community in Canada to go on this direction. And I believe they cited one case out of Ontario. So there's a movement to try -- sort of try this and see where they go in the academic world to try to carve research and teaching materials not only out from the Act in terms of the application in section 5 but also to raise the control and custody argument. That hasn't been tried here in this jurisdiction. It hasn't gone to court. We haven't issued any reports on it yet but I anticipate that that will occur. And regarding the control and custody issue I'll just say let's wait and see where it ends up because the arguments have not been thoroughly examined in my view.

Commissioner Letto: So the effect of exempting it let's assume that you – I'll put up a hypothetical example. Students have concern that in a particular course, there's really no plan, no anything. It's a kind of ad hoc kind of thing. And the results aren't good and they don't feel that they've got the instruction they should have and so on. So if they're exempted

presumably they could bar somebody from making a request for the plan, the outline, the curriculum, the syllabus, if you want for that course.

Mr. Murray: It would all come down to an analysis of what the phrase "teaching materials" means. And we would have of course do some research and see what the case lies, if any out there. But I would think that it's probably not as broad as the type of material you've described. I would thing it's probably intended to be an individual professor's teaching materials. Their actual notes and lecture notes and things of that nature. But I think it's important here to --

Chairman Wells: It wouldn't include texts?

Mr. Murray: I don't think so.

Ms. Stoddart: It doesn't talk about –

Mr. Murray: No.

Chairman Wells: But it certainly includes the professor's interpretations and views and opinions and --

Mr. Murray: Precisely. Yeah. Because sometimes a professor will essentially teach the course based on their own notes without -- with very little reference to text books. So they may have a lot -- they may be very proprietary to them. But I just want to ensure that there's a clarity about -- a distinction between section 5 whether the Act applies to records, and control and custody because they're very different concepts. And right now under section 5 (1)(h), a record containing teaching materials or research information of an employee of a post secondary education institution. The Act doesn't apply to that because Section 5(1) says this Act applies to all records in the control of are under the custody of a public body but does not apply to.

Now, I don't even think there would even been any need to put (h) in there if it was understood by everyone that research materials and teaching materials were not even in the control or custody of a public body. Arguably you could say that because the Act only applies to the information in the control or custody of a public body. So section 5 has said, well, teaching materials -- to my reading of section 5 is that teaching materials and research is in the control or custody of a public body, but (h) says that it's not -- despite that, it's not subject to the act. And so that means right from the get-go I would say that it is in

their control and custody based on the construction of the act. There is also the provision in section 22 that I referenced earlier -- 22. Where is it 22.(1). 22.(1)(e) so evaluations are associated with assessing the teacher --

Chairman Wells: I'm not sure that would be interpreted to mean that they are in a control or custody.

Mr. Murray: No but these are indications I think.

Chairman Wells: Would apply whether or not they're in a controlled environment. I don't know that a court would construe it that way.

Mr. Murray: I'm just saying that's an indication I guess but it's not necessarily determinant of the control or custody because the thing as was mentioned there in case law about control or custody and it's not an easy thing to determine in certain circumstances. But there is -- if you look at the case law -- where we've --- where its evolved to is there's a list of factors that you should consider that would indicate pro or con as to whether information would be in the control or custody of a public body. And in our view, that's just something that eventually come to us for review and it may go to court. But

it's a separate issue, as to regarding 5(1)(h) because if it -- presuming that either the court were to clarify that we do have the power to conduct reviews of claims of section 5 which that is heading to the court of appeal here or whether the legislation is amended to clarify that which is what we're hoping that you'll recommend. If we were to conduct a review and we found that the records under review, half of them were let's say research information, once we made that determination we would set that aside and say we're now done with those records. We can't do any further assessment of them because we've determined that the Act does not apply to them. We've reviewed them; we've determined that they are research information. The Act does not apply to them. We set those aside. We don't do any further review of them.

Chairman Wells: But you've had that right of review, did you make that determination?

Mr. Murray: Precisely. And the remaining records we look at and say, well, these are administrative records between professors or what have you or involving the administration and the awarding of a contract or something like that and it's got nothing to do with research information, we would then

review those and review any claims that were made regarding exceptions and issue a report with recommendations or -- and that's the way we did it prior to the court challenge being issued. In fact, every other commissioner we have talked to about this in Canada, we're the only ones that are in this situation regarding section 5. Everybody else is puzzled by -- how did you get into this boat? They don't understand how we even arrived at this situation where we can't review the section 5 claims and it's been --

Chairman Wells: And it's not been determined by court yet as to whether or not you can. That's the issue at the moment.

Mr. Murray: It has been determined at the trial division and --

Chairman Wells: It's now before the court of appeal?

Mr. Murray: Yes. Now going to the -- heading to the court of appeal. The appeal has been filed. And we'll certainly notify the committee if we -- we haven't had our hearing yet on that. If that occurs before you finish your process, we'll certainly let you know and you may hear about it. But we still think that it might -- it would be very helpful. We don't know what the outcome will be obviously. We are hopeful that the Act as it

stands now that we will be able to convince the court of appeal that we already have the power as every other commissioner does. But we may not be successful. We don't know. And we -- that's why we're strongly recommending that we have that authority explicit.

Chairman Wells: I have to discharge another responsibility and note that it's nearly 1 o'clock. If you're going to finish in just --

Mr. Murray: I'm pretty well done.

Chairman Wells: Oh. If you're done -- that was --

Mr. Ring: I have no other points except to thank --

Chairman Wells: In that case then it depends on us. If we have a lengthy further questions other than the ones we've asked. And personally I don't.

Mr. Murray: Okay.

Commissioner Letto: I just have one question and I ask you to address it in your written -- final written submission and this gets back to the idea of reporting privacy breaches and I know

what you said in your initial brief which is that you feel it should be -- probably subject to the same provisions that exist under PHIA. And the only question I would ask is what if every privacy breach had to be reported -- what -- to you so that you could monitor what implications would that have and I'm totally fine for you to address that in your final written submission.

Mr. Murray: Yeah. Okay. That sounds good.

Ms. Stoddart: Okay. Perhaps I could also just add one quickly; coming out of MUN's presentation reference was made to the BC legislation. Which was --

Mr. Murray: That was -- I forgot that was one other point so yes we'll just stop with that last point.

Ms. Stoddart: -- a third party notification to third parties that information -- it's not quite clear to me whether its information that affects their interest --

Mr. Murray: Or every time.

Ms. Stoddart: And or personal information but anyway, perhaps you could address that in your final brief too? It's like an interesting proposal.

Mr. Murray: Okay. And I'll just say briefly right now that it's another case that we were so happy to get the amendment to section 30 that of all the things in the bill – in the ATTIPA we wanted to look at it in detail. We -- it just didn't -- as I said, we provided you with a 90 page submission. We could have provided you with a 200 page one but I wouldn't want to burden you with that. But we will address that one additional issue and see whether it has -- if we have any comments about the merits of that approach.

Ms. Stoddart: Yeah. Thank you.

Chairman Wells: Commissioner and Mr. Murray, I want to express our most sincere appreciation to both of you for the terrific cooperation you've provided to the committee because we've been specifically directed as you know by our terms of reference to meet and cooperate and hear from you in detail. We feel we've done this but we couldn't do it alone we needed your help and we're very grateful to you for so readily providing it and for agreeing to provide further information to

us. It remains only for me to express the committee's appreciation to others. This is the last of our formal hearings, and I think it appropriate for me to take advantage of this opportunity and I don't want to make it sound like I'm only expressing it to the three people in the room who are not part of the committee, we're addressing.

We think untold thousands who are ardently listening in via the website to say to all 67 people who contacted the committee that we're grateful for your expression of interest, some have simply let their email stand as their representations, others have submitted further detailed written representations and some have made oral representations appeared here and have done those some 27 appeared here to make representations. We spent some 10 or 11 days altogether in hearings, and we think we've heard everything that people want to say to us. We're expecting there're still some written submissions to be made between now and the 31st of August which is the cutoff point. They will be posted online and if you want to make any further comment as I said earlier would be very pleased to have any suggestions you may have to make.

Only five responded to our online questions that we posted over a period of time and that's regrettable that we didn't have more

but more than 110 of the ATTIP coordinators that to whom we sent questionnaires, we sent them out to 350 and 110 of them at least have responded and that's 30%. That's a pretty good average we think. And we're looking forward to the results of those. We also want to express appreciation to the minister in the office of public engagement. They've been very helpful throughout and provided accommodation and guidance for us to the office of the chief information officer; they've been helpful as well in providing us with the IT services to manage our activities, and to Mr. Power at Bell Aliant who's helped us as well, and to Eastern Audio and Elite Productions who have provided the services -- electronic services for us during the hearing times.

For the members of the committee and the staff, the real heavy work, the heavy lifting as it were just starts now we've got to do a very thorough assessment and prepare summaries of everything that we've heard, do the legal research and research of practices in comparable jurisdictions to -- in order to enable us to be in a position to weigh all of the relevant factors and make recommendations and write the final report. So there's still a great deal of work to be done. We're hopeful that we will be able to complete it by the end of October but that of course depends on I guess the amount of work that we

find is involved when we dig into it more deeply. We're not really in a position to come to final conclusions on that at the moment but our aim is still to have it completed by about the end of October. But it may take longer. And thank you again for your constant attention, the fact that you've been interested enough to sit through all of these hearings has impressed us and we're grateful to you for it. This concludes the hearing.

I should say a final thank you to the lady who has been the most faithful attendee sitting in the back and we're grateful to have always had an audience through her efforts.