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

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

Chairman Wells: I assume that maybe you are pretty well finished now. Okay, thank you very much. Thank you to those who are here this morning, participants and observers alike. And thank you to the media too for their attention. It's important not only to this Committee, but I expect to the government and to the people of the province that they are well-informed as to what occurs here and the media is an important part of that, and we do appreciate the attention they are giving this. This is the first public seating of the Statutory Committee that was created under the provisions of the Access to Information and Privacy Act under Section 74, appointed in March last. And just so we have everything in context, I would just like to quote from Section 74, which requires the appointment of such a committee every five years. What that provision in the statute says is this, "after the expiration of not more than five years after the coming into force of this Act or part of it and every five years thereafter, the minister responsible for this Act shall refer it to a Committee, for the purpose of undertaking a comprehensive review of the provisions and operations of this Act or part of it". That's a regular requirement and the last review was done, I think, in 2012 and certain amendments were made as a result of it. But as a result, I believe, of controversy about amendments that occurred subsequent to that review, the Government has speeded up the process and

set up this Committee to review it within three years, instead of waiting for the full five.

Before going any further, I would introduce the members of the Committee established by Government. On my left is Ms. Jennifer Stoddart of Montreal and she is a former Privacy Commissioner of Canada, highly regarded not only in Canada and all of its provinces and well known to all of the commissioners across Canada, but well known internationally as well, and still continues to play a role internationally. So, we are most fortunate in having her experience, advice and sound judgment available to us and I express appreciation for her willingness to participate. On my right is another former, CBC journalist, well known in this province to anybody who has observed or watched CBC Television for the last 30 years I expect or pretty close to it, Doug Letto. He is a highly regarded, highly respected journalist; very easy to deal with. Good sound judgment and we are grateful to him for accepting the position as well. I'm a former also, so this seems to be a committee of formers involved in both government and the courts. And, probably, for that reason the Government thought that I might make a good Chair in this circumstance so, hence, I have been endowed with that responsibility.

Now, the tasks and responsibilities of this Committee are set out in the terms of reference that the Government gave the Committee when we were set up, and again, just to make sure that everything is in context and well-understood, the overview of that terms of reference spells out three particular aspects of the mandate that's given to this Committee. The first is this; the Committee will complete an independent, comprehensive review of the Access to Information and Protection of Privacy Act, including amendments made as a result of Bill 29, and provide recommendations arising from the review to the Minister responsible for the Office of Public Engagement. So, that's -- in very general terms, our task is to look at the provisions of the Act and its operations, and make recommendations as to how the Act and its processes maybe improved.

I would emphasize that the Act deals both with access to information, the entitlement of the public generally to access government-held information, but also protection of privacy. Most people don't focus too much on that, it's not a terribly exciting question until somebody's privacy is stolen, until their private information is hacked by the hackers because most of this information in today's electronic age is held on computers and other electronic means, and they are quite susceptible to

being hacked and accessed criminally or illegally. So, protection of privacy is a very important aspect of the functioning of this statute and that makes it an important aspect of the work that this Committee will do.

The review -- the Act also gives us pretty specific directions and two key points. The first is this; the review will be conducted in an open, transparent and respectful manner and will engage citizens and stakeholders in a meaningful way. Now, we interpret that as a specific responsibility on the part of the Committee to ensure that the public generally of the province have maximum opportunity to make their views known. And we spent much of the last two months devising means and taking advantage of every possible opportunity to promote interest in making presentations to the hearing, and I will speak later about how many we have and so on.

A third specific direction to the Committee in the course of its work is protection of personal privacy will be assured. So, within the conduct of its operations, this Committee has to be sensitive to ensuring that we protect any personal privacy that comes to the attention of the Committee, because persons making representations want to use particular examples, and in the

course of it disclose personal information. I will say something else about that in a moment as well.

The remainder of the terms of reference just give -- emphasize the matters that we are to assess and consider. Rights of access, exceptions to access, exceptions for organizations or structures like cabinet and government and police bodies, courts and so on, and we are to do an examination of the reviews and complaints portions of the statute and the powers and duties of the Information and Privacy Commissioner, as well as things like time limits that are imposed and fee schedules and all of the general aspects of the statute.

We are also specifically directed by the terms of reference to specifically consult with the Information and Privacy Commissioner. I will explain later that that is one of the factors in our decision to ask the Privacy Commissioner and his office to make the initial representation and they will do that as they are sitting here today, and they will be the first to make a representation.

I should probably give you a little bit of information, as well, about the structure of the Committee. The three members are here. Our offices are at 83 Thorburn Road. That was a Government

rented property that was vacant and they asked us if we would be prepared to operate from there and the offices are quite commodious and quite sufficient for our purposes. We have a website, its www.parcnl.ca, and as much information as we have is available on that website. We were -- we immediately we were appointed or as soon as we could get together about three weeks or so after the announcement was made, we put in place a staff and were very fortunate to have found not only capable but very experienced staff in this kind of endeavor.

The Chief Administrative Officer is Virginia Connors. She played a similar role in the inquiry conducted by Madam Justice Cameron into health matters, and has been involved for most of her public service career in running and operating these kinds of inquiry, so we were fortunate indeed that she was available and her services were readily available.

We also have an experienced counsel lawyer available to us in the person of Tracy Freeman. She is highly experienced, highly regarded and has had an extensive career. I first encountered her as a law clerk at the Court of Appeal and I had no hesitation in saying, that she is one of the most impressive law clerks we've ever had, so we are fortunate to have her services available. And in recent years she has worked with the

legislative council and presently carries on a business as a legislative consultant.

We have an experienced lady as our Information Management Coordinator, who has had a long career in the public service and very experienced and knowledgeable in managing information and in running an office in this way; it's Jeanette Fleming, and we are happy to have her.

We also had the good fortune to have made available to us a young student, just graduating from training school, Tina Murphy, and she is our Office Assistant who takes responsibility for most of the day to day management duties in the office, and we are grateful to have her as well. That's our entire staff. It's not very big, but they have done a marvelous job so far and on behalf of the Committee I express appreciation to the staff for getting us this far, this quickly. That we have done so and have been able to do so is largely due to the tremendous efforts that they have put in and I acknowledge that.

We should also express publicly our appreciation to three agencies of Government that greatly facilitated our getting up and running as quickly as we did. They are the Office of Public Engagement, the department of the Minister responsible for this endeavor.

They have been most cooperative and most helpful and our impression is they have tumbled over themselves to make effort possible to accommodate us. The same can be said for the Office of the Chief Information Officer, who setup our website and who provided the electronic and computer services and information management services that we need, and provided -- ensured that we were provided with it in a way that gives it total independence from Government.

So, the people involved with Government or people generally who may want to make representations may want to make it in confidence, may want to communicate with the Committee in confidence, can do so with certain knowledge that no agency of Government including the OIPC, the Office of the Chief Information Officer, can access that information. Those basic services are provided to us by Bell Alliant, an independent -- service independently managed by Bell Alliant. So, we have complete independence from Government. And persons wishing to do so, can have a high level of confidence that they can express their views without fear of tracking by any governmental agency. We thought that that was important in order to maintain the integrity of the Committee and the public confidence in the independence of its operations.

I would also express appreciation to our first presenters this morning, the Office of the Information and Privacy Commissioner. Anytime we consulted with them, as seen prudent on our part, to get us off the ground and up and running quickly we received great help and cooperation from them, and I should publicly acknowledge their high level of cooperation and assistance.

I should make a few brief comments, as well, about the Committee's approach and its processes. Following the specific mandate to engage citizens and stakeholders in a meaningful way, as I indicated earlier, we have put in extensive effort at ensuring that the maximum effort was made to attract interest in the work of the Committee and to attract representations. Those advertisements and news media endeavors and our website activities and interviews done by members of the committee with the news media, have resulted in our receiving more than 40 expressions of interest. Even that probably doesn't disclose fully the extent of the interest because two or three, at least, of those 40 would have -- would be umbrella operation for other segments like departments of Government. We may well receive half a dozen presentations from different agencies and departments of government, but government is only one of the 40 so they may well be more and there others like that.

We thought we might well receive more interest from municipalities.

And their organization municipalities Newfoundland and Labrador but so far we have not had any indication of it. But we would welcome more—there is no cut off at this point, any member of the public or any organization in the province that feels they have interest in the matters the committee will be dealing with are encouraged to express their views to us and every reasonable accommodation will be made to facilitate that.

The representations can be simple statement in writing submitted to the committee with nothing more, it can be done by email, it can be done by video conference, it can be done by participating here in the public hearing or any combination of those, if you want to make a submission in writing in detail as for example the commissioner has done and be here to address it and expand on it and elaborate on the ideas, even more importantly be available to answer the committees further questions on the issues that are raised. We encourage everybody to do so.

This is the first public hearing and I welcome all of the participants, they are not a great number here and all those who are

observers alike. If you are unable to attend to observe it and you are interested in it. When everything is working correctly and I can't say that it is at the moment, these actions will be—I think the phrase Doug is live webcast or…

Commissioner Letto: You got it.

Chairman Wells: I'm getting there as you can see. And at the end of the day we propose to put every written submission unless there is a particular request by the presenter not to do so, we propose to put the presentation up on the website so that it will be available and persons who can't watch it livestream I think is the phrase can do so at night can go in and call it up and watch it later, so that there is widespread opportunity for public access to what goes on here. More public hearings are tentatively set for the third and fourth week of July and the third and fourth week of August, to the extent that they will be necessary. So far we've had only two or three—three I think expressions of interest from outside the immediate St. Johns area within the province. There is a couple two or three from outside the province as well and we will receive representations from those and it may well be that we receive representations from the federal privacy Commissioner and Information Commissioner or may even receive direct

representation here we don't know as yet. We've received so few from outside the St. John's area that we consider it would be an improper use of public funds to take the committee out and all of the expenses involved, taking all the committee and it's paraphernalia and the communications operations of it outside, it would be far better if there's only two or three people to provide financial assistance for them to come to St. John's for a hearing.

And that's the course we've decided to follow. But to the extent that there is any acceptable level of interest from outside the province, the committee would be quite willing and happy to take—to conduct public hearings in other area of the province. There are a few rules or procedure that I should mention. I'm happy to say they are very few and they are very simple. With the exception of the information and privacy commissioner who will be the first one, we propose to limit the time involved in any individual presentation to 30 minutes, unless there is a good reason to do so.

If for example the municipalities, the federation of municipalities wanted to make a broader umbrella presentation we would of course be willing to accommodate it or any individual person for that matter who could make a case to the committee that

they needed a little bit more time, we won't be stingy with time. But to give people an idea how we operate we propose a limit the time and ask you to limit the time of your presentation to 30 minutes. The committee will then have its own questions and you don't have to make your time, your 30 minutes available for the committees questions, we will control that ourselves.

One fundamental is only the person presenting can participate at the time, we can't have a situation where persons in the audience or news media jumping up and asking questions, that's a recipe for chaos and we'd like to maintain a reasonable level of order and decorum in the committee hearings. We ask everybody to turn off their cell phones or at the very least prevent them from ringing and disturbing the conduct, it's disturbing to a presenter to be presenting and disturbing to the committee too and even those who are just listening to the presentation to be constantly interrupted by cellphones, so we ask that there be no cell phone usage in the hearing room.

And we would ask the media in their conduct of interviews that they may want to do with persons who present to do it away from the doors, the immediate doors of the hearing room, so that it

will not interrupt the continuation of the hearing. We've provided an area with a back drop where the media can do this, so we ask them to avoid doing interviews near the doors that would interfere with the hearing.

Now except for this morning when we started at 10 o'clock and I have to confess that was a minor error on our part, we had two notices going up. One fore nine thirty which is when we intended to start and one for ten o'clock. And rather than have a circumstance where somebody came at ten in response to the hearing only to find that 15 or 20 minutes or half an hour of it was already over. We thought the best thing this morning was to explain to people and apologize for this delay and we do so and start at 10 o'clock. But tomorrow morning and any morning after that we'll start at 9:30, we'll take a break midmorning and our lunch break at 12:30, return at 2 and if the afternoon is going to continue on for any length of time we will have a midafternoon break in any event we'd propose adjourning by 5pm on this and this will only take a few minutes or more to finish that particular presentation.

In the ordinary course we wouldn't propose and we see no reason now to sit after 5 o'clock. But to the extent that anybody who wishes to make a presentation and was not available during

the day, if they would let us know before hand, we will make arrangements also for accommodation after 5 o'clock. But it's in the best interest of expeditious operation and efficient operation and cost effective operation of the committee to have it closed down at 5 o'clock. So if you can avoid after hours we'd be grateful, but if you cannot we'll make sure you can make your presentation.

I said that we asked the Information and Privacy Commissioner to make the first presentation, there are a couple of reasons for that. One of which is the terms of reference specifically require the committee to consult with the Information and Privacy Commissioner and we think it appropriate to respond in this manner. But more importantly and more significantly, from the committee's point of view, from the public's point of view, from the media's point of view the information and privacy commissioner and his office operation, has the knowledge and expertise and involvement in these matters that makes them the best source of fundamental information for everybody. And that will be of benefit to everybody listening to it to get the best understand of the way the system works and what flaws if any it has and what difficulties the Commissioner's office encounters in the discharge of its mandate.

So we thought it best to ask the Commissioner to make his office's presentation initially and provide the whole day if necessary for the Commissioner to make the presentation and to answer questions that the committee may have. We're grateful to the commissioner for his ready willingness to accede to this request and we invite him now to make the presentation. Mr. Ring.

Mr. Ring: Thank you very much Sir. Good morning to the committee as well as Madame Stoddart, Mr. Letto. I'd like to first of all start by saying, thank you very much for the opportunity to be here today and to make the presentation on behalf of the Office of the Commissioner. I'd like to wish the committee well on their very important task ahead and I look forward down the road to see the end results of the work that's been under taken by the committee. I wish also at this time, to acknowledge the work and the effort of the staff of OIPC for their part in preparation of our submission beginning with the research and the jurisdictional scan that was done several months ago.

Each and every member of the office participated and put a tremendous amount of work into this and I hope it's reflective in the submission in the reference binder that's been provided

for use of the committee. Each investigator, each staff member were assigned various sections of the Act to proceed and do the appropriate level of research and then to make presentation to myself and other senior people in the commission. And throughout the preparation of our submission were there to be able to consult and to provide clarification and if necessary to conduct further research on the various sections as was required.

I'd like to particularly at this time to thank Mr. Sean Murray Director of special projects in the office who basically quarter backed the effort of the staff and was the person that held the pen in terms of the preparation, so a very sincere thanks to Sean for his work and dedication in that regard. With regards to the presentation this morning, I'm going to start off initially and talk a little bit about background, a little bit of context, a little bit about the office, a little bit about legislation, a little bit about Bill 29, I can't forget that. And after my comments bearing any questions from the committee or whichever way you choose to proceed we take questions now or later, this entirely at your discretion. Once I'm finished I'm going to hand over to Sean who will present a summary of each of the recommendations that are included in our presentation—in our submission sorry. And that will field questions as required

for clarification. And if necessary at the request of the panel we can conduct further research if in fact there is more clarification on any specific issue that the committee would like more work on from our perspective.

In terms of introduction, I'm also former army officer retired with the rank of brigadier general and served in both the regular force and reserve force. And I began my career with the Newfoundland government in 1992 on retirement from the regular force as director of policing services with the Department of Justice up in Newfoundland and Labrador. And did that job for four years and then spent the next 11 years at the public service commission and seven of the eleven years I was director responsible for the appeal and investigations division. I was appointed to my current position in December of 2007 and I've had three subsequent appointments in June of 2010, 2012 and several weeks ago June 2014.

Prior to my appointment there were two other commissioners, Mr. Wayne Mitchell from September 2003 to October 2004 and Mr. Phil Wall from December 2004 to December 2007 and I replaced Mr. Wall. Both Commissioner Mitchell and Commissioner Wall were appointed on a part time basis and I was the first fulltime commissioner and I guess the reason for

that was I was in the office for only several days, actually before there was rumors at that point that the privacy provisions of the Act would be proclaimed and within the next two weeks privacy provision was proclaimed which broadened the scope of the work of the office and with that I became the full time appointment. I've briefly introduced Mr. Murray but I'm sure he'll be able to make more comments himself when he's here at the table.

But Sean joined the OIPC in 2005 as an investigator or access and privacy analyst, the terms are sometimes synonymous. And he has occupied number of senior positions in the office I understand and is currently the director of special projects. The office of the Information and Privacy commissioner is one of five independent offices of the legislature here in Newfoundland and Labrador. The other offices are the Auditor General, the Office of Citizen Representative, the Office of Child and Youth Advocate and the Chief Electoral Officer and Commissioner Responsible for Legislative Standards. As commissioner, our report to the Speaker—through the Speaker of the House to the House of Assembly and we provide annual report, three year business plan and annual performance reports through the Speaker.

The ATIPPA applies to all provincial government departments, agencies, boards, including Memorial University and the College of North Atlantic and all municipalities in Newfoundland and Labrador. These are referred to as public bodies under the Act and there are approximately 440 public bodies governed by the ATIPPA. I say approximately because with community amalgamations and so on, sometimes the number may change.

The purpose of the ATIPPA and I think it's important just to emphasize the fundamentals here this morning because at the end of the day this is what it's really all about. The purpose of the Act is to increase openness and accountability. Where the public has the right of access to records but with certain exceptions. The Act calls for an independent review process which is the office of the information and privacy commissioner. It also provides a right of access to and correction of your own personal information. And also called for the prevention of unauthorized collection use and disclosure of your personal information. With regards to the right of access, citizens have a right to access to all records in the custody and control of public bodies. They have the right to recorded information in any format, however some exceptions do apply and between sections 18 and 30 of the

act. And these when done properly should provide the appropriate level of protection for information that should not be released.

And the exceptions are two categories mandatory and discretionary.

The public body has a duty to assist and respond without delay and there is also a small five dollar fee for all requests and additional fees may apply for reproduction, research so on and so forth and that would be assessed by the public body based on the scope, magnitude and complexity of the particular request.

Little bit about the history of the legislation and about our office.

The access provisions were proclaimed into force in 2005 and then three years later in 2008 in January, the privacy provisions were proclaimed, access first and then three years in effect and then privacy provision. The personal health information Act which is not subject to this review but worthy of note because of the oversight responsibility by the OIPC for the piece of legislation was proclaimed into force in April 2011. And unlike the ATIPPA, there are literally thousands of

custodians responsive to the fear PHIA represents significant workload for the office of the OIPC.

The first mandated review of the ATIPPA as Mr. Wells clearly indicated there is a five year mandatory review, the first one commenced in 2011 with the appointment of Mr. John Cummings as the Review Commissioner. Mr. Cummings concluded his work and submitted his report in January of 2012. Work behind the scenes continued and resulted in the lengthy filibuster in The House of Assembly to debate the bill, Bill 29. Unfortunately, the OIPC was precluded from any participation in that review except for its initial submission and this is in spite of numerous attempts by our office to become involved, to become engaged because it's our view that we have a unique perspective and experience with a very talented staff that could have informed the Review Commissioner in many ways.

The ATIPPA has been provided with an independent review process as we've indicated and that is the office of the information and privacy commissioner OIPC. The model that our office uses is Ombuds model. The OIPC—the Commissioner has recommendation power but not the power to order compliance. Other jurisdictions in Canada do have order power

for example British Columbia and Alberta, and Ontario. There is an option for the applicant under the ATIPPA to appeal to the OIPC for a review of the decision of the head of a public body. There is also an option for the applicant to appeal directly to trial division.

But if the individual decides to initially apply to the courts then he or she cannot come back and ask the commissioner then to review a decision made by head of the public body. It is my belief that the Ombuds model is a good one, and for example on average the OIPC receives a hundred requests for review on annual basis. Approximately 75 to 80% resolved informally and this is the best outcome for the applicant and the public body. There is not always total agreement but at the end of the day, the applicant has the information that he or she is seeking and or at least some of it and they may also come to the conclusion based on the interaction with our office with our investigator who actually mediates between the public body and the applicant. And the applicant is satisfied that the appropriate exceptions are claimed and that our office agrees that the information should not be released and normally their satisfaction at least to the point where the individual can move on and hopefully have the information in enough time to be of assistance for the purpose for which it was requested.

We do issue some reports and rarely do we go to court as a result of the public body refusing to comply with the recommendations. I'm sure there's others who would look at that statement and say, "What you're in court all the time?" Well, we're in court quite often and more so because of the result of Bill 29. Most court actions though has resulted in what I've referred to generally as show stoppers, these are situations that have involved jurisdictional issues. And that's different from going to court because the head of a public body refuses or disagrees with the commissioner's report and recommendation and decides to proceed as they decide.

With the jurisdictional issues there are fundamental problem where there is a disagreement between the head of the public body and my office with regards to the authority of the commissioner's office to review certain documents and so on. And at that point it is a show stopper because there is no oversight unless we can go to court and ask a judge at the trial division to review the matter and make a determination and a decision. It is my strong belief that no other commissioner in the country seems to have the same degree of challenge to jurisdiction as we do here in Newfoundland .

And there is—I'm sure by now have intimate knowledge that there is a significant amount of time and effort spent in our submission regarding jurisdictional issues. Section 21 particularly problematic which is the solicitor-client privilege of the ATIPPA and there is considerable amount of controversy about that over the last number of years. And in 2009 there was a culminated in a court case where the attorney general of the province made an application to the courts. A little bit of background on that information on that particular issue: prior to 2009, there were 49 cases involving section 21 solicitor and client privilege records that were with handled by the Office of the Commissioner.

At no time were there any difficulties with those files and in fact there were occasions when the—our office would go back to head of the public body and say, "Look you're claiming section 21 even though it's a mandatory discretion, it's the position of the public body that the information is not going to be released. But what you've done is you've clearly missed some information here that in our view this solicitor and client privilege and we're just reminding you that if you're not going to disclose is this an exception to that disclosure" and provided that sort of clarification. So there is certainly no abuse of the client privilege by the office of the commissioner.

The Auditor General's position was upheld in court though but that decision was subsequently appealed by my office and which resulted in a very favorable, strong and unanimous decision by the court of appeal clearly stating that the commissioner does have jurisdiction to review solicitor and client privilege claimed records as part of the mandate Commissioners role. Regrettably that court of appeal decision was removed by stroke of a pen in Bill 29 and the legislation was changed, it removed that jurisdiction from the commissioner's office.

As a point of note and why we had significant concerns about the removal of our authority. During the period where the Attorney General's challenge was before the courts both the trial division and Supreme Court—sorry The Court of Appeal. We—our office received 15 files including the one that prompted the Attorney General to go to court. And once the Court of Appeal—and then these files were held in abeyance and once we received the favorable Court of Appeal decision that basically concluded that our office had the authority, the Commissioner had the authority. Then we went out and demanded from the public bodies that those records be provided.

On review of the records of these 15 files, clearly 80% of the records that were being claimed as Solicitor-client privilege had absolutely nothing to do with…

Chairman Wells: What percentage?

Mr. Ring: 80% Sir.

Chairman Wells: 80%?

Mr. Ring: Yes Sir. We use 75 to 80 but it was the vast majority of these claimed records had nothing to do with solicitor-client privilege whatsoever and only 20% of the records were properly claimed. That was very telling, and very disturbing because some of the public bodies involved with these files were very sophisticated public bodies with significant amount of resources available including legal advice and quite frankly should have known better.

Commissioner Letto: What time frame was this again Mr. Ring?

Mr. Ring: Between 2009 when we—I think it was in the fall, we were hosting the Commissioners annual conference in St. John's at the same time period, I think it was September 2009, and I

think the Attorney General filed in court just prior to that and over the next almost three years we—these files were held in abeyance and with that of course you can just imagine the significance of that for an applicant who is waiting, trying to get information for a specific purpose.

Commissioner Letto: So after the Attorney General filed, all these files were put in a pile and kept in a safe place?

Mr. Ring: Exactly and they weren't all kept in the pile because some public bodies refused to even provide the records to our office, we had some and there was others that were missing. But once the applicant made the request to us and then the public bodies that said, "No. these are all claims under section 21 you have no authority." And then they kept the records and there was only—we compelled them to be provided once the Court of Appeal decision came down and re-instated provided the commissioner with the authority. So about a three year period, three and a half years, it went on for a long time. And very concerning to the number of the applicants waiting for the information for whatever purpose they needed it for.

So there was concern about abuse of that particular section and I'm here today to state that in my view when you look at the

percentage of information that was eventually reviewed and determined not be solicitor-client privileges that's very concerning. There were public documents in each, there were HR documents in there, things that were being claimed that absolutely had nothing to do with solicitor-client privilege whatsoever.

Commissioner Letto: So what then was your sense of why they were not being provided?

Mr. Ring: Well I guess there were a number reasons first of all not to have to do the work because in some cases it was a lot of documents involved and based on some of the responses that we were getting, everything in the banker's box is listed is solicitor-client privilege. Now there was lots of reasons that we speculated upon and one of them I think was that maybe the situation we're in and we don't want to get at that or there could have been information in it that might have been embarrassing or could have been counter to the public bodies position in terms of someone looking for information that may want to proceed to litigation and so on and so forth.

I'm not sure but they were certainly—they were locked down pretty tight and clearly there was—particularly in the cases where the

public bodies even refused to provide the documents to our office for safe keeping.

Chairman Wells: These determinations that 80% did not involve solicitor-client privilege, they were made by your office then when the documents were made available to you between the court of appeal decision and the passage of Bill 29.

Mr. Ring: That's correct Sir. It's document by document, line for line, word for word review by our analyst.

Chairman Wells: Having done that, can you tell us whether those documents were unmistakably without foundation?

Mr. Ring: Yes Sir, I can and some of the documents…

Chairman Wells: It wasn't just a question marginal, it was clear.

Mr. Ring: Sir in the approach and the direction from me was if there is doubt here on the side of caution to support the public body. But when you have records that were in there that was a huge report that had been provided to the applicant by another government department a year or two before. Clearly

it is not solicitor client privilege record, HR policies, not HR information but HR policies …

Chairman Wells: Information.

Mr. Ring: Information but ATIPPA policies and so on and so forth. I will add here that we have seven analysts in our office and all of our analysts are lawyers and they range from lawyers with five, six, seven, eight years' experience up to people with 30 years practicing law in various formats that are now employed at the office. So I was very confident and very secure in the information that when our analysts were telling me that these are not solicitor client privilege and the vast majority is not—a small portion is, I have great confidence in those people.

Our post Bill 29 experience has been significantly more court action has been launched by the OIPC and that's not surprising when you look at the fact that section 21 solicitor-client privilege has been removed from commissioner's jurisdiction and an exception that is quite frequently claimed, so there's other exceptions that may not be claimed frequently and so the result is not so dramatic. But Bill 29 provided the avenue for applicants to ask the commissioner to go and file in the courts to have the records reviewed by a judge. Essentially do the job

that Commissioner's office would have done in the past. And without getting into any of the significant detail of Bill 29, there were some fundamental questions that I had asked our staff—we had a staff meeting within hours of filibuster being concluded and the deal being done as it was.

And I said fundamental question was what do we need to do to ensure that there is oversight without any gaps and the only recourse was to continually go to court and ask the courts to do what the commissioner's office was now prevented from doing. And so that's—we've been doing that and it's not carte blanche if applicants ask our offices to go to court on their behalf, we will look at the merits and we just automatically won't go to court and spend tax payers money if you look at on the face of it, the issue is really not an issue that should before courts.

Commissioner Letto: Of the issues that you've been forced to go to court for since Bill 29 what percentages of those have been found to be covered under your solicitor-client privilege?

Mr. Ring: We have not had a decision, we got a number before the courts now that are in various stages at this point and time. So and some of them are close to—there was multiple times

when we had to go to court based on scheduling and so on and so forth. And again the fact that we don't have answers now for these applicants, that only underscores the significance of the Commissioner's Office not being able to conduct these investigations and these reviews because that's frankly significant part of the reason that the office was created. To have a timely, cost effective mechanism to deal with this. And prior to going to back to—before the ATIPPA there was the privacy Act which there was no oversight body and people automatically went to court and that was something that the ATIPPA tried and was created to remedy and here we are in many ways particularly with the section five jurisdiction issues, section 21 and section 18. Constantly we have to go to court to get an interpretation on the act.

Again back to your question Commissioner Letto, the fact that I don't have a specific answer for you it just underlines and underscores the fact that it's very time consuming and by the time some of these decisions are rendered, the information could be essentially useless to the person or to the applicant in the first place. And very expensive and costly from both time and effort and financially.

Bill 29 due to the lengthy filler buster and significant media attention did raise to profile of access to information in this province and in fact it's been said in a number of occasions that what we've seen as a result of Bill 29 was democracy working as it should. The fundamental reaction by the citizens over the province to Bill 29 was significant and I don't think anybody could have guessed that the reaction would be as intensive as it was and it has been over two years now, almost two years since Bill 29 came into force and every day I can hear on my radio in the back ground, listening to the talk shows because quite often some of the work of our office is mentioned there.

That even if it's not remotely associated with ATIPPA, a lot of other things that government does gets painted by Bill 29 and the secrecy. And I like to talk to the general public when I have an opportunity and casually and for example in our frequent trips down town to the court house in the taxis, talk to the taxi driver. And he doesn't know who I am or anybody who is in the car with me. And you ask, "What do you think of this Bill 29 stuff?" "Oh it's the worst thing that's happened in the province, everybody should know what the government is doing with our money." And I say, "Very good and what about the ATIPPA?" "I don't know anything about that, it's just that this is wrong."

So it's created this groundswell that I think has prompted government at this point and time to make the move early as Mr. Wells pointed out and create this committee which I think is outstanding process that you have outlined and I'm really looking forward to the result of this and I think I'm a little bit disappointed when I hear the fact that there is so few from outside St. John's and no one from Labrador. This is an opportunity to get this right and I just wish that there were others that would come forward and participate and contribute and not just talk about after the fact that if they don't like what they see.

But anyway it did—Bill 29 it did raise the profile of access and privacy in this province. And although—there was a significant amount of higher degree of negativity and dissatisfaction with the—from the general public. But as a result of Bill 29, there were some positive aspects that did occur. For example, personal information in section 30 was revised, which was a positive thing and which allowed more information to be released under certain circumstances.

The language concerning law enforcement was appropriately clarified and some ambiguity removed from the legislation. The ability

of the commissioner to approve time extensions was added and this has proven to work very very well and has been a very useful aspect of—as a result of Bill 29. However, there were many things that were not so positive. And I'll just mention the frivolous vexatious and bad faith section that was added as a result of Bill 29. The OIPC we recommended that that section be placed in the Act but we recommended that the decision should rest with the commissioner to adjudicate that as a result of Bill 29, it went part way, it left the decision with the head of public body to determine if an application or a request for information or frivolous, vexatious or in bad faith.

However it did provide for a complaint mechanism to the commissioner if in fact the public body decided that the request met the frivolous, vexatious and in bad faith category. I will say that it has not proven to be a huge issue and there is only one or two cases that one of them is for the court right now. And where this has been claimed so it's not been a big issue but the perception of the head of the public body being able to say to an applicant, "Go away." It just didn't sit well with the general public and I think should be amended.

Commissioner Letto: That language shows up in legislation in lots of places.

Mr. Ring: Yes.

Commissioner Letto: What's the purpose of it if you could explain it to me?

Mr. Ring: Well if for example you have a multiple requestor or a requestor that say in the short period of time submitted 10 or 15 or 20 requests for either information to a public body. But in each and every case, they are essentially the same request but a word or two different and when you look that each of these has to be handled as a separate requests but when you look at the amount of duplication and work that's got to be done by the head of a public body.

Now if there is informal resolution process we can deal with that and in fact we have in many cases and asked the applicant to narrow the request in terms of its scope, and it's breadth, what are you really looking for, what information do you really want inside all of this stuff and most cases we're very successful in being able to mediate that down. But it's the kind of thing where you have a large number and the head of the public body says, "Enough is enough this is not right and we're bogged down, it's interfering with the operations of our office

because we're totally inundated with these things that they view or the head view is for this vexatious were in bad faith.

Commissioner Letto: And what's the value of having the commissioner make that determination rather than say the head of the public body?

Mr. Ring: Well, because our office provides independent oversight we're in a position to be objective and to look at the merits of this and again the view that you're not being told to go away by the head of public body without in your mind specific justification for that decision.

Commissioner Letto: Because they'd have some self interest in telling you to go away basically maybe.

Mr. Ring: Exactly and so it's not being the big issue but it's one of the ones that the optics is bad and it adds to the time and space problem when an individual or an applicant is told that, "You're not getting this information because we feel it's frivolous or it's taking too much of our time." And then you go to the complaint process, to the Commissioner's office, so by the time it's resolved we could be dealing with a lengthy period of time. So that's just one example. As I said it's not

presented a significant problem but it's something that comes up when you are discussing with individuals the aftermath of Bill 29.

Bill 29 also broadened some of the exceptions to the right of access much more than our office feels was necessary. I am not here saying that the language in the Act has to be so specific and so precise that there is no room for interpretation on one side or the other. But in our view a number of these for example section 27 dealing with third party business interest and Mr. Murray is going to specifically speak to that but some more context and clarification on it.

Some minor errors were corrected as a result of Bill 29 but the bill failed to resolve the outstanding, in our view the more serious issues around the commissioner's jurisdiction and in fact went in the opposite direction dealing with the jurisdiction under section five, section 18 cabinet confidences basically removing the commissioners authority to review these documents and section 21 solicitor and client privilege.

Chairman Wells: Three sections you just mentioned?

Mr. Ring: Section five Sir which is the jurisdiction, section 18 which is dealing with the cabinet confidences.

Chairman Wells: And 21?

Mr. Ring: And 21 solicitor and client privilege Sir. The—I'm going to conclude with just a few more remarks and then I ask Mr. Murray if that's okay with the panel to move forward. The substantial written submission by our office addressed many of the issues with ATIPPA. We believe that our recommendations if accepted will result in the best and strongest access in privacy law in this country if not North America. It will provide for an appropriate level of access to information. It will provide for an appropriate level of privacy for citizens whose information is held by public bodies and it will be an improved and appropriate level of oversight of access and privacy so that the rights granted under ATIPPA will be upheld and protected and that the spirit and intent of the legislation will be achieved.

I want to think the committee again and barring any questions, I'd like Mr. Murray to come forward now and proceed with his portion of the presentation.

Chairman Wells: We're not going to let you leave just yet Mr. Ring.

Mr. Ring: Okay I was hoping you'd say that.

Chairman Wells: I'm sure the committee members would have some questions.

Mr. Ring: Yes, perfect.

Chairman Wells: Ms. Stoddart do you have any particular questions?

Commissioner Stoddart: Yes, thank you very much Mr. Wells. Good morning Commissioner Ring, it's very nice to see you here and we thank you again, I echo Mr. Wells' remarks that we really appreciate that effort that your office put in on fairly short notice to make this very comprehensive and technically very accurate report to us. You mentioned at one point that post Bill 29, the issues of clarification put clear around the three sections that you mentioned 5, 18 and 21 meant that you were often in court in the last two years and that this was very costly to the tax payers, so that leads me to a question about your budget. You didn't mention it in your submission but given the—I'd say the philosophy of Bill 29, do you feel that your budget is adequate to do the work that you have to for

the people of Newfoundland and Labrador. And what is suffering because you have to do all this litigation?

Mr. Ring: Well over the years at least in my tenure as a commissioner, we've been successful in successive years in having increases to our legal—our professional service budget. There has been years where we have exceeded our budget and have had to go to—during our budget process request additional funding for the subsequent years from the house of assembly management commission. We are clearly going to be overbudget again this year in terms of professional services but we're able to transfer funds from other activities for example travel, for staff to attend conferences and other things that we can find funding for, additional funding for to support our professional services requirements. But even with that it's becoming more difficult but I have not allowed that to be a stumbling block, I am prepared to go over budget and to reconcile that with the House of Assembly Management Commission when required because of this. And fundamental to the office of the privacy commissioner is that people have a right to under this Act and money has not been a problem for our office insurance because I don't mind going over budget if we need to.

But we try to minimize that again by transferring funds from other supplies, travel that kind of thing.

Commissioner Stoddart: Thank you.

Chairman Wells: Commissioner Letto did you have a…

Commissioner Letto: Yes the section three of the Act lays out what the Act is ideally about which is that the purpose of the Act is to make public bodies more accountable. It sounds that in the period since Bill 29 that accountability has to be achieved at least in the section you mentioned, through the courts. Does that square with what the Act purports to do which is to make public bodies more accountable?

Mr. Ring: I think at the end of the day when you have a matter that's being reviewed by our courts, at the end of the day the public bodies will stand to be accountable if they win, lose or draw.

Commissioner Letto: It's a roundabout way of doing it?

Mr. Ring: its roundabout way, it's as I mentioned earlier very costly in terms of time and sometimes very much to the detriment of an applicant when you have to wait two or three years to get

on the vital information that you may need in support of a very serious matter that you may wish to pursue.

Commissioner Letto: Could you give us a sense of what applicants say to you when they are put on this track where they can't get the information and they know that involves court action because everybody knows that that takes a lot of time?

Mr. Ring: Yes that's a very good question and sometimes the applicants say nothing and just walk away because it's just not worth the effort, they don't have the money, they don't have the time. And it's in my view a huge barrier to justice and to the individual rights under the act. Other people are in it for the long haul and even if at the end of the day, the information your receive it's out of date and not—no longer suitable for the purposes in which they requested the information, they want to go through the process and essentially hold public bodies accountable. So there's the mix there.

Commissioner Letto: But having to be forced into that process I presume has some effect on public confidence and what the Act is supposed to be about.

Mr. Ring: Exactly and this is part of reaction, this is part of the ground swell to Bill 29, people are just fed up and basically have a right to know certain information and they are demanding it. And I guess that's why we're here today.

Chairman Wells: Mr. Ring one of your initial comments was that with respect to the 2012 review if I have quoted you correctly you said something like the OIPC was precluded from any participation in the review other than the initial presentation and that this was unfortunate as even though you had attempted to be more involved in it. Would you elaborate on that for me?

Mr. Ring: I'd be happy to. In fact the—I don't know the rationale or the reason why appointing a review commissioner when the Act clearly states committee. And it was getting very close to the time frame that the initial review was supposed to take place and I spent a considerable amount of effort dealing with the ADM and deputy minister level to try to find out what's going to happen, when is it going to happen? Really with the underlining intention is that we want to be involved. I didn't know at that time it would be appropriate to have someone from my office actually on the panel. And I've educated myself beyond that now and that that would not be appropriate.

Chairman Wells: Yes, I was wondering what you were getting to. To some extent your office is under review here too.

Mr. Ring: Yes, absolutely because it's part of the…

Chairman Wells: Part of the workings of the Act so I'm a little intrigued by how you want to participate beyond your presentation?

Mr. Ring: Yes in terms of consultation for example at the review process was under way and in fact we did have one opportunity and much thanks to Mr. Cummings after we made a substantial written presentation or submission, Mr. Cummings contacted our office and said, can I meet with you to discuss some of the recommendations and get a little bit more clarification and some cases a little bit more information on what we were recommending. That was a good process.

But beyond that we were hearing things, there was nothing posted except our submission, we put it on our website it was absolutely nothing else posted, so when Bill 29—within hours of Bill 29 filibuster starting, I was called over to Department of Justice and has a meeting with the deputy that had a slide deck

with 33 slides on it, one for each recommendation that was being presented and was going to be debated in the house in terms of Bill 29. That was my first opportunity as an oversight body to have any comment and I literally didn't have much it was too little too late.

Chairman Wells: So but that's not the review committee, it's gone longer now that's a new legislation.

Mr. Ring: Yes.

Chairman Wells: I'm more concerned with the review committee, I may be wrong but I think we have—this committee has already indicated to your office that it would be helpful to the committee if you could be available at the end of all other presentation to express your view as to the impact of any particular recommendation on the operations of your office, that would be helpful for the committee in deciding what should and should not be accepted or the extent of any two, you've been advised of that I believe?

Mr. Ring: That's correct Sir.

Chairman Wells: Is that the kind of participation you were looking for?

Mr. Ring: Exactly and the fact that this committee as you have indicated earlier today will be posting submissions on it—our office will be very interested in following those submissions. For example, we may be able to—at the end of it and maybe a requirement to contact the committee again and say, what we've seen here and that's even prior to the committee making their submission to the minister responsible. But certain things in the Act as they stand right now as a result of Bill 29 are not synchronized, they don't work nicely together and in some cases they are at odds. So that input where we can make commentary that would hopefully end up in the piece of legislation that is synchronized and you don't have sections of the Act not being compatible or operating well with another section of the Act for example.

So yes that's—it was a frustrating process and not just with the committee, I very much appreciated Mr. Cummings and what he did and it was I guess beyond that the void that was there, I think the office could have been of direct assistance to in terms of the end product and we might not have had Bill 29, we might have had something more workable.

Chairman Wells: Okay that deals with that question, one or two other points you made. You emphasized that the office was created, that is the office of the office of the Information and Privacy Commissioner was created to have a timely and cost effective means of accessing information. That would be difficult to challenge that statement, I share your view and you've expressed some of the basis for your concerns of having to go through court and the extent to which there is length and process. I'm looking at it just even he way operations are, operate without having to go to court. It seems to me that those time limits are lengthy. 60 days, why should it take 60 days?

If there is an overwhelming amount then I can understand then the need for the extension of time, but if somebody is simply asking for a document or two or three documents or relatively minor amount of information, why should it take more than four days or five days, certainly not more than 10 days.

Mr. Ring: I totally agree with you Sir and in many situations that's exactly what occurs, what we're dealing with by the time situations come to our office, problems that have developed between the applicant and the public body and for whatever

reason, it could be volume of the records, it could be a situation where you got an applicant to constantly applying to a particular public body, a bad faith has developed and there is not the level of corporation that should be there, all these things. And as I said earlier…

Chairman Wells: The point of the question is this, shouldn't the time limits be considerably less and provisioned for extension of time where the factual circumstances warranted. So that public service would develop a culture of facilitating and making information available on a timely basis. So that as soon as a request came in, if the document was in the file, make it available.

Mr. Ring: There are practical reasons why I believe that does not occur in some situations and for example under ATIPPA I mentioned earlier we have about 440 public bodies. In Newfoundland we have to my knowledge two fulltime ATIPPA coordinators and what you have in—that's with Memorial University and with the college of North Atlantic. There may be others then Sean I'm is missing any? I think there's just two. And so what you're dealing with in large public bodies is an individual who is designated at the ATIPPA coordinator and it's probably double and triple had it with other jobs. And so when

you add the practicalities of that individual trying to meet the legislative time lines and other work demands.

I'm not trying to present an excuse here, I think it's some good practical reasons why things don't occur the way they do. Now we have no idea in my office how many requests for information occur on a daily basis even without using the ATIPPA process, someone goes and looks for a chart or a report and all you hear is, "Here take you five dollars back and here's the information, no need doing so." So that's part of the situation and there is within the larger public bodies there is this chain of command, if I can refer back and use a military term I've used to.

That by the time things work its way up the system, sits on the deputy's desk for a week or two or three weeks or ends up in executive council for another look. And time just goes by and it's very quick.

Chairman Wells: Your presentation employs the old adage justice delayed is justice denied and translates it to access delayed is access denied and that's a credible assertion. Don't those time limits invite delay? They have a 60 day time limit doesn't that say you can sit and do nothing for 45 days and then the last

few days and start at it and then you've got to ask for an extension time and why shouldn't… let me finish, why shouldn't… would there be any problem with having a shorter time frame, say 10 days, respond within 10 days or a week or something of that order unless the nature of the search involved or the nature of the request was such that an extension is required in which case, ask you for… to approve an extension. Would that make any contribution to reducing these delays if you only had to respond in that way then you only have a part time ATIPPA coordinator, if you had to respond on a timely basis then you'll have the ATIPPA coordinators you need to do it, will you not? You put them in place if you're required by law but if you got 60 days to think about it and sit and do nothing, doesn't that invite delay?

Mr. Ring: Yes and I totally agree that in some situations where a public body is particularly busy or the coordinator particularly busy or you have multiple requests that you're dealing with that they, they actually don't get at the file until day 25 and then the first thing in the Act as it stands now that head of the public body has the ability to extend 60 and to extend it further of 30 up to 60 days and then beyond that ask the commissioner for an extension. In an ideal world sir I could not agree more with you but I don't think that in terms of

Newfoundland legislation that were that far had to sync if at all with other jurisdiction across the country where the reality of getting this kind of work done, in a perfect world where there was resources allocated at the public body level it would be… it would be ideal but…

Chairman Wells: Our mandate is to make recommendations that will make the operation better. The fact that they have a different standard or a lesser standard in most or all of the other jurisdiction doesn't diminish the burden of that mandate.

Mr. Ring: I'll agree.

Chairman Wells: Would your office be prepared to express at a later time because it's not really contained in your submission now, at a later time, more appropriate time limits that would achieve the objectives of the Act and provide for timely disclosure would still allow it to operate in such a way that it doesn't unduly interfere with the normal operations of public bodies but that should be more responsive, I saw there was time at 60 days and 90 days, it's just, off the top of my head it doesn't seem right, particularly in a day and age when everything is computerized and you can access it or locate it by putting an inquiry into a computer for the most part, there's

always going to be circumstances when you have some trouble. But isn't there, can't those time limits be improved, would your office in the meantime and at perhaps some later time, give the committee some advice as to what might be better time limits?

Mr. Ring: We'd be more than happy to do that sir and we'll provide some commentary and some recommendations and look at the pros and cons in terms of the reality of dealing with these on a day to day basis. It's a question again, I keep referring back to the fact that I believe it's a resourcing issue at the public bodies and I think also it's not all public bodies have bought into this process as readily as others. And so yes there are public bodies that I believe procrastinate and I believe wait till day 28 to get out an issue and then automatically the head's going to extend it. So some of that does occur and we address it when we can at our office but again, when you have recommendation power it can only bring you so far.

Chairman Wells: One of those, one of the things that caused me to raise this time issue with you is, we'll probably hear from Mr. Murray on it specifically your recommendation that the 90 day time limit that's now in place for resolving without having to have a hearing and making an order, without the

commissioner making an order, I was quite surprised by even that it should be 90 days and then to seek a further… why does it take so long for the commissioner to have discussions with a public body to say, well, you've got this request, you don't want to release it, the applicant feels he should have it. Is there some way we can compromise and find the best solution here which is a very credible approach and I highly recommend it. But it strikes me as not very efficient or cost effective, if it's going to take 90 days which is the time limit present and you're asking that that 90 day limit even be eliminated, it just seems to me to be unusual time limits.

Mr. Ring: Yeah, the reality is that on a day to day basis, that's what's required and some cases particularly with the larger public bodies or dealing with a bureaucracy and it's early on, our office can tell that this has gone well beyond the purview of the ATIPPA coordinator it's not with the director or ADM and ultimately ends up with the deputy. It takes time and when you…

Chairman Wells: And it's gets put to one side and not dealt with.

Mr. Ring: Yeah, so…

Chairman Wells: Would a 10 day time limit focus the mind on what's the issue?

Mr. Ring: I think what you're suggesting and what you're commenting on is ideal and makes me a very happy person as the commissioner to see this kind of a turn around, this kind of production but I think we're dealing with resourcing, we're dealing with to some degree, a culture shift and buy in and it's… we're not there yet Sir.

Chairman Wells: Culture shift may… culture may be the big part of the problem…

Mr. Ring: Yeah, I believe so…

Chairman Wells: And… but doesn't these extensive time limits, very lengthy time limits, doesn't that drive the culture?

Mr. Ring: It does to a degree but in some cases from our office's perspective the individuals have already dealt with the public body and they're coming to ask us now can we help and in very simple terms and so we start negotiating with the public body and try to reduce the amount… the scope of the request and to do anything we can to provide some level of

satisfaction for the applicant. And it's like this void you get sucked into it and we're at day 27 of our informal resolution now and somebody's on vacation for two weeks for example or someone is sick and so, rather than cut it off and go do the process of asking for public body and the applicant to makes submissions and we'll do a review, produce a report at the end of what we recommend to the public body, they may or may not agree with the recommendations, they may maintain their position that the information should not be withheld for whatever reason. So we tend to go the extra step day by day by day and yes, it… so it's all in… for the process of trying to get at least some resolution as quickly as we can and yes, the timelines are terrible.

Chairman Wells: So it seems to me if there's five or 10 or 15 or 20 documents or a document with 20 or 30 or 40 pages, an afternoon should deal with that, 90 days and then further extensions or unlimited time, just, that just invites doing nothing.

Mr. Ring: But it's not that simple because in that 40 or 50 pages, there could be 10 exceptions claimed by the public body that you get into discussions to try to reconcile and try to resolve and so, quite frankly we never put this, this issue in our

submission because I just think that we were doing pretty good as things go… but you raised a very interesting and good point.

Chairman Wells: Would think about it some more and if you have any further thoughts we'll provide you with an opportunity to express them to the committee.

Mr. Ring: That would be tremendous and we would commit that we would do that in a substantial way.

Commissioner Letto: I've got another question, you said, we… at the end of the day I think to paraphrase you, "We only have the power to recommend." What if you had the power to order them and compel them to produce the documents?

Chairman Wells: The public body can produce, oh at the end of it, yeah, for example…

Commissioner Letto: If you had that power to say, "You have to produce these documents for this applicant."

Mr. Ring: Yeah, we… we've given a lot of consideration and thought to the order power option as opposed to the Ombuds option

and I think when we look at the successes that we've achieved in this office over the years in terms of compliance rate with our recommendations for example, I think the compliance rate is very high and not very often that a public body has frankly said, "No, we're maintaining our position as recommendation and records will not be released." There is an option of course that either applicant or through the commission will then go to court. Again what we're doing is increasing and going outside of what basically the office was designed to do but we feel overall that the fact that we're able to achieve 80% success with our informal resolution process. I believe that the Ombuds model is a good one. There are other commissioners out there and I believe Saskatchewan is one of them where the commissioner really has no authority to be able to the matter before the courts. We have that; I wouldn't want to lose that.

Commissioner Letto: If I could borrow a phrase from Mr. Wells who talked about being able to focus the mind, it would seem to me that if you had in your back pocket, the ability to compel a public body to produce documents, that it would probably focus the mind and do away with a lot of delay and obfuscation and the kind of sideways movement that probably frustrates you and I'm thinking of the applicant as well who

needs to at the end of the day, have faith in the system and that it works.

Mr. Ring: Yeah, there's some very good and strong compelling arguments for order power, not having that in this province, we've tended to concentrate and try to make the process that we have work as effectively and efficiently as we can. There are merits to having order power, again but consensus in my view personally is that the Ombuds model is a good one and it does work.

Chairman Wells: And surely having order power doesn't preclude the use of the Ombuds model before you invoke the order power.

Mr. Ring: Yeah true, that's true enough, yeah.

Commissioner Stoddart: Perhaps if I could ask a question on that same issue which is… I know well commissioner, a big debate across the country but the four largest provinces in Canada, Quebec, Ontario, Alberta BC, have order making power. Of those that have Ombuds power including the federal commissioners, there's a tendency to ask for order making power. The Information Commissioner asked for it recently in some circumstances and the privacy commissioner asked for it

for the public sector which is regulated federally as you know, so the private sector. I'm just wondering if this doesn't suggests if we go back to your assertion it's not the first time that I've heard this that one of the things to come out of the review is to try and make Newfoundland's legislation the most up to date and really a model for the rest of the country. I'm just wondering if we don't look at a trend where jurisdictions move from Ombuds type powers as they enter into this area of potential regulation and then perhaps with the confidence or I don't know whether it's the simplicity or the fact that courts are very busy and courts are very expensive both for the taxpayer and those going before them compared to Ombuds people or tribunals. There isn't a kind of tendency towards… to move towards order making power.

Mr. Ring: Yeah, you're right but I think from our office's perspective in terms of preparation for this review, we focused our attention primarily on the issues that were show stoppers for this jurisdiction. The fact that there's been a huge degradation of the commissioner's authority, if we had that authority that I believe is necessary for the office to do its work, then I think that things would happen in a very favorable way and I think the going the extra… I guess the extra step of looking at order power would be something that, yes, it would be a good thing

but I guess it boils down to… there's so many things on our plate at this point in time that we're struggling to try to repair in terms of our ability to do our job even with the Ombuds model.

If we can make progress and based on our recommendations we're clearly asking for that for the clarification with our jurisdiction to reverse some of the decisions made in Bill 29 in terms of solicitor-client privilege and cabinet confidences and some of the other recommendations that we're asking for in terms of re-instituting the three part terms test in section 27. You know, we can work with a good piece of legislation and an Ombuds model and maybe at a future date in a future review where all those things might be in place that we're able to go that extra step but I thing we've got to… I think we got to walk before we run here and to try to get some fundamental changes that we think have been… that have been done incorrectly – repair is the focus of our presentation and submission.

Chairman Wells: Thank you commissioner, we're assuming that after we've heard from Mr. Murray all our other concerns will be addressed but in the event that they're not and you will continue to be available if we…

Mr. Ring: Absolutely, I'll be here the entire time sir and more than happy to address anything that I can to be of assistance to the committee.

Chairman Wells: Before we hear from Mr. Murray, we'll take a 10 or 15 minute, 15 minute break, I'm told it's to be 15 minutes.

Mr. Ring: Okay sir.

Mr. Ring: Thank you very much for Mr. Murray, thank you Mr. Ring.

Commissioner Stoddart: Thank you commissioner.

Chairman Wells: Thank you.

BREAK

Chairman Wells: Mr. Murray,

Mr. Murray: Yes, so, carry on?

Chairman Wells: Carry on…

Mr. Murray: Alright, well, greetings, good morning Mr. Wells and Ms. Stoddart and Mr. Letto, I must say that it is an absolute pleasure to be here today, look forward to our discussion this morning and I would suspect carrying on into the afternoon. Just to briefly introduce myself, I've been with the office since 2005. So that's when the office was established. So I've had the benefit, I guess of seeing how things have evolved over the past nine years. In my various roles, I'm essentially the senior permanent employee of the office as the commissioner is appointed by statute. I'm the supervisor of the operational staff in the office, the senior advisor to the commissioner and I work with our legal council on all our court cases in the past several years. What I plan to do today is, I'm not going to just repeat what's in the submission, I just want to emphasize that our written submission is… that encapsulates the position of the office to date regarding the ATIPPA review. As has been discussed with Commissioner Ring earlier and a request made by Mr. Wells for us to provide further comment on a couple of

issues – we're more than pleased to do that. What I'm going to do is, I'm going to touch on the main topics that are covered in the written submission just to identify them, summarize what the issue is and what our position is on it and after I touch on each topic, I would like to invite you to ask me any questions that you may have, make any comments or what have you; hopefully we can have a good back and forth bit of discussion about the contents of our written submission.

Chairman Wells: It seems a practical approach,

Mr. Murray: Okay, great. I guess one of the… one of the challenges I've had in sitting down to try to think about how I was going to present this. There's so many details as you've read our submission, there's a lot of detail to it so, I thought I would draw a picture to make it a little simpler. I'm going to pass this up to you after but… basically this is what I think is, what we're looking with the review submission.

So I'm going to ask you to imagine that this entire spectrum here, the green blue and the red, all of it combined is the totality of the information that is held by all the public bodies in Newfoundland and Labrador that are subject to the ATIPPA. So the red area would be the information that shouldn't be

released. There's a good reason and the proportions are not exact here, this is just a rough idea. The red area is the information that shouldn't be released and there's good reasons for it: there's solicitor client privilege, there's cabinet confidences, there's all the exceptions in the Act and the information need to… certain information needs to be withheld in order to allow for the efficient operation of our government. The government needs to keep certain information confidential; I think we all accept that.

The green area on the hand, on the other side represents the information that the public should expect to be able to get without any trouble. Maybe they'll file an access to information, request for it or maybe they'll go to the website, the government's website or their municipality's website and it should already be there. There should be no question that they have a right of access to all the information in the green area here.

What I think we're focused on here in the ATIPPA review in terms of the access to information piece is the blue section here. I don't know how really, how big it is but it's… I've colored it in here as blue, and so what we're talking about here is, it's a relatively small proportion overall of the entirety of the

information that's held by public bodies, but really what we're… what the committee has asked to do and I think in governments and this turns it's mind to… subsequent to the committee's recommendations is, how much of this blue is going to become green, how much of it is going to be red. These are the areas of information that are up for question or debate, the information that's in this blue area doesn't need to be withheld or can it be released and even though it's a small proportion overall, this is, in many cases this is the nub of accountability, this is the key information that will be able to tell the public or applicants, any applicant, whether their public body is being sufficiently transparent or accountable. So I think that's really what' we're talking about in this review and ultimately where we want to go, I think is we need to draw the line and when we're constructing a provision that is an exception to the right of access.

What we want to do in my opinion is we want to draw the line as close as possible to the border between the red and the green, we don't want to go over into the red, we don't want to provide a right of access to any information which needs to be withheld in order for the government to operate effectively. However, we don't want to draw the line too far back in the green, we don't want to have information that should be

released to the public being withheld. So all of the exceptions in my view should be as close to the line as reasonably possible without going over. It's kind of like The Price is Right, the maximum retail price without going over, that's where we want to go. So when we've talked about… when we talk about the exceptions, the recommendations we've made for some of the exceptions, amendments to some of the exceptions, that's what we're trying to do, we're trying to suggest that we should adopt a model for each exception and in most cases we're able to point to a version of it somewhere else in Canada that already exists. But we want to find a version of each exception that gets us as close to the line so that the maximum amount of information that can be released is available to be released without going into that red area where there's information that must be withheld to allow government to operate effectively.

So I'll just carry on now if that's alright and with the first section. First section I want to reference is the beginning of part A of our written submission: Section 2 P. What we're proposing there and this section 2P contains the definition of public bodies – what we're proposing there is an expansion of the definition of a public body and, so as was mentioned earlier, we've got municipalities, we've got governments departments and

agencies and entities of that ilk but what we've noticed is that there are situations where public bodies own or create other entities to carry out some part of their mandate or mission and we think that, including those entities that are created by other public bodies, better fulfils the accountability purpose of the ATIPPA. There's also a privacy rationale of course, so if one of these entities has created that, holds the personal information of citizens, by ensuring that they're covered by the ATIPPA it allows for protection of privacy of that information as well. As we've indicated in our written submission, there are broader definitions of public body in other jurisdictions which cover the same or similar territory to what we've proposed, we think we've proposed the best one but there are other models. There may be challenges to implementation. No doubt it would take a period of weeks or months of contact for the government, the ATIPPA office perhaps of government to contact all of the public bodies out there to inquire whether they have created other entities that carry out public… some of their public mandate and to help them understand how those new entities should now come under the act. I haven't put any examples there, although we've certainly encountered a number of situations where people have come to our office and say, "Look, I've tried to get information from such and such and entity." And many cases we've seen that it's one

that's created by a municipality. So you could get some sort of development corporation or a corporation that's been established by a municipality to maybe operate municipal recreational facilities. I'll give you one example here in St. Johns which I've wondered about although we haven't got an inquiry about is Metrobus. So Metrobus is a separate entity from the city of St. Johns, it operates the mass transit system here and they get a lot of money from the government to build and establish their facilities, they operate a service for a public purpose on behalf of the municipality here, I'm not sure if Mount Pearl is involved or if it's just St. Johns but this is a major multimillion dollar public entity which is not a public body under the ATIPPA and we've identified a number that we think… of examples that we think could be deemed to be public bodies if the definition was changed as we've proposed. We've identified that to past ministers responsible for the ATIPPA, so we've considered the issue in some depth, I can't say with any assurance that any one particular entity that we've proposed, because I don't know… I don't have their incorporation documents, I don't know exactly how they're composed and that would have to be investigated I guess before it could be determined that they would certainly fall under this new definition that we're proposing. But I think

that, that's the basic gist of that recommendation, are there any questions of that?

Chairman Wells: One that comes to mind as I read your definition that you've recommended… the amendment to 2 paragraph p, 5,1, a corporation or entity owned or created by or for a public body or group of public bodies. That would then be only a wholly owned corporation.

Mr. Murray: Well, I mean, I suppose that, I would be open to expanding it, I mean this is what we…

Chairman Wells: No I'm not suggesting you expand I just, I'm just trying to…

Mr. Murray: Okay, I think you're right.

Chairman Wells: I see where you're going now with the…

Mr. Murray: That's true so it wouldn't include for example a corporation that was created jointly with a private sector. So it wouldn't be like public private partnership, they wouldn't be covered by what we've proposed. Now if the committee felt that it would be better to expand the definition to include such

entities, we wouldn't been opposed to that, we haven't considered that in any detail and I think what, the examples that we've encountered have primarily been of the type that would be captured by what we proposed as the definition here.

Chairman Wells: Just by way of example, the definition you have there wouldn't include CFLco

Mr. Murray: Okay,

Chairman Wells: You agree?

Mr. Murray: I don't know enough about CFLco to say but I'm sure you're right, I'm sure you know something about it.

Chairman Wells: Well CFLco is 35% owned by Hydro Quebec.

Mr. Murray: Right, well there are, as I mentioned in our written submission, there is a jurisdiction that, where is it? Alberta specifically designates gas utilities and entities that own generating units, transmission facilities or electrical distributions systems as local public bodies. So you could go

that way as well, you could designate specific types of entities as well.

Chairman Wells: Yeah, What I'm thinking about is, where this takes you, how this might affect the ability of government owned corporations that are engaged in the private sector. I gather from your definition that…

Mr. Murray: It would not impact.

Chairman Wells: It would not include Hydro Quebec for example or CFLco however it might include the Nalcor subsidiary that operates in the offshore oil if it were wholly owned.

Mr. Murray: Right, now I think that that would probably already be covered because the definition of public body in section 2, let me just refer to it there briefly, 2, P I think. So 2, P sub 2, definition of public body includes a corporation, the ownership of which or the majority of shares of which is vested in the crown and the problem that we've encountered is that municipalities, I don't think, are the crown, so when municipalities establish a corporation to run their recreational facilities, I don't think they're captured and the same with Metrobus, if St John's creates an entity to run its mass transit

system as a separate corporation and appoints members to operate it. I don't think they're the crown. I think when a minister creates an entity then it's a crown entity as my understanding anyways.

Chairman Wells: Then just go back to the question. Is… assume and I don't know what it is at the moment, assume the 65% of CFLco that's owned effectively by the government of Newfoundland, the shares, that 65% is held by Nalcor as the overriding. Is that the crown?

Mr. Murray: Maybe it is?

Chairman Wells: Is Nalcor the crown?

Mr. Murray: I don't know.

Chairman Wells: It's a crown corporation?

Mr. Murray: Yeah, I don't know the answer to that but its worth… it's a question worth looking into.

Chairman Wells: What I'm getting at is, do you not have to be careful with your definitions here because you can't operate crown

owned corporations that are engaged in direct competitive businesses, can't operate in a system where information that's crucial to the confidences, confidentiality which is crucial to their operations, either success, you can't prevent them from being successful by providing access to information.

Mr. Murray: I don't take any issue with that and I think that's another good reason I guess to go back to the definition of …

Chairman Wells: So we have to be careful with that definition.

Mr. Murray: Yeah, I agree and that's…But I think the definition that we've proposed, I don't think would get us into that… into trouble on that regard so…

Chairman Wells: But you agree that you… that that should not be included that kind of business corporation.

Mr. Murray: We've never… we haven't turned our minds to it at all, I have to say, so based on just our discussion here, off the top of my head I would agree.

Chairman Wells: Okay, alright, that's…

Mr. Murray: You have other questions on that provision?

Chairman Wells: You have anything Ms. Stoddart?

Commissioner Stoddart: I'm just trying to remember, and you may know this better than me not having looked at this for a while. Federal crown corporations are generally covered by access to information and I believe the way the business issues are handled in that use simply the business, trade secrets and (inaudible) exemptions.

Mr. Murray: There are, yes, there are provisions for that and the same with the crown corporation under the ATIPPA so the Newfoundland Labrador liquor corporation is covered by the ATIPPA and there are exceptions there that I think allow them to function adequately. What I don't know and is a little bit out of my depth is the operations of CFLco and the involvement of Hydro Quebec. It's kind of, not something I've given any thought to so…

Chairman Wells: I just used that by a way of example and the offshore oil operations are now underway. They would be those corporations would be privy to very confidential and highly valuable competitive information that their partners in

the development have to make available to them. They could seriously, adversely affect business interests …

Mr. Murray: Right, now of course regarding Nalcor we have the Energy Corporation Act which is a regulation as superseding the ATIPPA anyway so they have their own regime for access to information and that's another issue we can certainly discuss later. But I think it's true as Ms. Stoddart points out that just because an entity is subject to the act, doesn't mean that information involving their business dealing is necessarily going to be disclosed under the Act and I think…

Chairman Wells: It's otherwise protected.

Mr. Murray: Right, I think the protections are there in the ATIPPA to protect the interests of crown corporations and their operation. That's been the case in other jurisdictions that I've looked at and as we mentioned in that section as well for example Manitoba hydro which is very similar to, has engaged in many similar operations I would suggest as Nalcor in operating hydroelectric generating facilities is subject to Manitoba's freedom of information and protection of privacy Act and has got no special legislation that overrides their being subject to that Act so…

Commissioner Letto: You've talked about the municipal owned organizations and I think that's… you used it as a point of, I guess reference for this, you also said that you've written to the minister on several occasions in respect of this. I'm wondering if you can reveal kind of the concerns that you've expressed about these organizations.

Mr. Murray: Well I think that, just in terms of the overall concept behind the ATIPPA, if a public body such as a municipality can create a corporation to carry out part of its public mandate and therefore remove that sphere of that public mandate from being subject to the ATIPPA, I think it runs contrary to the purpose, the spirit and intent of the ATIPPA. So what we're saying is that if the municipality or another public body which is not a crown… part of the crown let's say, creates a corporation or another type of entity to carry out its purpose, perhaps spending public money, we think that to… in order to fulfill the purpose of the ATIPPA really it should be, those entities should be subject to the ATIPPA. In our… when we've talked to our government about this in the past, I don't think we've encountered a great deal of resistance but it just, it hasn't happened so…

Commissioner Letto: They've set up these very significant waste disposal; regional waste disposal organizations as well.

Mr. Murray: There are lots of them out there actually doing all kinds of different things so and I think it would be worth getting a handle on them and if a lot of public money is being spent they should be subject to the ATIPPA.

Commissioner Letto: You mentioned recreational groups, the landfill, what other sorts of categories would there be?

Mr. Murray: You see economic development organizations that are established by municipalities, town councilors may be appointed to the boards of these entities, maybe employees of the town maybe appointed to the boards of these entities, they may receive funding from various levels of government to promote the town, to promote economic development in the town and they're carrying out, one as we mentioned in our submission, one town may do this with town staff. They may have a director of economic development in the town. The next town may do the same activities but have established a corporation to carry out these duties and I think to be fair really, both municipalities should be… play about the same rules.

Chairman Wells: Thank you Mr. Murray, if you continue on now with your next section.

Mr. Murray: Alright, the next section I'm going to talk about is section 18 and this is the cabinet confidences provision. So this is a mandatory exception to the right of access. So if the information is subject to a mandatory exception, there's no discretion, no discretion to release information even if a public body wish to, looked at the information and said, 'there's no harm in releasing this,' they don't have the discretion to release it. The change in Bill 29 to section 18 was that it transformed this exception from an information based exception to a record based exception. So it started off as an exception which basically said, 'a public body shall not disclose information that would reveal the substance of deliberations of cabinet'. That was prior to Bill 29. Post Bill 29 you get a broad… a lengthy list of… sets of descriptions of types of documents that must be withheld under section 18 and it doesn't matter whether their document may have factual or background information that would not have revealed the substance of deliberations of cabinet. But if they're in a record that's been broadly categorized or classified as a cabinet

record, the record must be withheld and there's no discretion. So I'll just move on to say…

Chairman Wells: Would that…?

Mr. Murray: Pardon me…

Chairman Wells: Would that be a problem if… if the commissioner's office could look at the record and make a decision as to whether it's genuinely claimed or improperly claimed as the 80% of the solicitor client claims that you dealt with.

Mr. Murray: I guess the issue really…

Chairman Wells: Would that be a difference for it?

Mr. Murray: It would be a difference but I don't think it would deal with the core issue here because the core issue here is really determining what is a cabinet confidence, what should be withheld, what should fall within the scope of a cabinet confidence's exception and I don't even think we really have a classic cabinet confidence's exception anymore because if you look across the country at the other jurisdictions which tend to all use this term, this phrase, substance of deliberations, so

basically the exception is designed so that information that would reveal the substance of deliberations of cabinet must be withheld. But if we've changed to this new version which nobody else has, which nobody's… I've never encountered anywhere before to this sort of more of a records management approach, you could have lots of information in there that would not reveal the substance of deliberations of cabinet and would probably be no harm to release, may already be pre existing factual or background information that may or may not have ever reached a cabinet table and to have no discretion at all to release that information. I think the brush has been painted much more broadly for the exception.

So us being able to look at the records is one thing but if we look at the record and we're stuck with the version of section 18 we've got, all we're going to be able to do is say, "Is this one of the records, types of records that falls into one of these categories?" The categories are so broad that if we find it is we no longer have the substance of deliberations test, so we're no longer in a position to look in the record and see, well, would it reveal anything would it actually disclose anything that would harm the deliberation of cabinet or disclose anything about the deliberations of cabinet. We wouldn't be able to do that anymore because that's not in section 18 anymore as it is right

now. So we're saying go back to a version of section 18 of the cabinet confidence's exception that's more similar to the type of cabinet confidence's exception that you have in all the other jurisdictions in Canada which is a true exception that would ensure that only the information that is required to be withheld to protect the cabinet process is actually covered by the exception and not… so broad that the brush is so broad to capture all this other information which under the current section 18 is now protected as well.

Chairman Wells: This list as I understand it came as a result of Mr. Cummings recommendation on the last review. That the list was added and I think he specifically said, 'it should be the list of documents set out in the management and information act.' And this is what he did and this is essentially what government did.

Mr. Murray: Well they did but they left out one important part because one of the things that Mr. Cummings also said is that, the substance of deliberations test is an important part and he did not recommend that that be removed in fact he'd recommend that it be kept.

Chairman Wells: Well.

Mr. Murray: He said, keep the substance of deliberations test but add in all these descriptions of records from the management of information act.

Chairman Wells: Like Ontario does.

Mr. Murray: It's fair enough, as long as you still have the substance of deliberations test.

Chairman Wells: Yeah but now the substance of deliberations test applied in Ontario renders keeping both pointless as I read the… on page 38 of Mr. Cummings' report, he says this, "The Ontario commissioner has interpreted this section to mean that not only must the substance of cabinet deliberation not be disclosed…" Okay, so any document, whatever it is, wherever it is, whether it's on that list or not, if it would reveal, it can't be disclosed because it would offend the substance of deliberations test. It goes on to say, "But that, in addition, any records specifically listed in the relevant section must be protected from disclosure because they're deemed to reveal the substance of deliberation of cabinet." So whether they do or they don't it doesn't matter, those are a class of documents that fall within the category of cabinet documents,

and generally speaking most people would consider it, even though they may contain information that would not reveal it. So what he's saying is in Ontario, if they're in that class they're barred, in addition to that, if any other document that's not of that class, if it would reveal a substance of cabinet deliberations, that's precluded from disclosure as well.

Mr. Murray: Well I think what he's doing there is he's pointing out that there's a disagreement across jurisdictions in Canada as to what substance of deliberations is meant to include because I think he also notice… he notes… he may have referred to our submission on it. He notes that in the Nova Scotia court of appeal, the O'Connor decision, it defines a substance of deliberations in a more narrow sense and it does not include documents by category or classification. It simply says that, the test being that is it likely that the disclosure of the information would permit the reader to draw accurate inferences about cabinet deliberations. If the question is answered in the affirmative, then the information is protected by the cabinet confidentiality exception.

Chairman Wells: I had the impression that the reason for including the list was to make an issue more definitive instead of having the uncertainty of whether its… it would disclose the

substance of cabinet deliberations. That's a pretty uncertain and ephemeral idea. If you list this document, that document, it's clearly, are almost always, involves cabinet discussions and so on even though some may not as you say, if you list that as a category of documents, that makes the issue definitive. You don't have to worry about applying this and that was why he recommended it.

Mr. Murray: That may be true but our take is that things will get captured in that that will move our line back here a little bit too far. You know what I mean? Like there's going to be information that's going to be… that would be withheld by section 18 that doesn't need to be withheld that would not actually harm or impair the cabinet process in any way and the fear is that, especially because it's a mandatory exception with no possibility of discretion.

Chairman Wells: But then if you… if you're going to apply the substance of… I thought you didn't disagree with having the list.

Mr. Murray: We don't disagree with having a list but…

Chairman Wells: Then why have a list at all if you're going to apply substance of…

Mr. Murray: The only purpose of the list is to give examples of the kinds of information it may contain but the list is not essential so I mean you could dispense with the list.

Chairman Wells: Yeah, that's my point, why have it at all if you got… if you're going to apply the substance of deliberations test anyway to all documents. So the list is meaningless.

Mr. Murray: Fair enough… I guess if the … one issue, one way you could look at it is, let's say that, the option, the two options were to have no list and just have the substance of deliberations test. That would be fine from my perspective; I think that would be fine. But if the option was that no, we need the list and we don't want the substance of deliberations test which is what we've got now, then I think the list needs to be looked at. Furthermore, I think we also need to look at some formal discretion… and maybe it could be even broke...

Chairman Wells: See, even if you had the list, don't you still need the substance of deliberations test not to apply to the list but to apply to documents not on the list…

Mr. Murray: Yes

Chairman Wells: Good. So from government's point of view, the laws of the substance of deliberations test is a bit of a hazard because there may well be documents…

Mr. Murray: That are not on the list…

Chairman Wells: That wouldn't fit within that category on the list that would reveal the substance of… probably not many but one could envision that it would occur.

Mr. Murray: Yes and I agree with you and I think that was one of the strengths of the previous version of the provision that we had and I guess one of the challenging things here is that if we were to go back to the version that we had prior to Bill 29 of section 18 which references the substance of deliberations. It had never been interpreted by a court and so we would… what we had before Bill 29 is we had our office having issued some reports with some recommendations about what we thought section 18 meant and we were focusing on the substance of deliberations test, as I indicated, saying that basically if

something met the test, whether it's on the list or not, if something met the test of substance of deliberation then it should be protected, that was our take on it. Our understanding is that government took the other perspective on it So we were in a situation before Bill 29 where we had two different views on what the exception meant and we hadn't had… nothing had gone to court yet so we didn't have a court decision saying that it should be this interpretation or that. So we're also throwing out here the possibility that the committee could, if we do return to some form of substance of deliberations approach to this that the committee could recommend that the provision specify in some way or be designed or drafted in such a way that it's clear, how it's meant to be interpreted in that either the substance of deliberations test is essentially it and that the list is secondary or the list is crucial and the substance of deliberation's part only goes to as you suggested, adding in anything that might fall inside the list.

Chairman Wells: The Ontario approach.

Mr. Murray: Yeah, so I think it would be helpful to get something specific in a recommendation so that at least if we did go back to a version like we had before…

Chairman Wells: What's your view of the Ontario approach?

Mr. Murray: Well I mean it's not our view that we've adopted in the past. The view that we've adopted in the past is similar to the O'Connor decision out of Nova Scotia as to what the… that the substance of deliberations test is the key and that; they don't even have a list in Nova Scotia so maybe we don't need one.

Chairman Wells: If you have substance of deliberations as a test, it's always applicable. A list is absolutely pointless.

Mr. Murray: Fair enough.

Chairman Wells: It's just a waste of time putting it in

Mr. Murray: I'm good with that.

Chairman Wells: Okay, alright, and you agree with that proposition if you're going to apply. If you apply it the way Ontario does then it has value and both have value. Now, just… what follows from that is, would you go over the… the six items that are listed, starting on page 37.

Mr. Murray: Okay.

Chairman Wells: That are in that list.

Mr. Murray: So this is in the proposed language that we're proposing, is that…?

Chairman Wells: In the list, in the present list.

Mr. Murray: Okay.

Chairman Wells: I was just looking, I'm sorry, I was looking at Mr. Cummings report, it's on page 37 at Mr. Cummings report.

Mr. Murray: I'm sorry but I don't have Mr. Cummings report.

Chairman Wells: No, you don't need it, look at 18, so this is in 18.

Mr. Murray: Yes, I've got… the new section, the current section 18, yeah. Okay, so…

Chairman Wells: The list that they have there.

Mr. Murray: Yes and so advice starting with advice recommendations or policy considerations submitted or prepared for submission to cabinet, is that the one, starting with that?

Chairman Wells: Why would you apply the substance of deliberations test to that, I mean, shouldn't that be clearly a document that…

Mr. Murray: Well some of these might be, some of these there may never be a case where the substance of deliberations test wouldn't apply. But some of them might be a case where information would, so for example number 4, a discussion paper, policy analysis, proposal, advice or a briefing material including all factual and background material prepared for the cabinet but if you go down below to subsection 2, it's… this protects, sorry, it goes to B, C and D. This could be information that's in a discontinued or supporting cabinet record. So a discontinued cabinet record is not an official cabinet record and some of these cases, this is information that may have never gotten to the cabinet table or have been seen by any of the cabinet ministers or been involved in the discussion at all. It's just a background paper that was prepared but never went any further or not only that, it could be background

information. It could be factual as in point number 4 there, it could be factual or background material and as long as… so the word prepared, as long as somebody pulled it together, thinking that, well Cabinet is going to be looking at issue X, so we're going to pull everything we can together on issue X as we prepare our cabinet submissions and the background material maybe never go into any cabinet submissions but it could be captured.

Chairman Wells: Anything like that is available and in a dozen other sources they just bring it to a cabinet when an issue comes before their cabinet saying, you have to consider this and look at the document from this department relating to management of schools or something but that's just added to it, then it's available from another source.

Mr. Murray: You would think so; my concern though is that, because section 18 is a mandatory exception and the way it's presented here now, I think the possibility is there that a public body could say, "Now that it's been gathered together as part of preparing for this cabinet submission, it's now protected by section 18."

Chairman Wells: Then the value of the list is rendered useless if you apply this way, one of the values of the list is to make it easier and faster to deal with these issues, that was what motivated it in the first place. People were complaining about having to go through this process, it just greatly lengthened it, delayed the release of the material and imposed a great deal of more work and the simple way to do it, as was done here, if it was a document that was prepared for cabinet, if it had other unrelated things that really… it's somewhere else in perhaps a myriad of other places in government files, get it through that source if you want it. But I mean the mere fact that it was intended to attach to a cabinet paper, provide factual information attached to a policy recommendation from the staff for cabinet to make a decision, that's no justification for looking at the whole paper. Look at it where it originated.

Mr. Murray: Well that would be good, that would be better, I'm not sure that we would get that result.

Chairman Wells: Does it include looking at it in that other, from that other source?

Mr. Murray: I'm not sure, if… see, I mean it all depends on how the public body responds to an access request and our fear and

our concern is that public bodies could use this section 18 as it is now to withhold preexisting factual or background information regardless of whether it's founded elsewhere.

Chairman Wells: It's no problem if you want to clarify that to say, add to it unless it appears somewhere else.

Mr. Murray: Well, maybe there could be…

Chairman Wells: As a matter of fact, what I'm getting at is, the mere fact that it's a bit of factual information attached to a policy decision…

Mr. Murray: It should not be protected by cabinet confidences.

Chairman Wells: It's not, it shouldn't be protected by cabinet confidences, it's available somewhere else but the cabinet document to which its attached, together with the (inaudible), it's easy, yes so it's just…

Mr. Murray: Yeah, that's fine… I agree, so if there's a way to do that, then we'd be open to that.

Chairman Wells: Okay.

Mr. Murray: Yeah.

Chairman Wells: Good.

Mr. Murray: Alright, any other questions about cabinet…?

Chairman Wells: I think so --

Commissioner Stoddart: No thank you.

Commissioner Letto: Mr. Murray you've lived in the pre and post Bill 29 worlds, I wonder if you can give us a sense of your experience, operating with respect to section 18 prior to Bill 29 in terms of release of documents, documents withheld, you're office's involvement, how … differences over interpretation were sorted out, so pre Bill 29.

Mr. Murray: Right, yeah… I think pre Bill 29, now it's not an exception, it's not a section of the dealt that we dealt with frequently, I'll say that. But it doesn't matter if it's frequent or not because there could be… there's very important issues at stake in terms of determining whether information should be released or not. But prior to Bill 29 we did issue a few reports

with recommendations. My recollection, I don't recall specifically whether we got public bodies to agree with us in terms of the response to our report or not, I know there were probably a few that were resolved informally where we either… we looked at the record and either agreed that it was a cabinet confidence and indicated that to the applicant and the applicant was satisfied with that and the file was closed or we may have gone to the public body and said, 'Look, it doesn't look like it meets the… it doesn't look like it falls into the criteria set out in section 18 as it was" and made some case to them that perhaps it should be released and I think at some cases we did get information released as a result of our recommendations at the informal level. So it worked fine, that's the way it's supposed to work I think and I never went to court, I know there was… there were, there was a file I think, maybe even just around the time that commissioner Ring was appointed where there was some issue whether some information was subject to section 18 or not, there was an indication at that time that the government intended to amend section 18 even back then, so I think there's probably some interest in… giving some attention to section 18 even years before Bill 29.

Chairman Wells: And what's been the experience in those areas since?

Mr. Murray: Since then… I don't know, I think we've… I don't think we've gotten many if any reviews, I think we've gotten… a couple of times it's come to our office. On one occasion it came to our office… I know one time it did come to our office and it did certainly meet the criteria set out in section 18, no trouble for us to be able to say that to the applicant that, "Yes you've requested this review, we've looked at the record, it's definitely covered by section 18" so it was very clear cut because section 18 is pretty broad and on another occasion, I know we were contacted by an applicant who received a response and I can't recall whether they were advised up front or whether when we initiated the request for review, we were advised that it was an official cabinet record and therefore we couldn't do a review. So the only thing we asked for then is for the certificate to be produced because it says the clerk must produce a certificate. So we didn't get to see the records or anything of that nature in that review and that's… the issue with that is of course that the clerk can certify anything and their decision is determinative of the matter.

Commissioner Letto: So how does that process work if you ask to see the record or the certificate, what does this certificate look like?

Mr. Murray: It would be pretty brief, it would just identify the record and the clerk come saying, I certified that the record is a cabinet record and we would not get to see the record or the information in it.

Commissioner Letto: So your involvement then with that file ends.

Mr. Murray: Is done, we'd be done, Yes.

Chairman Wells: Mr. Murray, the people in government who see and have access to cabinet documents are more than the members of the cabinet. The staff at executive council, staff in the minister's office would see all papers that are circulated to ministers before they go to cabinet and so it's a pretty broad swath of public service that have access to cabinet documents. Is there any reason that you know of why government or the public generally should have less confidence in the ability of the office of the information and privacy commissioner to keep cabinet material confidential in the same way these other

members of the public service who have access to it keep it confidential. Are you less trusted than the others?

Mr. Murray: It's been, well, we were a bit insulted I think when this amendment was in because the implication there is that perhaps we shouldn't be trusted and that's certainly one way of looking at it and it's… I think it's deeply insulting to our staff, if that is… if that was the thought behind it because everyone in our office signs an oath of confidentiality, we have very high measures for information security in our office, we take our mission, our mandate very very seriously. I think it could be said that we would be, it would be the biggest disaster ever if something was ever leaked or slipped out of our office and in any form at all. It would be absolutely disastrous. So we do everything we possibly can to keep a completely air tight operation and I think we've been extremely successful in it and I've never heard of, not only our office but any other commissioner's office disclosing a cabinet record to some third party, I mean it's completely unheard of, so…

Chairman Wells: And what follows from that, is it… taking into account your experience with the solicitor client claim, 80% of them are unfounded. The ability of a public body to hide behind, arbitrarily hide behind—arbitrarily hide behind

solicitor client privilege claim that other public bodies at cabinet offices… a minister could hide behind it and… by certifying it as a cabinet document, you have no ability to look at it.

Mr. Murray: We would have no way of knowing and I guess it's not only us and our frustration and our fears, it's a public perception I think as well, when you have a situation where the independent oversight office for the legislation is not allowed to fully fulfill their mandate, to be able to say that, 'Yes we provide complete oversight of the decisions, acts or failures to Act in relation to access to information requests." If we are removed from some portion of that, I think it creates suspicion in the minds of the public that maybe something is being hidden. We certainly wonder what the rationale is, we've not been able to come up with any reason why it should be the case. So I think it's, it's certainly our… it's number one on our agenda, I think, this review.

Chairman Wells: Would your concerns or some of them be addressed if you had the ability to access the document and express the view as to whether or not it was genuinely a cabinet …

Mr. Murray: As I said earlier, I think that would be a big part of it, we also do feel however that we want to make sure that we have an exception that is crafted in such a way to ensure that information that does not need to be protected because it's not a cabinet confidence of someway or is not going to harm the cabinet process in any way. Any information that would follow outside of that should be, the provision should be crafted such a way that that information is not captured by their provision, so that's our priority.

Chairman Wells: Okay, thank you Mr. Murray for those answers.

Mr. Murray: Anything else on section 18?

Chairman Wells: That covers section 18 for me at the moment.

Mr. Murray: Okay, move on now to discuss… well…

Chairman Wells: Just before you do, I see our chief administrative officer looking at my less than stellar performance as chairman keeping the time frame. I think we ought to adjourn now for lunch and we can pick up from there when we come back after lunch.

Mr. Murray: Sounds good.

Chairman Wells: Ms. Connors, is this room secure that we could leave everything in the room?

CAO: Yes.

Chairman Wells: So anybody who wants, they can leave anything they want to in the room.

Mr. Murray: Alright and when will we be back?

Chairman Wells: We will be back at 2 o'clock.

Mr. Murray: 2…

BREAK

Mr. Murray: Okay Mr. Murray, all right. I'm going to pick it up again with section 20. This is the advice and recommendations provision.

So, I'll just explain a little bit about opposition on that. The purpose of section 20 is to ensure that public officials are able to give advice and recommendations to higher officials and heads of public bodies without fear of scrutiny by the media or the public or whoever. Public officials need to be able to blue sky ideas. The deliberative process must be protected without fear that it will be politicized and taken out of context. If advice and recommendations had to be released instead of withheld our fear and our concern would be that there would be a switch to verbal advice, or worse of all ministers and others may not receive the same quality and detail of advice which they need to make the best decisions. And exception to the right of access for advice and recommendation is essential. Our question is does it need to be broad as it currently is post Bill 29? And does it need the helper provision that is found in section 7 sub 4, 5 and 6. That's warranted specifically to briefing notes.

And I just want to remind us again that when crafting an exception to our right because we are talking about the right of access to

information. When crafting an exception to our right, that exception should be as narrow as possible while still accomplishing the purpose of the exception. It shouldn't result in information being withheld that is not necessary to withhold. The judicial interpretations we have cited in our written submission, show that the protection against disclosure of advice and recommendations was already there is the wording part of Bill 29. Our feeling is that our reports which discussed our interpretation of section 20 were not widely read among the leaders in the public service. There was confusion and incorrect assumptions therefore as to what section 20 would allow a public body to withhold and I still encounter senior public officials today who don't have a grasp on it and don't know the difference between the pre and post Bill 29 versions of section 20.

Section 20 is probably the most important provision for decision makers and writers of briefing notes to understand, but I don't think it has been well understood and that is a failure of education and training, not a failure of the legislation.

So how do we know that we can manage with the old version of section 20? Well, we did it for six years and Ontario, British Columbia and Nova Scotia have been doing it for 20 to 30

years or more. They've been operating with the version of section 20 that we had prior to Bill 29.

So in regard to section seven sub 4, 5 and 6. This is a new provision from Bill 29 which removes the right of access to ministers briefing notes which are prepared for a sitting of the house or upon their employment to a portfolio. The previous version of section 20 would have allowed all advice and recommendations within the briefing note to be withheld. And additional information could be withheld if other exceptions were to apply.

Mr. Cunnings in his reports raised the specter of a verbal versus written briefings as I just mentioned a minute ago and certainly no one thinks it's a good idea for verbal briefings to replace written briefings. However most provinces seem to be able to get along without this provision, this section seven sub 4, 5 and 6.

So I guess the question is how harmful is it to have factual information in a briefing note released with the advice and recommendations withheld. Is it politically undesirable or is it actually harmful to the function of government? And I would just like to add that even if the committee recommends that

section 7 sub 4 be kept as it is, we ask that the committee make it clear that any access to information denial based on section 7, 4 be reviewable by the commissioner. So that's section 20, any comments, discussion about that?

Commissioner Letto: I will in a moment you've been busy making notes maybe you have some?

Chairman Wells: I have one. You've said that the protection for that advice was already there?

Mr. Murray: Yes, that's our opinion.

Chairman Wells: And that's on the basis the interpretations – the court interpretations that standard advice includes policy options and advice and recommendations includes policy options et cetera.

Mr. Murray: Right, yes. We think that…

Chairman Wells: If that's so what's the harm in just stating again in 20, if it was already there and you re-stated and there can't be much harm to leaving it there is it?

Mr. Murray: Well it does, section 20 also adds however the post Bill 29, it adds – 20 sub 1C consultation or deliberations…

Chairman Wells: Let's see what 20 sub 1….

Mr. Murray: Consultations or deliberations involving officers or employees of a public body. And it could be said that hardly anything that an employee of a public body does is a consultation or a deliberation of some sort. People are getting together and talking about anything.

Chairman Wells: That's the second question I have for you.

Mr. Murray: Okay, I'm going to hear that.

Chairman Wells: Do you know what's meant by that involving, does that mean…It's consultations about or consultations between or with?

Mr. Murray: I think it could possibly be all of the above, but I will – because I'm skipping ahead maybe I'll go back to the other one the question you initially asked and that is ,"What's the harm of leaving these other words in here?" I think it just adds to a little bit of confusion because we've got to keep in mind that

access and privacy coordinators with all these public bodies, some of them are large public bodies with lots of experience. There does tend to be a lot of turnover of access and privacy coordinators, you get smaller public bodies that don't deal with a lot of access requests and I think if we have unnecessary words in the statute, it could just add the confusion. And of course the assumption is that the words in the statute every single one must have a distinct meaning and must be there of necessity. So I guess our pitch is that if advice and recommendation covers it sufficiently, it just might add to confusion to have the other words in sub-section 8.

Chairman Wells: This is the statute as a whole, when you take into account the whole of it and try and make rational and consistent with the purpose, it's not that you've got to give specific meaning to every single word, consider it in the whole context.

Mr. Murray: Fair enough but when the words have to mean something, wouldn't they be there for some reason?

Chairman Wells: Not necessarily, legislators or draft persons who draft for the legislature, are not necessarily perfect. They often use words like I just saw in the statute there, something

is appointed by an act, you are appointed under but the Act through the appointment, that's the council makes the appointment. So you get these words that are not perfect. But the point I'm making and I couldn't grasp when I read your submission … is this section 20 issue really significant for you if the protection was already there anyway? It's just re-stating it, it's not adding to it or detracting from it.

Mr. Murray: I suppose in that part, part A that could be the case, our issue is – we have a few different issues with section 20 so that's just one of them. So I think that if it's not necessary to add those words I just think it could lead to confusion and it could lead to an interpretation of section 20 by public bodies which is maybe broader than was intended. Yes maybe if it comes to our office or our court we can try to straighten it out, but why create the confusion in the first place, let's just keep the words in there that we need to be there to what's intended, so that's all.

Chairman Wells: Okay so I gather from that that isn't the major item but if you don't need the words, why have them?

Mr. Murray: That's basically it.

Chairman Wells: That's not an unreasonable decision for that part. That's for part one is it?

Mr. Murray: Right, for A. So for C again it seems pretty broad. It's not in the Ontario, B.C or Nova Scotia versions of section 20 and it wasn't in our version prior to Bill 29, the bit about consultations and deliberations. And as I say if we're trying to craft an exception that only allows to be withheld the information that is necessary and we have a Supreme Court of Canada interpretation of the provision out of Ontario saying that it does seem to strike the balance so what we had before I think did strike the appropriate balance. I'm not sure what this consultations or deliberations thing adds. My concern is that as I said earlier pretty well everything that goes on inside a public officials as you say the word involving, you could interpret a huge amount of what goes on as a consultation or a deliberation of some sort.

Chairman Wells: Did I read somewhere the Mr. Cummings recommendation was between and not involving?

Mr. Murray: That could be.

Chairman Wells: So I don't know how broad involving it is it just seems to be…

Mr. Murray: I don't know either and I think it is potentially too broad.

Chairman Wells: If it meant consultations or deliberations involving – if it meant concerning the performance of officers or employees of a public body, the minister or the staff of the minister, performance evaluation, that kind of thing…

Mr. Murray: That would probably be withheld under section 30….

Chairman Wells: That's what I said if that's what it meant you would understand their being included, but if it meant simply the fact that views were exchanged, there doesn't seem to be a logical basis.

Mr. Murray: That's our view, I think we had in section 20 as it was before Bill 29, I think we had a provision that adequately protected advice and recommendations and again as the Supreme Court of Canada has said, the word of advice is broader than recommendation and it includes discussions around policy options and stating what the issues is to be

discussed under policy options and laying out all the policy options and discussing those policy options, we think that's broad enough to accomplish the purpose of section 20.

Regarding the part B of section 20, the content of a formal research report or audit report that in the opinion of the head of public body is incomplete, unless no progress has been made on it for three years. So if you've got a draft report and well let's say – I don't know whether it's a draft report or not. You've got a report and it's nothing has been done on it for three years, it seems like you can release it after the third year unless some other exception applies. But I guess the concern is that all that is required here is that the opinion of the head of the public body is that it's incomplete. So if nothing is done for three years, at the two and a half year mark, if a few things are moved around in there it could potentially be argued that well more work has been done on it, it remains incomplete, could this be used – this provision be used to shield a report from being released that really shouldn't be.

Chairman Wells: So even having – letting the commissioner have access to read it himself or herself wouldn't necessarily solve that problem?

Mr. Murray: No.

Chairman Wells: If the head of the public body says, "It doesn't matter what you think, in my opinion it's not complete."

Mr. Murray: That's all that's required there, the opinion, if it's in his or her opinion that's not complete, I think they've met the requirements of the exception. And I think what really – what we need to see is a more of an objective analysis to say, "What can we tell by looking at this? What are the clues? Let's talk to the person who was commissioned to complete this report. Are they still working on it." We can speak to employees of public bodies and private if we need to, we can look at if outside consultant was engaged, have they been paid for the work, have they done further work on it? This is not to say that just because a report is complete that it's released with a carte blanche with no other questions asked. The other exceptions of the Act could still very well apply, but we don't think that section 20 should apply without question in this situation, we think there should be some analysis – deeper analysis of the…

Chairman Wells: Some other basis than the opinion of the head of the public service?

Mr. Murray: Precisely.

Chairman Wells: Some other basis for objectively determining?

Mr. Murray: Yes, exactly. And also the bit about – I also don't like the idea that you could potentially reset the clock for another three years if you just do a little bit work on it. That doesn't seem right either and as I said in regards to some of these other provisions, it's not a common provision across Canada, I think if I recall correctly I think it might be Alberta and Prince Edward Island I think are the ones that have this or Alberta and one other. So it's not a common provision as most jurisdictions seem to be able to do without an exception like this. So if you can do without it maybe we shouldn't have it. So with regard to section 7, 4, 5 and 6.

Commissioner Letto: Could I ask you one question before you go on?

Chairman Wells: Yes please, go right ahead.

Commissioner Letto: In respect of the interpretation of that section you said there has been a lot of turnover with access coordinators and I realize that's a practical part government in that. But what insight can you give us into what leads to that?

Because I think we heard from Mr. Ring earlier this morning that access coordinators typically aren't in those role full time they do many other things.

Mr. Ring: Well it seems like it's not a popular position to hold, I don't know why. But it's my perception and it tends not as a senior a level in the public body as perhaps as it should be. And so perhaps people are doing a great job as coordinators, they are getting promoted. I don't know but we do see a lot of turnover. We love it when a coordinator for a public body stays in their role for a year or a couple of years because we build a relationship with them, they know us, we know them, get them on the phone we can resolve requests for review very quickly because we know they've got the experience in working with the Act and they know our procedures and it's really helpful when you've got a coordinator who's stuck around for a while.

Commissioner Letto: So what's your experience in it, how long do they last typically?

Mr. Ring: Sometimes you get three or four coordinators in the run of a year for our department. It can happen, I have seen it.

Commissioner Letto: That many?

Mr. Murray It can happen, I have seen it. And other times you might get one coordinator who sticks around for a year or two or more but you can get easily three or four in the run of a year.

Chairman Wells: Is it a practice then, they leave it to the most junior person the work that doesn't want to be done by anybody else?

Mr. Murray: I would say it varies from public body to public body as to whether that's the case. But as I said I don't think it's a popular role to take on so maybe that's why it may end up being taken on by people in a senior level as it would be nice to see.

Chairman Wells: That problem would be solved with full time.

Mr. Murray: It would potentially, you can certainly put it on the wish list. I don't know if that's going to…

Chairman Wells: But if you only needed a part time in a particular department and you had two or three departments like that,

what's wrong with having one coordinator fulltime dealing with two or three departments?

Mr. Murray: I suppose there's different ways you could approach it, yes,

Commissioner Letto: One of the suggestions they saw in a report from Queensland was that these be mid-level positions, mid or upper mid-level positions and that they be career positions and the pay would be commensurate with that?

Mr. Murray: Yes I can certainly see that in larger jurisdictions the argument is much stronger for that, like at the federal jurisdiction for example you might have to have a staff in each department for example each public body. And the smaller the jurisdiction you go, the more you run into the challenges where there is not enough work to give to one person fulltime, you could entertain the options as you suggested Mr. Wells of combining – sharing of course.

Chairman Wells: There will be two or three different departments and probably bodies.

Mr. Murray: You could, I guess there may be challenges with that as well practical challenges that I don't know the interval working of their systems, the departments and there may be difficulties with that. But certainly there's probably just a difficulty of having enough work for some public bodies, I think some department and agencies – some public bodies do have fulltime coordinators. Others I think some departments even though they might not have a fulltime coordinator technically, sometimes the individuals does spend a lot of their time working on access and privacy issues?

Commissioner Stoddart: Who sets the job classification levels for the ATIPP coordinators, do you know?

Mr. Murray: I don't know and I don't think there is a – as far as I know there is not an actual classification of access and privacy coordinator as far as I know within the provincial public service.

Chairman Wells: They wouldn't likely be if they weren't fulltime.

Mr. Murray: There you go.

Commissioner Stoddart: So they could be at different levels for the public administration and municipalities?

Mr. Murray: Yes, municipalities they tend to be like the town clerk or town manager if they have a town manager one of those types of position which is fine.

Commissioner Letto: So then if you have to have rapid change and I know there are policies and procedures manuals that's exist, would that speak to the consistency or inconsistency of applying the same relations of ATIPPA what problems are you running into there?

Mr. Murray: Well I know that the – the ATIPPA office government over the years has done – it's their challenge to educate the access and privacy coordinators of the line departments of government and the government agencies that report to those ministers and even that office, the ATIPPA office I think has gone through five directors through 2005 since the ATIPPA came into force. So I'd say there has been some challenges in keeping consistent education of coordinators. Right now it seems like it's working well, the people that are working there seem to be doing the best they can with it from my perspective but it doesn't stop the turnover.

Commissioner Letto: So when the Turnover happens I'm wondering what kind of a mountain it is for you and your office to climb when you get in touch with them?

Mr. Murray: Well you have a new coordinator to start off with as it is, you have to explain the process for sure, and it does help again with line departments of governments, they do work closely with the ATIPPA office and they do have them – those people are a phone call away from them and I guess they do the best they can to bring the new coordinators up to speed.

Okay so section seven, the addition to section seven in Bill 29 which added section 7 sub, 4, 5 and 6. So this is the provision from Bill 29 that removes the right of access to a minister's briefing notes which are prepared for a sitting of the house or upon their appointment to a portfolio. So I guess it did come up from – Mr. Cummings did raise the idea that when Ministers are being briefed, we don't want to have a situation where people are having to get verbal briefings because they don't want to put the information together in a briefing note. And again I guess I come back to the fact that this provision is only in two jurisdictions in Canada. It can't be the case that verbal briefings have taken over everywhere in Canada, I don't think

so. I think it goes back again to section 20 and I'm wondering whether there is a good understanding of what section 20, and perhaps some of the other exceptions, would allow a public body or the head of a public body to withhold or whether it be an access to information request. And the issue is that – our view is that certainly in a briefing note, you usually see a background section with some factual information and you usually see a section that involves advice and recommendations for the minister how to handle this issue, these certain questions that come up or things like that or how we're going to – how the government is being suggested or recommended to deal with a particular issue. All of that would be advice and recommendations, except the background and factual information might not be. And some of it might be subject to another exception under the Act or might not be. But I guess the question to be asked is if you can withhold all the advice and recommendation from a briefing note, which as we've discussed includes policy options and analysis of policy options. If you are left with some factual information stating that, "Okay the bridge on such and such a road is 50 years old, it's in a hard state of repair", something like that, to what degree does that harm the function of government, does that impair the ability of public body employees to provide advice from recommendations? Does it impair that or does it

potentially just inform people that certain issues are being considered by government. Identify an issue that's up for consideration, the minister has been briefed on the state of the roads in such and such district. Because that's the factual information you've got but you don't know what the advice or recommendations or the further details of the briefing are, you might know some of the facts behind it as to the state of the road. So I guess I'll leave it to you as a committee to say, in order to protect the advice and recommendations process do we need to have some provision that protects all the information associated with that advice and recommendations, including the factual information, the background information in a briefing note. Or do we really – can we dispense with section seven, the amendments in section seven, and just rely on section 20 and the other provisions in the Act to protect the information that needs to be withheld.

Commissioner Stoddart: Yes, thank you for that explanation. I'm interested in the last sentence of your submission which is basically about the location of section seven which dates from 2002. And we're left to wonder whether there was an intention that the decision to refuse access on the basis of section 7, 4 should not be subject to appeal or review by the

commissioner which we believe would be contrary to the purpose of the ATIPPA in section 3, 1E. This is conjecture on your part or have you had – is there anybody of opinion that suggests…

Mr. Murray: It's based on our experience with section five, so our experience with section five which I'm going to get into later is that we – section five is part of the Act that says, individuals have a right of access to information in the control or custody of a public body except the following information, is not part of the act, it's not covered by the act. Some of the – we've lost – we lost when we were taking the court on that, we had a decision by Judge Fowler and we had two subsequent decisions. Now it's going to the Court of Appeal right now as to whether we have the ability to conduct those reviews and be able to see the records that were withheld under section five or not. But based on some of the arguments I've seen in those court cases, I'm concerned that anything that's not an exception to the right of access in another part of the act, if depending on how things go with the court of appeal and depending on how things go with this review. I'm afraid that we might see an argument presented that well, there is no right of access to begin with to records under section seven, because that's what section seven says there is no right of

access. So it's not in the exception part of the act, it's in this part of the Act and it's a strange place to find it I think. So why was it put in this part of the act, why is it not in the exception part of the Act where it's clear that we have the ability to conduct a review. I think we could make a strong argument that we do have a right to review these records. It hasn't come up yet because I think nobody asked for these anymore because of the way the provision is structured, it says, "Applicants do not have a right of access to these records." So it hasn't – and people have not been coming to us with request for review because I don't think they are asking for these records anymore.

Chairman Wells: Mr. Murray there is a word in each of those two subparagraphs that you haven't noted and the word is solely. Now that is a record created solely for that purpose. Surely that's should have some degree of confidentiality right up front, no questions asked. It's created solely to – for the purpose of briefing a member of the executive council – member of the cabinet with respect to assuming responsibility for a department.

Mr. Murray: Well that's a valid opinion and it's a matter of opinion though because as I said, there are other jurisdictions in Canada.

Chairman Wells: But in normal practice it was created sole for that not created for any other purpose.

Mr. Murray: But it wasn't and it's not the normal practice in any other jurisdiction except two in Canada.

Chairman Wells: It's a normal practice in two other jurisdictions?

Mr. Murray: It's a normal practice in two other jurisdictions that have this…

Chairman Wells: You say the similar documents would be covered by some other?

Mr. Murray: What I'm saying is that only two other jurisdictions have an equivalent to section seven sub 4, 5 and 6. So in any of the other….

Chairman Wells: So any of the other provisions would accord similar protection?

Mr. Murray: Well in any other jurisdiction it would probably be more or less the same as it was here prior to Bill 29, you have section 20 and you have other exceptions to the right of access which are the more typical exceptions to the right of access.

Chairman Wells: By way of exception rather than an actual prohibition?

Mr. Murray: Right, up front, instead of saying up front, it's clear that no one has a right of access to anything that is a briefing note prepared for this purpose. Instead of approaching it that way, instead of saying, What information is necessary to withhold here, what information is – what's the minimum amount of information we need to withhold in order to protect the purpose for this exception or the purpose of having a briefing note for example. So I guess the idea is that if – can governments function? I guess – my idea is we shouldn't be adding exceptions to the Act if it's not absolutely necessary. And if all these other jurisdictions have been able to operate without a provision like this, have they gone to verbal briefings? Has this completely curtailed their ability to brief ministers because there is a fear that through access to information you might get some of the factual background

information in a briefing note? I don't know the answer to that but I would suspect that if they are having a major problem with it we'd be seeing a lot more amendments like section 7, 4, 5 and 6 across Canada.

Chairman Wells: Or are they using a combination of both?

Mr. Murray: Good question but I think we should know that for sure before we make a – we insert an exception like this, which it's already there but I don't think we should have exceptions in the Act that can't be clearly explained and the rationale is not clear in terms of being – allowing them the maximum amount of information to be released and only withholding the information that is required to be released to allow for the operation of government.

Chairman Wells: Even if it parallels or duplicates another exception that would have the same effect, would bar the same information. By way of exception rather than prohibition of the time.

Mr. Murray: Exactly I think that's the way to approach it.

Chairman Wells: So you are bothered by – even if other exception would…

Mr. Murray: Exactly another exception might exclude it but you get to assess it based on the actual content of the record as opposed to up front just because it says briefing note on top, it doesn't matter what's in it, it's completely off limits.

Chairman Wells: Would your view change if the commissioner had a right to see this and judge whether or not it fell within…

Mr. Murray: No I think it's quite possible that the commissioner may have the right to review it now, I would certainly say that we would assert that we do that right. But I'm raising the issue there because of the problem we've had with section five in the past. I'm just saying that I wouldn't be surprised if someone were to raise the same objection that people have raised to our ability to review claims of section 5. So I'm not sure what else I can say about it other than that I don't think we should be including a provision of this nature if there is reason to believe that government can operate without it. Because as you say other exceptions are going to apply a good deal of the information in it anyways.

Chairman Wells: You have any questions?

Mr. Murray: Next section I want to talk about is section 22.2 information from work…

Chairman Wells: Just before you go on then. On your specifics…I think you've covered it, some additional notes I have here on your comments, thank you very much.

Mr. Murray: You're welcome. Section 22.2 information from a workplace investigation. So this was added through Bill 29, this is a provision which on the one had denies access to information to applicants who have no connection to a particular work place investigation. But it attempts to guarantee access to information for parties who are directly involved in the workplace investigation. We have no issue with the intention of the provision, however we have proposed some amendments to the wording which we believe will make it easier to understand and apply. Would you like me to go into that in more detail or this a straight forward one or?

Chairman Wells: No I think you should give us a bit more detail I have a little trouble understanding fully.

Mr. Murray: Not a problem. The turn of praise in there I guess that has provided some confusion not only to us but to public bodies that have come to us, that we've dealt with in the course of reviews is that the phrase substance of records. We believe the phrase substance of records is unusual and due to the construction of 22.2 it needs to work forwards and backwards. An applicant is refused access to the substance of records, while parties to the investigation must be given the substance of records. So the main question that arises is whether this is meant to include all information gathered or created as part of the investigation. If it is meant to do that, perhaps it should say that, if not what's in and what's out? Our view is that an uninvolved applicant should be denied access to any information created or gathered that is relevant to the investigation. And the parties should get access to that information with the same limitation for our witness. So basically we're saying we like the word relevant to an investigation. We don't believe it should be all information created or gathered in a work place investigation. Because there could be information which is gathered but is not relevant. So when we're thinking about one of the parties to the investigation the complainant or the respondent, let's say it's a harassment investigation and there is a complainant and

a respondent. If both of them are entitled to the substance of records, the question that – the challenge that public bodies have had is that – does this mean we give them everything that was gathered in the investigation both of them or does this mean that we can take some things out that are not the substance of records whatever that means. And our view is that maybe it should be more of the information that is relevant to the investigation, because sometimes information can be gathered in an investigation…. you might say, "Okay we're going to need Joe Blow's HR file." And you might get that as a consequence of the investigation and copy it and put it in the investigation file. But it might contain all kinds of information that is not relevant to the investigation. So we think the word relevant would be helpful. You also get sometimes…

Chairman Wells: So they should be able to refuse to disclose information that is not relevant.

Mr. Murray: Precisely and we should be hang up on the phrase substance of records, because right now the Act says that the parties to the investigation can't get the substance of records and it also provides that applicants…

Chairman Wells: Where does it say that?

Mr. Murray: It says – let's see.

Chairman Wells: I only saw the substance of records in the prohibition in sub 2.

Mr. Murray: It's a very tangly provision to get a handle on. Okay sub two, "The head of a public body shall refuse to disclose to an applicant, information that would reveal the substance of records collected or majoring in an investigation."

Chairman Wells: That's what I saw but you've taken the reverse they shall read…

Mr. Murray: We're going to get to the other parts Sir, I'll explain it. Yes it's on the next page. So this sub two that I just read, this refers to the general applicant, person comes out of the woodwork, has no connection to the investigation at all. So you have to refuse to disclose anything that would reveal the substance of records to that uninterested party. But sub three says, "The head of a public body shall disclose to an applicant who is a party to a work place investigation the information referred to in subsection 2."

Chairman Wells: That's the substance of it? Quite right.

Mr. Murray: So it means through a party you've got to give them this – the party to the investigation has to be given the substance of records. But we think the party should be given all relevant records, rather than the substance of records.

Chairman Wells: Can't that party get them anyway? It protects the substance there and that ties it back to the same definition which may be a bit clumsy drafting.

Mr. Murray: From a natural justice standpoint, if you are a party to an investigation you would think you can get it all, however we still – we have the ATIPPA here and someone says, "Well I'm a respondent to an investigation." Let's say before the ATIPPA and they might say, "I want to know all the information about what I'm being accused of. Presumably this is not a criminal investigation of course this is an internal workplace investigation. So I don't know what requirements at law would be there outside the ATTIPA to give it to someone. But within the ATIPPA you've got section 30 for example, so if you don't have this provision, someone who is a party to a work place investigation might be given a stack of paper with all

kinds of stuff severed because of section 30, other people's personal information. So other people who have been spoken to as witnesses or were involved in some way, their information might all be withheld and that's what this section is trying to deal with, it is trying to say that despite the personal information section in section 30. If you're a party to an investigation you can get all the information.

Chairman Wells: The substance of it.

Mr. Murray: The substance of it. The problem is we've encountered public bodies having great confusion as to what the phrase substance of records means and that's why we want to change it so that it's clear that if you're a public body and one of the parties comes to you and says, I want all the information about this investigation from this investigation, that when you go through the investigation file you give them all the records that are relevant to the investigation and if there's anything in the investigation file that's not related to the investigation or is not relevant to it you don't have to give it to them. And then of course that person can come to – will then be able to come to our office if they still weren't satisfied if they didn't think they got everything, they could come to our office and we would review the records and we would see is there anything

else relevant to the investigation that was no given to one of those parties and that's how we would envision it working.

Chairman Wells: Tell me why you would see a great difference between interpreting the phrase substance, the substance of deliberations and substance of records.

Mr. Murray: I knew you were going to ask that.

Chairman Wells: It's a rather obvious question, why is there a big difference?

Mr. Murray: Well I'll tell you why. The substance of deliberation has been considered by courts of appeal in this country and a lot of commissioners have looked at it too, so there is a lot of case law out there. The substance of records, the only jurisdiction that has it besides us is New Brunswick and even their commissioner hasn't issued a single report explaining what they think this phrase means.

Chairman Wells: That doesn't answer the problem.

Mr. Murray: Well it's the beginning of an answer.

Chairman Wells: Well sorry if you haven't finished, go ahead.

Mr. Murray: Well I was going to say that – so that's the first problem I guess, the second problem is that we've encountered – we got the experience since Bill 29 of working with public bodies on this and we have told them what we think it means and informally we haven't had an opportunity to issue a report on it yet. Even if we did issue a report, we don't know for sure if they are going to agree with our interpretation of it. But on an informal basis we have advised public bodies, what we think the phrase substance of records means and our view is that it should cover the same territory as the records that are relevant to the investigation. That's seems to be intention of this provision. But we're getting a confusion and failure to buy in on some parts. So we just think that better wording could accomplish what the intention seems to be.

Chairman Wells: Obviously there would have been a time when substance of deliberations…

Mr. Murray: Was in the same boat.

Chairman Wells: Was in the same boat and no court had ever interpreted it. Now they have it and they've explained how they interpreted that phrase.

Mr. Murray: Which hasn't been figured out entirely though.

Chairman Wells: Okay, fair enough, you might get some help interpreting this. Now you come to interpreting the phrase, "Substance of records." Wouldn't a court in the ordinary course say that's another provision in the same statute, the same approach should be applied to interpreting substance of records, the same principles as were applied in determining substance of deliberations. So it's not a major hurdle, a definition of it?

Mr. Murray: Sometimes – you can go years without having any of these provisions go to court.

Chairman Wells: Well I know that and its reasonable for any lawyer at least to conclude that that's the approach the court would take that they would look at how they interpreted substance of declarations, applied the principles, come to a consistent conclusion so that they had consistency in the use and application of words throughout the statute. So you don't

have to wait for the court to reasonably anticipate what a court would say in that circumstance.

Mr. Murray: Well I think we're pretty comfortable with our interpretation of it. Again we have an opportunity here now to fine tune some of these provisions. And if there is a way to say something that's user friendly to public bodies because again we have to keep in mind that we've got public bodies that are sophisticated government departments and other that are small municipalities. And we think if there is a way of wording an exception or provision of the Act that will be clearer then why not do it and here we have an opportunity. And that's pretty well it.

Chairman Wells: So your suggestion is that sub 2 be removed all together?

Mr. Murray: Yes and replaced.

Chairman Wells: By?

Mr. Murray: By a provision that says, "the head of a public body shall disclose to an applicant who is a party to a work place investigation, all relevant information created or gathered for

the purpose of a work place investigation." Because if you're an applicant coming out of the blue…

Chairman Wells: Wait now we're not talking about shall disclose, sub 2 is a prohibition against disclosure.

Mr. Murray: Right but that doesn't need to be there in our view and I'll tell you why because before section 22.2 was here, section 30 and the other exceptions worked fine to prevent people from getting access to other people's internal work place investigations. So if someone – a completely unrelated outside applicant came in and asked for this type of information, they would not get it because…

Chairman Wells: So that's surplus that you don't need it the text is already there?

Mr. Murray: Yes, don't need it. And so we can leap right away to the next part of the provision which is to ensure that an applicant who is a party to a work place investigation would get all relevant information created or gathered for the purpose of a work place investigation and we just think it's clearer that's all. Anything else on that section?

Chairman Wells: I think that covers it for me.

Commissioner Stoddart: Yes just want to understand in sub three that your use of the plural of witness at the very end of the suggestion means that if a witness comes forward, the only information referred to which shall be released will relate to the whole of the witnesses as a corpus estate, not just the statement of that particular witness.

Mr. Murray: No.

Commissioner Stoddart: So if you are a witness then you have access to all the other witnesses?

Mr. Murray: No I don't think that was the intention it's supposed to be related to the witness and it's supposed to be a possessive apostrophe there just to indicate that it's that witness's statement.

Commissioner Stoddart: Okay. The witness only has access to his or her own…

Mr. Murray: That's the intention. Whether we've executed correctly there I don't know, but that's the intention.

Commissioner Stoddart: Okay I read it witnesses plural so I just wondered – I'm not sure what the…

Chairman Wells: No… witnesses two s's in it and the apostrophe is after the second S which is a singular. And you could make it clearer to that witness's, use of the word that might make it clearer.

Commissioner Stoddart: Absolutely.

Chairman Wells: Okay, thank you.

Mr. Murray: Okay section 27, this is the exception for business interest of a third party. So the purpose of this mandatory exception and again this is one of the mandatory exceptions. The purpose of this mandatory exception to the right of access is to protect from disclosure certain information of businesses that might be held by a public body. It's important can recognize that no information of third parties which might bring section 27 into play is released without notification of the third parties. And they have an opportunity to object if the public body wishes to release any of the information, they have an opportunity to object initially to the public body, but if

the public body still despite the object wishes to release it the third party then has an opportunity to request a review by the commissioner of any decision to release information and the public body must withhold information until the end of that process. So that's how it works. There are two versions of section 27 in Canada. One is a three part test and the other version you only have to have one other three parts apply. In British Colombia, Ontario, Alberta, Nova Scotia and Prince Edward Island have the version of section 27 that we had prior to build 29 and that's the three part test. So at that point it was – before Bill 29, the majority of Canadian provinces had the three part test. So we believe that version represents the most appropriate balance for public bodies in dealing with third parties. And just to give you an idea of what we're talking about, prior to Bill 29, it was assumed that – because of our section 27 as it was, it was assumed that the amount of money paid by a public body for goods and services, was available to the public. Pretty straightforward and any time an issue came to our office we had loads of case law to point to, to say, "Look, if a public body is paying for goods and services, the amount that's being paid should be made available." And we're always able to resolve these things informally, we've probably issued a few reports on it but it was always pretty straightforward and that would be the case in those other

jurisdictions that have that three part test. But right now and we were in court last week, right now the public cannot find out how much Memorial University pays for a stapler, they cannot find out that right now because of its new version of section 27, which has – you only have to meet one of the three parts of the test.

Chairman Wells: So which part of the new 27 prevents finding out how much Memorial University paid for a stapler?

Mr. Murray: Well the part that I – personally our argument in court this last week was that it shouldn't…

Chairman Wells: It doesn't have that – the provision doesn't have that effect.

Mr. Murray: It is – the argument that was used is that it would – it's 27 1 C 1. That disclosure of that information would harm the competitive position of a third part or interfere with the negotiating position of a third party or three, result in significant financial loss or gain to any person or organization.

Chairman Wells: How would Memorial disclosing that it paid $19 for a stapler harm the competitive position of a third party or interfere with the negotiating position of a third party?

Mr. Murray: Well the idea is that – a public office that has put its office supplies contract out to tender and bids come in and they are specific to all the different items that Memorial needs. And this is for the successful bidder not for the unsuccessful bidder. The successful bidder who is actually selling these items at that price. The successful bidder is saying that well, "At some point in the future that contract is going to be re-tendered, so other competitors will know what we charge for a stapler when we won the bid two or three years ago." And the fear is that the competing bidders will be able to use that information to craft their bids. Now our argument of course is you don't know what situation each company is in, each company has a different amount of flexibility.

Chairman Wells: Whole host of factors.

Mr. Murray: Absolutely and two years later, everyone's situation could be different. So anyways, one of the problems we've had with Bill 29 is that this provision that we've had, this is the

one that's made it to court. But we've got several other reviews where we issue reports and there are reviews in the pipeline where not only Memorial University but other public bodies are adopting this position. Now, to Memorial's credit they initially adopted this position that they can't release that information. However after we issued our report, where we said that we didn't think that's how section 27 should be interpreted, they followed our recommendations or they agreed with our recommendations, however the third party whose information was involved, went to court to prevent the information from being released. So that's where we are at right now and we're waiting for a decision on that. But we don't know and the outcome of that decision, we don't know for example, let's say…

Chairman Wells: On that basis government could never disclose what it paid for any item it purchased, it tendered.

Mr. Murray: That's a big problem.

Chairman Wells: And you think that that's the way that's going to be interpreted?

Mr. Murray: I hope not, one would hope not. But I guess we're concerned in off that we're seeing this position crop up in numerous places, that people are public bodies and not just one and it wasn't just Memorial University. Several public bodies are taking this to mean – and third parties as well are taking the new section 27 to mean that this is what it's meant to accomplish.

Chairman Wells: By that standard no public body could ever disclose what it paid for anything.

Mr. Murray: Yes it's pretty bad, agreed.

Chairman Wells: I don't think it's – it doesn't appear on the surface.

Mr. Murray: That that's what it should be and we're arguing that that's can't be what is meant.

Chairman Wells: Are you jumping ahead now or are you anticipating a problem that hasn't yet really materialized forcefully?

Mr. Murray: No I can't say – well it's in court, in a month's time we could get a decision saying that, "Yes you can certainly withhold this type of information from here on in." Or we

could get a decision saying that, "In this particular case because of these particular facts, maybe you have to release it, maybe you have to withhold it." It all depends on – and then perhaps even if the third party lost, you might see this go to a court of appeal. That process could last longer than it takes you folks to do your jobs and submit your report to government. So we felt it was important to get on the table here now because we don't know where that issue is going to go despite how outrageous it sounds on the surface. It is a significant problem we've encountered regarding section 27.

Commissioner Letto: It sounds based on your submission that Mr. Cummings felt that the pressure to implement this particular part came from the public bodies themselves?

Mr. Murray: It did and again one of – our experience is that, we were – an applicant is coming to us with a request for review, they are saying that they have asked for information from a public body that involves a third party and the public body has denied access. And our experience is that when we have gone to the review process, we've gotten very little in the way of written submissions and arguments, evidence of any kind. Quite often we are getting a few paragraphs of bald assertions and not much more. And so people are – our view on it is that Mr.

Cummings was hearing from public body saying, Section 27 is too hard a threshold to meet as it was prior to Bill 29, the commissioner's office is holding us to an unreasonable standard. Here we are we are using the same jurisprudence that's in five other jurisdictions. We're struggling, we're begging them to provide us with detailed and convincing evidence that there is some harm to the release of this information. We've written reports where we've got several paragraphs saying that – imploring public bodies to please provide us with sufficient evidence or anything to be beyond an assertion that the section applies and we weren't getting it. So what I'm saying here is that I think there was a failure to execute on the part of public bodies and that's why we were ruling against them. If we were, if we issued reports and recommendations saying that information should be released it's because there was a failure of effort on the part of public bodies and in some cases of third parties to explain how the section might apply. And the burden of proof is on them, it's not up to us to figure out – to guess how the release of the information could impact the third party, they have to explain it and they have to set it out.

Chairman Wells: And it not only has to harm or impact, has to harm significantly, it's not just we may have somebody might know

the potential place where our state was two years down the road, it's got to be significant.

Commissioner Letto: How they probably benefit from the Memorial University in the long run wouldn't it?

Chairman Wells: You would think.

Mr. Murray: They did take out the word significant out of one part of this Act actually it's in Bill 29 and I'll show you where it was. You see under C, where it says, "Harm the competitive position of a third party?" Well it used to say, "Harm significantly the competitive position of a third party." But they took out the word significantly in Bill 29. So that seems to be that if you can put forward any argument for even a small amount of harm, relatively trivial amount of harm, maybe you could meet that threshold and that's a concern too. And I guess just to take it back a moment that if there was a problem with bill 27, sorry with section 27 as it was prior to Bill 29. Again our view is that the problem was with a lack of engagement by public bodies. And to be quite honest, this was our experience not only with section 27 but with all of the exceptions that require a public body to come forth with evidence of harm or anything of that nature. Discharging the burden of proof it seems like there

was very little effort over the years if you look at our reports and if you want us to find some more examples of it we can certainly do that of where we've had to say in our reports, "We got nothing, you've given us nothing to work with, to assess – you've not discharged your burden of proof because you've give us nothing to work with." That was a serious serious frustration for our office for years and it still comes up from time to time now.

And so my thought is that we had a version of section 27 that was the most commonly used in Canada, it was the gold standard I would say and we got rid of it because in my view public bodies were not – putting their backs into making the argument that they needed to make, if they wanted to withhold the information and third parties were in the same boat. And I think if the issue is – if the concern is that businesses are not going to work with government here, they are not going to provide their information, they are not going to do their business with us if we don't beef up section 27. Well I don't think they are refusing to do business with Ontario or Alberta or Nova Scotia or Prince Edward Island or B.C. Businesses do business with those governments all the time just as they do with any other government. And I think the rationale for beefing up section 27 was just not there. So we

think if the rationale is not there, if other jurisdictions can work with this exception as it was before Bill 29. Why do we need to increase the coverage of the scope of this exception, why can't we go back to the one we had before, so that's basically the position on that.

Chairman Wells: As I read 27, 1. A and B they have been combined as it were and prior to Bill 29, it was essentially as you're now proposing be replaced.

Mr. Murray: Yeah, we just go right back to the exact version we had before which was a three part test, so you had the old version of section 27, if you have that handy at all, I don't know if you have the pre-Bill 29 version?

Chairman Wells: Yes I do.

Mr. Murray: Okay, so it would be, you'd have to meet A which it would have to reveal trade secrets of a third party or commercial, financial, labor relations et cetera. It's usually not very hard to meet that part because usually it's commercial or financial information of some sort. So it's usually pretty easy to meet A. B, supplied implicitly or explicitly in confidence, there's lots of case law on what that means and in confidence

– I'm sure you've encountered that before. The word 'supplied' has a very specific meaning and access to information jurisprudence and for something to be supplied; it's usually in the context of a negotiation or like an agreement to purchase some goods or services. What's supplied is if there's background information. So for example if I produce widgets in order to make whatsits and I sell my whatsits to the government but I'm not going to tell the government what goes into cost at going to making my widgets because those are the parts I use to make the whatsits that I sell to the government. So that's the background information, the costs, the labor costs, the import costs for the parts, all that kind of stuff, that is information that if it is given to the public body, it would be supplied in confidence. That would be secret information that you don't want to give away the caramel secret, you don't want to give the Colonel's secret recipe. But what is not supplied in confidence is the information that's has to do with the actual sale price to government. The information about how much government is paying for or public bodies are paying for goods and services. And so that would not meet the test of supplied in confidence because you can't say that, you know if I'm the government, I'm buying something from you, I'm paying a certain price for it, you can't say that that price is in confidence supplied by you to me in

confidence because it was negotiated between us. So it wasn't supplied to you, even though you bid it, I accepted your bid and it's not in confidence.

Commissioner Letto: So is the issue in the component prices as opposed to the final?

Mr. Murray: Well the component prices behind the scenes sort of, so if I'm making something, if I'm manufacturing something, the prices of the components that go into manufacturing my product, would be… if for some reason I had to give that to you, maybe to show how good my product is, that would be supplied in confidence. That should not be released. It's one of these immutable costs that cannot be changed, it can't be negotiated because the public body purchasing the good has no impact, it can't change that in any way.

Chairman Wells: The cost is not the only factor?

Mr. Murray: Yeah.

Chairman Wells: If you're the wholesale or retail supplier of components, whatever they are and your manufacturer from whom you bought it said, Here's – gave you in confidence,

here's how I made this component and here's why it's so good and here's why you'll be able to sell it to your customers.

Mr. Murray: You also shouldn't be able to release that either I agree.

Chairman Wells: Okay, now if in the course of persuading the government to buy your product because it's so much better and here's why it's so much better, you give that information to the government in confidence.

Mr. Murray: It should, that would be supplied in confidence and it should not be released.

Chairman Wells: Okay, but you give it in confidence…

Mr. Murray: Yes.

Chairman Wells: Okay, and Mr. Letto comes along and asks for that information, unless the information meets, unless the circumstances meet all of the three tests that you say you wanted to meet, it has to be supplied.

Mr. Murray: Our experience is that that type of information that you just described would meet the three part test in section 27 as

an existed prior of Bill 29, because that's something that is not negotiated with the public body. It's not a price that the public body is paying for this good or service. If you're giving some information to try to public bodies, as long as you make it clear that it's intended to be in confidence, it says even explicitly or implicitly, so…

Chairman Wells: So it would be caught anyway even under three part test…

Mr. Murray: Yup it would be, I am 100% confident on that.

Chairman Wells: Yeah.

Mr. Murray: But I think what we want to make sure about where I guess we've run into uncertainty with this new version is public bodies and third parties are going beyond that and they're saying that an item that I'm selling to the government, because it might expose me to some future competition if people know what price I'm selling it to government for, that now section 27 should apply to that. I think that certainly goes contrary to the whole fundamental purpose of the ATIPPA which is to make public bodies accountable.

Chairman Wells: But if you couldn't show that it was going to harm significantly the competitive position of a third party, it wouldn't be protected even though it was supplied in confidence.

Mr. Murray: Well it just has to do one of those four things actually, one of the first one is harm significantly the competitive position. So that's in C, it has to meet one of the four parts in C. So for example number 2…

Chairman Wells: Or may result in number two maybe.

Mr. Murray: Which is a prime example of what you just described where you're trying to explain about how good your product is, the quality of your product and you're giving information to government to show that, that might be the kind of thing if the public…

Chairman Wells: The government would release it; you wouldn't get that kind of information any more.

Mr. Murray: Exactly you wouldn't get… right, so it's obvious a government would want to say, No, I'm going to apply sub section, a clause two here to that because we need to be able

to find out how good all these products are. so we can't give that information out and we would support that and we think that's what the purpose of section 27 is for.

Chairman Wells: Did you ever receive from government any kind of an explanation as to why they changed this section? Most of the components are there, they've changed them around substantially, reorganized them, did you ever receive any explanations as to why they thought that was necessary?

Mr. Murray: One of the challenges that we had after the last review, I think Mr. Ring touched on it briefly was that although we saw Mr. Cummings report, that's pretty well the only thing we had to go on in terms of any rationales for why things might have changed and as I mentioned from Mr. Cummings report, the only thing we could get is that public bodies were concerned that our threshold, our interpretation of section 27 was unreasonable, it was too high and that they just couldn't discharge the burden in section 27.

Chairman Wells: And that's why this was recommended.

Mr. Murray: That's why, in my view that is why and our response to that, had we had an opportunity, had we been aware that that

was a position of government's, we would've said in response, Well here's all these reports where you gave us two paragraphs, with no evidence and scanty argument as to why section 27 applies. This is why we've been… if we've been issuing recommendations contrary to what you would prefer, this is why, because you haven't been discharging your burden of proof. And we've got a version of section 27 that's the same as five other jurisdictions, the interpretations we've been taking, we've been using the jurisprudence and quoting them in our reports, right out of these cases from other jurisdictions, we're not to do anything different than any other commissioner in these other jurisdictions or courts than all these jurisdictions have done. So one of the failings as Mr. Ring mentioned of the other process is that a change like this, an amendment like this from Bill 29, we had no idea this was coming, other than Mr. Cummings' reference, any of the Bill 29 amendments, other than anything we could glean from Mr. Cummings report, it was completely out of the blue, we had no discussions with government about what their actual plans were so we didn't know and we don't know any reasons for the changes to section 27 beyond what Mr. Cummings indicated in his report.

Commissioner Letto: So just to clarify, I think Mr. Ring alluded to this earlier but it's coming clearer into focus. So various groups who presented to Mr. Cummings, their presentations or submissions were not available for anybody else to see so there was almost like a secret process…

Mr. Murray: Correct, precisely, so we had no idea what people were saying in terms of any concerns people may have had with the act. We don't know if one person had a complaint about section 27 or 20, we don't know if it was one public body that felt that we were not… we had an unrealistic threshold for section 27 or whether all of them said it. So we were sort of working in the dark there and had we had an opportunity to address those concerns and explain why they may have felt that we were taking a position that they didn't like or didn't agree with, well, here's why, we don't think you're actually doing any work to lay out your, discharge your burden of proof.

Chairman Wells: You weren't aware that these proposals had been made to Mr. Cummings?

Mr. Murray: No.

Chairman Wells: So you didn't have an opportunity to hear the views of others as you're…

Mr. Murray: None whatsoever.

Chairman Wells: Clearly well have now?

Mr. Murray: Yeah, we didn't have that and I must say that we're so delighted with this process that we have right now. This is our ideal… you guys are our dream team with our dream ideal process in terms of review of…

Chairman Wells: Now don't go too far in that.

Mr. Murray: I'm trying to butter you up a little bit here, I'm trying to butter you up a little, take any opportunity I can but it's true that the last… there was a serious flaw in the last process that as the oversight body for the Act and not having any idea what concerns were coming forward about the interpretation of the act, we were kind of working blind so we're in much better position now. So, anything else on 27 or… I'm good?

Chairman Wells: No, we're okay with it, thank you.

Mr. Murray: All right, next thing I'd like to move on to is section 30. So section 30 was completely re vamped as a result of Bill 29 and we're very happy about that. It was certainly an important amendment to make to Bill 29 and this is section 30 is the provision which protects personal information from disclosure. So it's a much better provision now than it was before and it's more similar to the ones you see in other jurisdictions across Canada as well. So we've only got a couple of minor suggestions regarding section 30, I don't know if they're minor or not but… so pre Bill 29 it was understood that all forms of remuneration were being paid to public body employees were able to be released to an applicant. The principle behind that being that if someone is paid from the public purse, the public has a right to know how much they're being paid. Post Bill 29 and I believe that Mr. Cummings indicated that he had heard from a few individuals who expressed concern about this, about their salary being released. Post Bill 29 this was reduced from remuneration to salary range. Now there is a provision in sub section 5 that might allow a balancing and it's possible but it's not at all clear whether the provision as currently structured could reliably be used to release such things as full salary including bonuses of senior officials. The provision in section 5 that I'm talking about that might allow a balancing is… so this is section 30 sub 5. So it's at the beginning of sub

five there says that, "In determining under sub sections 1 and 4 whether a disclosure of personal information constitutes an unreasonable invasion of a third party's personal privacy, a third party is anyone other than the applicant in this context. The head of a public body shall consider all relevant circumstances including whether A…" – and this is probably the provision I would look at, "The disclosure is desirable for the purpose of subjecting the activities of a public body or a public… or the province or a public body to public scrutiny." You might look at that and say, well, if someone's being paid a lot of money, presumably, maybe it's desirable for the purpose of subjecting the activities of the public body to scrutiny that the full salary, not just their salary range should be disclosed.

Chairman Wells: Full salary and benefits…

Mr. Murray: And benefits and things like that, bonuses and stuff like that. I would argue that…

Chairman Wells: It would certainly be a possible to argue that.

Mr. Murray: It's an… I would say that the argument is there, that you could make the argument and whether it will be successful or not I guess you'd have to see. My view is we shouldn't have to

go down that road and make that argument which may or may not be successful and that we feel that the remuneration should be there. I mean the salary range provision I think works fine for maybe 80 or 90% of public body employees who are perhaps unionized employees and their salary range is in a fairly confined area, it's not a really wide salary range, it's a few thousand dollars or something like that. And the periods of moving from one, of one, two and three steps is only usually three steps in the salary range for example, it's fairly confined. But as you get senior and into management levels and senior officials, you can get… your salary range can cover a lot more territory, it could be a lot broader and there's provision for bonuses, as well, bonus pay and that can be quite significant as well, you can get severance and other things as well, it can be quite significant. And even though it's personal information, as the office of the information of privacy commissioner, we have to look at both sides of it. We're looking at the transparency and accountability purpose of the Act and we're looking at the privacy purpose of the act. And our assessment is that for this type of personal information, we come down on the side of transparency and accountability and we think that that type of information should be available. As I said, when it comes to salary range for most employees it's not going to make much difference whether salary range or the individual

salary's disclosed. But as you get more senior, it can certainly be quite significant and that's why we take that position.

Chairman Wells: Would the same thing be, the same transparency and accountability be substantially achieved with salary range plus benefits, plus any benefits, bonuses or any other remuneration.

Mr. Murray: It would certainly be a step in the right direction and you might be able to argue that it would achieve that goal, I don't…

Chairman Wells: You can see how the explicit salary as a personal information that most people just feel a little uncomfortable.

Mr. Murray: I can see, I do understand why people have felt, maybe some people have felt a little uncomfortable with it and it is just simply, you weigh the factors and you say, yeah, some people may feel a bit uncomfortable with it. But on the other had its being paid out of the public purse. And you can look at it in one of two ways and we've come down on this side. We understand why there may be a different perspective on it and this is the thing with a lot of these issues – it's rarely black and

white, there's a lot of shades of grey there and maybe there is a middle ground provision of some sort.

Chairman Wells: There's a balance maybe to be arrived at and that's why I posed the question of whether salary range plus all other…

Mr. Murray: Remuneration or whatever… yeah.

Chairman Wells: All of the remuneration or benefits or bonuses or whatever…

Mr. Murray: That's a possibility, I mean…

Chairman Wells: Would that provide at least a small measure of …

Mr. Murray: It certainly would provide, it certainly would go a long way towards…

Chairman Wells: But would provide substantial transparency…

Mr. Murray: It would help a lot, yeah, I'll agree with you there. I think our recommendation is still as it is but I agree that what you're proposing would certainly bring you a long way there.

Commissioner Letto: I suppose it's also quite telling though if the head of an underperforming agency is at the highest level and gets paid bonuses.

Mr. Murray: Yeah.

Commissioner Letto: It kind of goes to the heart of how the system is being managed and if there are rewards and penalties for non-performance.

Mr. Murray: Yes and that's why I think part of what this is getting that, particularly regarding bonuses and things of that nature.

Commissioner Stoddart: Thank you for the presentation and perhaps ironically as a former privacy commissioner, I feel very strongly that those of us who are paid by the public purse should be quite candid about that information because it is the public's money, so and I certainly hear your very, I think incisive comments about the difference between employees who are at the lower end or the medium end of the pay scale and then the huge difference in range as you go up to executive or deputy minister or the equivalent in the municipality and so on. As well as in most pay schemes, the difference that the

bonuses, and there are different words for it in different bureaucracies, can make to your total take home pay and in my experience it would go to something like 25%, so you could say my salary range is this but then you…

Mr. Murray: Right, you're making a lot more.

Commissioner Stoddart: Yes, have to answer, so my question is, is remuneration a word that captures all that?

Mr. Murray: Well our experience prior to Bill 29 and using the word remuneration, our interpretation was that remuneration did capture it. If there was any concern about that. If you would like us to do a little bit of further research on that to be sure I mean we could certainly do that.

Commissioner Stoddart: Was that upheld by the courts or has that been upheld?

Mr. Murray: It's never been to court here, we didn't have any trouble getting public bodies…

Commissioner Stoddart: Be my bonus and my car that supply this part of the end and perhaps my overtime on the other hand?

Mr. Murray: There's commissioner's reports and court decisions from other jurisdictions I believe on it that we were able to show to public body coordinators and heads of public bodies here and we were able to, on an informal basis, we were able to pretty well establish that all forms of remuneration to public body officials should be released and we didn't get any objection to that at that point. So we were successful in getting that point across I think to public bodies.

Chairman Wells: It seems likely that the word 'remuneration' covers everything that you receive for the function you perform?

Mr. Murray: That's the idea I think.

Chairman Wells: Everything, the value of everything.

Mr. Murray: It's worth noting…

Chairman Wells: Whether you're remunerated in kind or money or whatever.

Mr. Murray: Exactly or hockey tickets, hockey tickets or something I don't know, it could be anything right? I'm going to just throw

out the idea that some jurisdictions in Canada actually have sunshine laws which mandate the disclosure, proactive disclosure, you don't have to ask for it, there's a list published of people who make over a certain amount of money and that's in several jurisdictions in Canada. So that's worth considering throwing into the mix there too that that's part of how things are done elsewhere.

Commissioner Stoddart: Are you suggesting that?

Mr. Murray: I'm not suggesting it, it would certainly be a way… I mean government is moving towards this open government process here, open information, open data, it might be something that they could look at, particularly if the provision was changed to make it clear that this type of information can be disclosed.

Chairman Wells: That's something that one would expect to be followed from the open government endeavor rather than access to information or protection of privacy.

Mr. Murray: Right, yup. One small point further on section 30 relates to deceased individuals. So currently in section 30, after 20 years, any individual, the personal information of any

deceased individual appears to be accessible to any applicant. This is because of 30 sub 2 M. So after 20 years it's not personal information anymore. So we just think it shouldn't be quite as black and white, we think that… and we've proposed a provision that might work, I mean this is just a suggestion, what we've got there and pretty well all of what we've got here, this is a suggested wording but I guess the idea is that some personal information maybe shouldn't be disclosed to just anyone who asks for it after 20 years. On the other hand there might be some information that's not 20 years old that is of… there's no particular sensitivity to it at all.

Commissioner Letto: Put personal information there just for want of my own information, could it be that there was a police investigation into somebody 30 years ago and it produced a report that has unproven allegations?

Mr. Murray: There could be, yes. Now you might be able to use one of the law enforcement exceptions to prevent release of some of that information.

Chairman Wells: That information wouldn't be… I don't think you could get that because of the law enforcement protection.

Mr. Murray: But even if there was some small part of it that could be released, you would still be able to… you know that could be an issue, I don't know if… I mean, it's hard to make off the top of your head guess as to what our recommendation would be. You don't have the record in front of you, it's quite likely that it would turn out as Mr. Wells mentioned but you can't be sure until you'd have the actual records with the information in front of you as to say what exception would apply to it. But it is… it's theoretically possible that that could happen.

Commissioner Letto: And I think as I understand what you're saying, I'm dead for 20 years, so it doesn't bother me but It's my information and my family's shame.

Mr. Murray: Distraught about this coming up again, that type of thing, yeah, exactly and it allows I think, some discretion to be added to the process. I just don't like the idea of in our office, we're very uncomfortable with the idea of just an arbitrary period of time after which it all goes to whoever asks for it, it just doesn't seem right, it doesn't seem respectful.

Commissioner Letto: Have there been any cases?

Mr. Murray: Not to my knowledge, but I mean we may… once it's released, I guess… there wouldn't necessarily be any cases because even if this section has been used, so let's say an applicant has asked for information that involves personal information that's involving a deceased person that's been deceased for over 20 years, a public body looking at ATIPPA as it is right now, would just look at 30 sub 2 M and say, "Here you go." So they wouldn't come to our office and we wouldn't hear about it. So this might be happening but we wouldn't hear about it because the applicant is actually getting what they want if it's over 20 years old.

Chairman Wells: I just raise one question with you on that whether what you have there is significantly different because the test is whether or not disclosure is an unreasonable invasion of the deceased person's personal privacy. A deceased person has no personal privacy, it's a well-known principle of defamation law that you can't defame a dead person and the state has no action for defamation.

Mr. Murray: I would submit that we're talking about two different things though, I don't know anything about defamation law but I have read that in the privacy laws sphere, and we can do some further review, find something specific for you on this,

that the rights of the deceased regarding their privacy, their privacy rights are not extinguished immediately upon their death, that the privacy as a concept, continues to apply but it's decreasing… it applies in a decreasing manner.

Chairman Wells: That's at least a recommendation that some scholars have suggested, I don't know whether it's…

Mr. Murray: I couldn't tell you whether there's any cases on it off the top of head but we can certainly check into that for you if you like.

Commissioner Stoddart: Well perhaps it's interesting to note that in the federal censuses they're not released until 90 years after the census is taken presumably to allow the people to be deceased and therefore not to be perturbed by the release of such information as you will remember there was a huge debate about this for years and then finally some changes were made to the census taking.

Mr. Murray: And we also should observe of course section 30, sub 2 M as it exists now, it does create a cut off period and it protects the personal information of the deceased up to 20 years.

Chairman Wells: But that's all.

Mr. Murray: But that's all and…

Chairman Wells: Whether it causes, expected to cause harm or not.

Mr. Murray: Right and what we're saying is that, you know most of section 30 does take the approach of assessing whether there's unreasonable harm or not, that type of thing, whether it's unreasonable invasion of privacy, sorry and we're just saying, why not take the same approach to information of the deceased and would allow for the nuance that I think would be probably more respectful or would be more sensitive I think.

Chairman Wells: Or maybe the phrase would be an unreasonable invasion of the deceased person's personal privacy if he were still alive.

Mr. Murray: Fair enough, yup, it could be anything.

Chairman Wells: Judging from that standard, it's a standard that you could apply.

Mr. Murray: That's true, yeah okay, I'll go with that.

Commissioner Letto: Except if they were still alive, it'd be in perpetuity I guess wouldn't it?

Chairman Wells: Yeah, but then, so there's no limit there. But I don't know how she could stand… I'm getting a symbol that I've gone over time for the midafternoon break and we'll take an adjournment for 15 minutes and be back to continue with you then.

Chairman Wells: All right, thank you.

BREAK

Chairman Wells: Okay, Mr. Murray.

Mr. Murray: All right. Can we move onto Section 31?

Chairman Wells: Yes.

Mr. Murray: Okay. Section 31 is the provision is entitled information shall be disclosed if in the public interest. Section 31, allows essentially for the override of any provision in the ATIPPA if there is a risk of significant harm to the environment or to health or safety. This section is there to ensure in my view I think sort of in the simplest way of looking at it, it's there to ensure that the ATIPPA can't be blamed for a failure to disclose information that is clearly in the public interest to disclose. We never want to be in a position that the ATIPPA has prevented the release of information that could have saved someone's life or saved people from serious harm. The proposed revision broadens the provision and builds in safeguards, including notifying the affected individual if possible in advance and the commissioner in order to get an independent perspective before making the disclosure. So, it's pretty straightforward. I don't think it would be…I don't think it's in anyone whose…who believes in the concepts of the, you know that represented in this law, I don't think it's in anyone's

interest to have a situation, where someone is saying, well, I didn't release that information because of some provision in the ATIPPA and somebody has died or there is people are ill or hurt or something like that or you know the environment has been destroyed or something like that, because of a provision in the ATIPPA. So, that's basically, you know why this provision is here. It was already here, but I think it could be done a little bit better than what's here and that's what we've proposed. Any questions on 31?

Chairman Wells: I have no real question. It seems to make a good deal of sense.

Commissioner Stoddart: Yeah, could I just ask why you use the verb in your rewritten Section, mail in the day of all kinds of transmission.

Murray: I agree you see mail in all the legislation like this sometimes and I think we probably got this provision from some other jurisdiction maybe with…

Commissioner Stoddart: Okay. Just under a generic send.

Mr. Murray: Maybe we should have…yeah, send would be better I agree. We should have given that a bit more thought I think I agree with you there.

Commissioner Letto: So, the language you've suggested here is really just to capture any other eventuality just so that something that happened outside of health and safety and so…

Mr. Murray: Yeah, would cover anything that is clearly in the public interest and it would have to be clearly and they would have to…the way we're proposing is before the public body releases it really they should be giving us a call and say, look, we're looking at doing this type of disclosure. Here is why we're looking at it. What do you think? And now they can do it whether we agree with them or not, but at least having our requirement there that they contact us and notify us it will give them sort of this outside perspective on, you know, on what they're doing vis-à-vis the ATIPPA and whether they've reached that…the standard or the criteria, the threshold they need to reach. So, that's all what that's supposed to do.

Chairman Wells: The only thing I note is that if for any reason it's clearly in the public interest, why do you need A?

Mr. Murray: Well, I think A helps to inform…

Chairman Wells: Puts it in context.

Mr. Murray: Yeah, exactly. It helps to inform the head of the public body, who is contemplating using this provision, the types of things that he should be, that he or she should be, you know using this provision for and B, is really for things that we haven't thought of, but we wouldn't want it to, you know if something else would have come up that could be, you know a good reason to disclose information despite the ATIPPA, I guess B is there to catch that. It's sort of like the failsafe there.

Chairman Wells: Okay.

Mr. Murray: All right. Move on now to Section 43.1 Power of a Public Body to Disregard Requests. So, this is one of those provisions, this is one of those sections of the ATIPPA that was added through Bill 29. There were times in the debate about Bill 29 and I don't mean just in the house, but I mean I guess the public discourse about Bill 29. There was a lot of discussion about this section. The idea is as Mr. Ring mentioned earlier the people were very concerned about the idea that the head of a public body could disregard a request

on the basis that it's…that they believed it was frivolous or vexatious or something of that nature. Our take on it at this point after a couple of years have passed is the provision probably in hindsight received a bit more attention than it deserved, because it really hasn't been used. It's only been used once or twice and as you know there is an option there that, let me see, yeah, it's in 43.2 the…sorry 43.1 sub 2 provides for a circumstance where the head of a public body may request that the commissioner authorize the decision to disregard a request. In 43.1 sub 1 enumerates the circumstances where the head of a public body may disregard a request for access. So, they can do it on their own with 43.1 and 43.1 sub 2 they have to ask the commissioner. So, I think we've got…I think we've encountered one example of each since we've been…since Bill 29 came in. You know the idea that Commissioner Ring mentioned earlier that perhaps this should be changed so that you have…public body would have to come to the commissioner to request authorization to disregard a request for access. If that amendment were to be proposed we would be fine with that. I guess it wasn't…it's not as big of a headline item as it might be for others just simply, because it hasn't been used that much.

Chairman Wells: Just let me get it clear, you'd be happy with the change, although I don't see that you recommended it.

Mr. Murray: We're not recommending. We will find it acceptable. We wouldn't be opposed to it and we're not recommending it per se either. We're just saying that either…it can work either way, but we're not going out of our way to say that this section really must be amended. There maybe some appetite to amend it just because of the perception there and provide some confidence for the public that public bodies are not going to be in a position to on their own authority disregard a request. Now, if you do that, if you have…if you make sure…if you say that to public body, the public bodies must come to the commissioner every time that they want to disregard a request for access and we're are the ones that have to authorize it, then you are…one effect of that is that you're removing the commissioner from the appeal part of that process. So, we wouldn't be able to hear an appeal. So, the only problem I guess the challenge I guess for an Applicant in that position is if we authorize a public body to disregard an access request, the individual, the only option for them would be to go to Court. But that's the only, you know fallout that, you know any potential negative implication for going that route.

Chairman Wells: And you'd be hard pressed to go to the Court on behalf of the Applicant for the same reason.

Mr. Murray: We would, yeah, we really wouldn't be able to, I don't think.

Chairman Wells: Yeah.

Mr. Murray: So, it's…I would say it's not a headline thing for us, this particular provision. We wanted to suggest…

Chairman Wells: May well be better as it is.

Mr. Murray: It might be okay the way it is. There might be an appetite to change it just for the sake of perception and you know what, in a situation like this if it comes down to public confidence in the Act that could be reason enough, but just you know I guess one of the fears out there too that we heard expressed was that people were saying, well, you know it's upto…the minister is going to decide what's frivolous and what's vexatious. So, they can consider anything frivolous or vexatious, but there is a lot of jurisprudence in the case law and other jurisdiction's commissioners have considered this in

depth else where and you know if something were to come to our office for review say we didn't authorize it a public body simply use the frivolous and vexatious provision and we were asked to review that decision, you know there is a lot of background on what that means that we could bring to bear.

Chairman Wells: There is all kinds of case law in our own jurisprudence, because there is a similar provision in the Court rules.

Mr. Murray: Okay.

Chairman Wells: Any person can apply to have a statement of claim struck out one of the grounds is on the ground that it's frivolous and vexatious.

Mr. Murray: Okay.

Chairman Wells: So, it's a well known phrase, well understood in the law and there are also provisions that a Judge can order that a potential party not be permitted to file anymore statements of claim without the approval of a Judge and that again…

Mr. Murray: On that basis.

Chairman Wells: …based on a record of submitting frivolous and vexatious actions.

Mr. Murray: That makes perfect sense.

Chairman Wells: So, I mean there is a lot of jurisprudence on it.

Mr. Murray: Yeah. So, that's…I guess that's why we…

Chairman Wells: The thing that off the top of my head, which seem concerning is it takes the commissioner out of the appeal process if he is involved from the beginning.

Mr. Murray: That is the thing exactly. So, you could…there is different ways of looking at it and we put it out there just as food for thought really that here is a couple of different sides to this issue. So, we don't…so, we ask…our recommendation was that it be considered, you know and we'll be happy to work with whichever approach that ends up being the case.

Chairman Wells: You're not specifically requesting it?

Mr. Murray: No, but we do think it should be looked at and considered and other parties to this other people coming might have compelling arguments…that's right absolutely. Can we move on?

Chairman Wells: We move on.

Mr. Murray: Okay. Section 46 and you referenced this briefly earlier. So, the timeframe that's here now in the Act for informal resolution is 60 days and it was 30 days and we recommended that there be no time limitations to the informal resolution process. Only two other jurisdictions in Canada have a time limitation on the informal resolution process and that the time limits are 30 and 45 days. The rest of them it's at the discretion of the commissioner, I guess and you look at the process. Basically, we think that we, you know our approach is that if the parties believe that there is value in continuing the informal resolution process if they think they're getting somewhere with it and if we as the commissioner's office feel that progress is being made or there is reasonable prospect of further progress, we like the idea of continuing with informal resolution and the idea is that, and I know that you're wondering earlier about the length of time involved, I guess the types of things that you see going beyond 60 days are

ones, where you've really got a large volume of information. You've got, you know you could have a banker's box of records.

Chairman Wells: Then you can justify extending the time going through that process instead.

Mr. Murray: There is no provision in the ATIPPA right now to say, okay, the time limit is 60 days or an extended time period as maybe allowed by the commissioner, but that would be fine too. I mean anything that works to give us that flexibility I think would be…is important and we do that anyways in practice. I mean, you know we, to be quite honest, we don't shut down our informal resolution at 60 days, because if we did that what would happen is we would then put…that matter would then go into a different process, which is the formal investigation process where submissions are invited and a report would have to be written and there is a lot of research involved and going into that report and that takes much longer than informal resolution does on it's own. And so we're often finding that we could…that this thing could be resolved in another week, you know. So, are we going to wrap it up now and you got an Applicant saying, you've just sent me this package of information yesterday. I haven't had a chance to

look at it to tell you whether I am satisfied or not. Can you give me till tomorrow? So, we haven't said, no, no, you can't have till tomorrow. You got to, you know.

Chairman Wells: I've seen some of the reports.

Mr. Murray: Right.

Chairman Wells: And they take the form of a decision of the Court of Appeal doing an assessment of the factual situation, an assessment of the applicable law, an assessment of the historical jurisprudence and it runs in, I mean why is that necessary? Why is all of that necessary when somebody is simply looking for access to a document? Why can't we have a summary process and then if either the department or the individual is really dissatisfied with the result and operating on the assumption that the assumption is you get a release on and there is a compelling reason not to and you had a summary process, wouldn't this operate much more efficiently and only the rare cases would go to the Court of Appeal and they got lots of time. Let them write that kind of a judgment.

Mr. Murray: Well, I tell you…

Chairman Wells: The commissioner's role could provide for a more expeditious release of information.

Mr. Murray: I tell you there is, I guess there is a lot goes into that, the answer to that, but you know I guess we have to step back first and just start with the idea that 75 or 80% of the request for review come to us are resolved informally. So, you got a relatively small proportion that are not resolved informally, but if we're going to make a recommendation that we want a public body to accept, you know we have to explain the rationale for that recommendation and in fact we ourselves has to be sure that we're making the right recommendation. We have to be sure on where the law stands on it. We take it very seriously that, you know we don't want to make, you know judgment calls off the top of our head on these things, because each case can, you know as you know brings different facts to bear and require different interpretations and we also want our reports to be able to be used as tools for education for public bodies. We don't want to have write the same report 10 or 15 or 20 or 50 times. We want to be able to write one report that deals with a particular type of circumstance that we encounter and be able to say, look, in the future and we do this all the time and then we use this as a tool in informal resolution. When we get a new request for review

that deals with a subject that we've dealt with in another report in that past, where we've sorted it out in detail as to how this type of situation should be dealt with we can say it to the public body and/or to the Applicant when we're trying to resolve it: Look, this is how this type of case goes. This is how we've decided this type of case in the past. Now, if you want to keep going and make this a formal report, you know we can go down that route, but we're suggesting that this should be resolved informally this way or that way based on this report that we've decided in the past and the one of the parties, the public body or the Applicant or the third party can see our reasoning and can see the case law that we've cited, can see that it's well researched and well thought out and it's a great tool for informal resolution.

Chairman Wells: And I agree with all that.

Mr. Murray: Yeah.

Chairman Wells: Except, you've gone different than the Courts. A Trial Court is a same thing. A Provincial Court may end up with an appeal to the Trial Division and the decision of the Trial Division can be appealed to the Court of Appeal, the Court of Appeal onto the Supreme Court of Canada.

Mr. Murray: Right.

Chairman Wells: But the Trial Division Judges don't usually write a definitive treatise on the law on that issue. They leave that to the Courts of Appeal. That's what they're for to do that assessment and have 3 or a panel of 3 or 5 Judges do that. One would have expected that the commissioner would opt for a more expeditious approach in order. You got to think about what you're doing, you can't just do it arbitrarily and you couldn't explain why you're doing it, but you don't have to take the time to write this treatise on the law and do an assessment of all that jurisprudence and so on in these cases. Isn't that what drags this time on out and by the time the individuals gets the information it's moot, it's of no value?

Mr. Murray: Well, it certainly doesn't have, you know us writing those detail reports doesn't…it doesn't impact the discussion regarding Section 46, the length of time for informal resolution. So, the…

Chairman Wells: Oh, no I know. I don't suggest that it does.

Mr. Murray: This is where we're going. Well, I mean there I suppose, you know you might have that view. I mean our experience is that we found that the thorough treatment that we give in our reports has been useful and it does take time it's true, but it is…it turns out to be the minority of reviews that we conduct that…

Chairman Wells: 20 or 25%.

Mr. Murray: That's true, but they don't and the reports are not all as lengthy and involved as the ones you've seen. Some of them are 10 pages, where basically you've just set out and it's 10 double spaced pages, where you've set out the position, the background, what this is about, the position of the two parties and the discussion and the conclusion and sometimes that can be, you know 40 pages, sometimes that can be 10 pages, but you know we certainly try to write it as briefly as we can, but sometimes we just feel that the case demands, you know, a more in depth analysis if the issues are complex, if several different exceptions have been raised, if there is lot of different issues, if the set of records is lengthy and varied sometimes it can call for this type of treatment and I can tell you that the analysts in the office who work on drafting these reports are not writing anything any longer that they feel is

necessary. We're reviewing them, myself and the commissioner. We're providing input and contributing to them and we certainly don't want us, you know to write a report longer than we feel is necessary, because of course the longer it is maybe less likely someone is to read it as well and we do want the report to be there as an education tool for public bodies.

For the ATIPPA office when they're writing, for example, the just finished writing a new manual for the ATIPPA, helping public bodies interpret the various provisions of our Act and they refer to in sight our decisions that we've issued our commissioner's reports numerous places throughout where they're saying this is how this provision should be interpreted and they are using our reports to explain to public body coordinators. So, we feel that there has been a lot of value to the work that we've done in that regard.

Regarding the informal resolution part, I mean it's…the concern is again it's an arbitrary deadline of whether you make it 30 days or 60 days or 62 days, let's say you've got a set of records a 300 page set of records, okay. So, first of all, 2 weeks right off the bat, the public body has 2 weeks to provide that set of records to us. That's in the act. They have to produce

anything that we demand and they have to produce it within 2 weeks. So, sometimes they might provide it the next day, but they have 2 weeks. So, we get the set of records. We review the records informally. The first thing that the access to information the analysts in our office will do is assign to the file is after having reviewed the records probably have an informal discussion with the coordinator over at the public body about some of the issues that they may have found that the things that we would need more information about in terms of how the exceptions are meant to apply. The coordinator will then take that back and look at what the concerns were, probably either come to a meeting or write something up in an e-mail and say, look, this is why we claim these exceptions, but you got to acknowledge as well that if you're looking at a 200 or 300 page record, you could have several exceptions claim on every page.

Chairman Wells: Just as a matter of interest…

Mr. Murray: Yeah.

Chairman Wells: Can you give us an idea of how many 200 or 300 pages, how many of the 25 that you have in a year would be 200 or 300 pages and how many would be 5 or 10 or 15?

Mr. Murray: 5 or 10 or 15 would be in the minority, I would say. They're not all 200 or 300, but it's not unusual I'd say an average one if I had to guess will be you know a 100 pages. That wouldn't be unusual for…at an average.

Chairman Wells: So, that would not be unusual to have a 100.

Mr. Murray: No. There is a lot of…

Chairman Wells: They would vary.

Mr. Murray: It would vary widely. I mean I've had…I've been involved with reviews, where the entire top of a board room table was couple of banker's boxes. That's not…that was our biggest one, but it's not unusual. There is usually, you know a few going on in the office at any given time, where there is a banker's box or a half a banker's box, you know hundreds of pages of records. Now, you can easily get, you know you might get one with 50 pages of records, you might get one with 5. But it would be…it's pretty unusual actually to get one, you know with only a few pages. A lot of the access requests that get to…that are filed maybe for a record or a few pages, but those are the ones that are not coming to us for review.

Those are the ones, where people are probably getting what they're looking for. They're only looking for one thing. They're probably getting it. If we get something like that as a request for review with only a few pages that's one of the ones that we can probably resolve hopefully, unless there some intractable issue where we have a very different take on the application of an exception. Those are the ones that we can resolve very quickly within a few days or a week or what have you as long as we have enough time to have the back and forth between ourselves and the public body and then some back and forth with the Applicant. Sometimes what happens is in practice you're doing these reviews, let's say we get the public body we've had a discussion and the public body says, yeah, you're kind of right. We haven't really...we don't really have a strong case for applying this particular exception here. So, we're going to actually release some more information on page 2, some more information on page 6 and more here and more here and more there. And so we say, okay, we'll, send that out to the Applicant. We'll give the Applicant now a chance to look at that. If they're satisfied with it then fine, even though you've applied other exceptions, you know if the Applicant is satisfied with this first cut that you've taken out then that's it we're done.

Chairman Wells: Resolves the problem.

Mr. Murray: It's resolved informally. So, the Applicant then gets a chance to look at it. Now, the Applicant, you know has a job, has got kids, has got lots on the go and they may take a week or two to look through a couple hundred pages let's say that's been sent back to them and they get back to us and they say, yeah, it's just looking great, but it looks like there is something on page 30 and there is something else on page 50 that's withheld. I can see the paragraph before that it's probably getting into this subject. I really wanted to get that. I am not sure about that exception they claimed. So, as you can see it tends to turn into a back and forth and the thing is that if the Applicant is saying to us that, look, after the informal resolution period in the Act is up, the Applicant is saying to us, look, I am fed up and I think they're just going around in circles and we're not getting anywhere with this. We send off the letters. We ask for submissions we're going formal. But if the Applicant is saying, look, you're doing a great job. I've got more information that I ever thought I would. I really appreciate your work, but if you could just try to see if they'll do something with page 20, even if the exception applies ask them if they'll exercise their discretion to release it anyways and that got to go up the chain of command probably to the

head of the public body to exercise their discretion. There is all kinds of things that can happen and this is why the 60 days is not realistic in some cases, so. I am rambling a bit, I am sorry.

Chairman Wells: It's okay Mr. Mr. Murray. You've provide me a good deal of information.

Mr. Murray: Okay. Anything else on Section 46? We did have some other detailed recommendations, which are probably bit more technical and not really philosophical if you wanted to talk about any of them we certainly could.

Chairman Wells: No, I have nothing arising out of them. We can go onto 63 now.

Mr. Murray: Okay. So, Section 63. This section of the Act sets out the options for Judges, as to how they should dispose of an appeal in making a decision in relation to an access to information matter. So, we're simply looking for a clarification which we believe will help Judges and will support the purpose of the Act in ensuring that discretionary exceptions remain discretionary in a meaningful way. To have some exceptions discretionary and some mandatory must be a meaningful

distinction. The exercise of discretion must be meaningful. It must be exercised in good faith and for a reason that is connected to the purpose of the exception. We believe that the section as it currently exists doesn't prevent a Judge from ordering that a public body take a second look at whether it is gone through a legitimate process of considering it's exercise of discretion. But given our experience in Court recently, which we outlined in our submission, we think it would assist the Court in future if it was clear that this was an option. We believe that there is case law and different types of administrative law, including access to information cases, of Judges and Commissioners ordering that an administrative decision maker reconsider their decision regarding the exercise of discretion. So, all we're suggesting here is that it might be helpful given the experience that we've had in Court recently regarding how Judges have looked at the issue of discretionary exceptions and to make it clear to them that if it becomes clear to them that the public body has not exercised their discretion in good faith or has exercised it for a reason that is not actually connected with the purpose for the exception that they will have…that they should have the option and perhaps they already do have the option maybe they haven't recognized it, but make it clear that they have the option to send it back to the public body to say, look, I want you to

reconsider your exercise of discretion here for in good faith and for a reason that's connected to the purpose of the exception. If you still make the same decision, fair enough.

Chairman Wells: Doesn't the statute…isn't the statute broad enough to allow the Court to make such order as it deem just in the circumstances?

Mr. Murray: I would agree, however, you know we encountered a situation, where the Judge didn't seem to think that he had that discretion. So, we wondered whether it might helpful to make it more explicit. So, that's the reason for…

Chairman Wells: A provision that enables a Judge to make such order as the Judge deems appropriate in the circumstances would certainly include an order that you're asking for.

Mr. Murray: Let me just…one second there now. So, that provision you're referring to is in B, the 63.1B.

Chairman Wells: 63.1B.

Mr. Murray: Yeah.

Chairman Wells: Okay.

Mr. Murray: So, 63.1B where the Trial Division, the Judge determines that the head is not authorized or required to refuse access to all or part of a record. So, this is where the Judge is saying that the exception does not apply. You're not authorized to refuse the record.

Chairman Wells: I don't see that in 63, disposition on appeal.

Mr. Murray: Yeah. So, 63.1B…

Chairman Wells: On hearing an appeal the Trial Division may 1B, where it determines that the head is not authorized or required to refuse access to all or part of the record on the part 2 or 3 order the head of the body to give the Applicant access to all and part of the record and make an order that the Court considers appropriate.

Mr. Murray: Right, but that Section B is for situations, where the Judge says the exception does not apply. Well, we're talking about is a situation, where the Judge says maybe the exception applies if it's a discretionary exception, but you haven't given

me any…I am not satisfied that you've exercised your discretion appropriately, you know what I mean?

Chairman Wells: Yeah.

Mr. Murray: So, the Judge…so, if the Judge is hearing that, well, Section 20 applies on it's face, but you're telling me when you had to consider discretion, because it's a discretionary exception, let's say Section 20, it's a discretionary exception, which means that the public body is allowed to withhold the information, but they're not required to withhold it. So, let's say we're in a situation…

Chairman Wells: That's normal standard for a Court of Appeal…

Mr. Murray: Okay.

Chairman Wells: …an Appellate Court dealing with an authority or a tribunal or a person exercising a discretion, reviewing that exercise of discretion on judicial review.

Mr. Murray: Yeah.

Chairman Wells: That they had to be satisfied that it's within the jurisdiction and exercised judicially and it needs to stand that's the normal court standard.

Mr. Murray: Agreed, but Section B as I was getting to, Section B, part B there, subsection B, applies only to those situations, where the public body…where the Judge has found that the public body is not authorized to refuse access. So, the public body is being told by the Judge Section 20 does not apply. So, there is no issue of discretion. The discretion issue doesn't come up when B is in play.

Chairman Wells: No, it's where the Judge determines that the head is not authorized…

Mr. Murray: That the head is not authorized or required to refuse access.

Chairman Wells: …or required to refuse access.

Mr. Murray: So, none of the…the exception in Section 20 let's say Section 20 the Judge is saying… for B the Judge is saying, Section 20 does not apply. So, I am going to order B clause 1, I am going to order the head of the public body to give the

Applicant access to all or part of the record. So, that's not the situation we're in when we're looking at the exercise of discretion, because when we're looking at the exercise of discretion it's a situation, where the Judge is saying that, well, I agree that Section 20 on it's face does apply. So, it's not B it's actually A. So, on hearing an appeal the Trial Division may, where it determines that the head of a public body is authorized or required to refuse access to a record dismiss the appeal and the Judge does not…is not specifically given what that…that option that he has in B of making an order that he considers appropriate.

Chairman Wells: Okay. I see the argument now.

Mr. Murray: Right, yeah. So, if…

Chairman Wells: But that's a normal…that's normal treatment of any Court in reviewing the exercise of a discretion by…

Mr. Murray: Agreed, but the statute gives the Judge that sort of second option of making an order that they consider appropriate in a case where the Judge finds that the exception doesn't apply, but we like to have the…

Chairman Wells: …apply in both.

Mr. Murray: Exactly to be…to be given…to make it clear to the Judge that the statute is not limiting the discretion that you would normally have. We want to make sure that it's clear to the Judge that you do have the discretion to do other things as well, including something such as telling a public body that you've got to reconsider your exercise of discretion, because that would be, you know that's something that we've encountered as, you know, as having had problems with, so.

Chairman Wells: Okay. I got your point. Now, this doesn't really relate to your recommendation, but it's just an observation I make on your submission that's at the bottom of page 44, where you attribute to Chief Justice Orsborn a comment that, if a Court determines that certain information is covered by an exception to disclosure, but that a public body has not properly exercised it's discretion in regard to whether the information will be released then the Court is prevented from ordering that. I suggest you reread Chief Justice Orsborn's decision. I am sure I would agree, but it doesn't bear directly on what you've just submitted.

Mr. Murray: And in the case he's kind of talking in the abstract there as well. I will agree there that he is, because he is saying in this case he didn't have an issue with the discretion. So, he didn't…I guess he didn't get into it in any greater detail, but it seems to…there seems to be some doubt anyways, that's why we raised it. So, we move on.

Chairman Wells: Yeah.

Mr. Murray: Okay. The next part of the Act that I would like to talk about is Section 72, the Offense Provision. So, I'd like to just start off with the question of, what is the purpose of an offense section in the law, such as the ATIPPA? Much of the Act is oriented towards public bodies. They are the entities that are governed by the act. It's the public bodies, the head of a public body, as opposed to the individual employees within the public body and the accountability in the Act lies with the head of a public body. We can recommend if we issue a commissioner's report or make any type of recommendation we wish to make, we can recommend that the heads of public bodies take certain actions. We can bring a matter to Court in relation to access to information to seek an order if we want to appeal…if I want to appeal in a situation, where we feel that a public body has not followed our

recommendations and we think it's important enough to take them to Court we can do that or can an Applicant. We're proposing that we're doing…we do the same thing for privacy now and we're going to get into that in a little while, but what if there has been a serious privacy breach and we have no recommendations to make? Let's say we have nothing that we need a Court to order a public body to do or there is nothing we can ask or recommend that a public body do to improve how they've dealt with the personal information of somebody in a privacy breach. Let's say the public body has done everything right. They've got great policies and procedures in place. They've got great security measures in place, yet a rogue employee has willfully gone around every rule, procedure and safeguard in place and contrary to their training in privacy protection the employee has willfully committed a serious breach, a privacy breach. There must be…

Chairman Wells: And thereby you believe an offense under the act.

Mr. Murray: Precisely. There must be a way of making that person accountable and that's what we see as the main purpose of the offense provision. So, we feel we need it to deal with a rogue employee, who willfully collects, uses or discloses accesses or attempts to gain access to personal information

contrary to the ATIPPA. And we've seen examples, where labor arbitrators often reinstate employees and reduce penalties assessed by employers in those situations. We've seen in it in this province. We've heard from commissioners in other provinces that that's been the experience there. If a senior employee, who is eligible to retire we've seen situations, where that person has been accused of a serious privacy breach and they've just simply retired and faced no repercussions at all. This is about ensuring continued public confidence in the ability of public bodies to collect, use and disclose personal information. We shouldn't have a law, which provides no practical way of dealing with someone, who has willfully broken it.

Chairman Wells: Why do you say it provides no practical way?

Mr. Murray: Well, the offense provision is the practical way. However, there are various I think deficiencies with the offense provision as it exist right now.

Chairman Wells: And tell me what you think they are…

Mr. Murray: Okay. Well, I guess the main one is right now that the language says that a person, who willfully discloses personal information contrary to part 4, okay…

Chairman Wells: Yeah.

Mr. Murray: …is guilty of an offense. But our experience is that a person doesn't need to just disclose information to commit a serious privacy breach and we've encountered situations where individuals have accessed and used personal information themselves without disclosing it to any further party. You can collect personal information inappropriately. You can access it from a database that you have no, as an employees, you have no right of access to that database, but if you manage to sneak in there or in some way to hack it or what have you, there should be some penalty for that, some ability to prosecute someone for that. Now, we need to make…we need to put it in context here to and it's not…this is not something we envision doing every week. It's something that we might not do every year or every 5 years. Maybe we'll never do it, but we think we need to have this provision. We need to have the ability to do this if the need arises and we have this scope the ability to do this to undertake these types of prosecutions exist in the Personal Health Information Act.

Chairman Wells: You can undertake prosecutions now as 72 is now worded, but it doesn't cover somebody who you say attempts to gain or gains access to personal information in contravention…

Mr. Murray: Exactly, it doesn't cover that ground.

Chairman Wells: You want to create additional offenses.

Mr. Murray: Basically, yes. We want to broaden the scope of the offense language itself and it's not just so…so that is not just someone who discloses. We want to cover someone who basically does something that's willfully contrary to the ATIPPA. Someone who collects, uses or discloses personal information in contravention of the ATIPPA and not just does it, but does it willfully, that's the important distinction.

Chairman Wells: The offense is there now requires it to be willfully now.

Mr. Murray: It requires to be…which we of course agree with. The other parts of the offense are there regarding, you know, false statements to the commissioner and misleading the

commissioner, they can all stay certainly, but you know couple of the other recommendations we're making here one is that we think that the time limit within which a charge can be laid is a crucial consideration here and we've learned that lesson in undertaking prosecution under PHIA, because the PHIA being the Personal Health Information Act. Under PHIA you have to lay your charge…a person has to be charged with…as per the requirements of the Provincial Offenses Act, which is within 1 year of the event occurring. However, the problem is with privacy is that quite often the offense might not be discovered until an audit has occurred and an audit may not even be triggered…there are random audits. Public bodies sometimes undertake random audits of their electronic systems to see who has accessed information and whether it's been done appropriately and things like that, but sometimes an audit is done at the request of an individual who has some reason to suspect that someone has access to information inappropriately and this could occur sometime down the road.

We don't know how long of course you don't want to go years down the road, but you know to be fair, I think you need more time than the 1 year, that's been our experience. And first of all, I mean the processes that tend to unfold is if someone has a suspicion first of all, they probably ask the public body to look

into it. Public body may do some sort of audit and some sort of internal investigation and produce some answer to the individual. Individual might wait to see if anything happens or if this person is going to be punished and they might not find out actually if the person is ever punished in any way even if it's been established that there was breach because the public body can't release information about someone's work history and their disciplinary issues and things like that at work. And the person becomes, you know says, well, who do I go to next? And they say, well, you can go to the commissioner's office I guess. So, in that case we might have nothing to recommend to the public body. They've done nothing wrong. They've got all the great systems in place regarding privacy protection, but you got this rogue employee and we just need a way to be able to provide some assurance to the individual out there whose information has been breached that, yes there are repercussions. And also in the public, you know this person goes public and says, look, my information has been breached and the public body says, they can't tell me who did it or what they…or whether the person faced any punishment and I am being told by the commissioner's office that there is nothing they can do because the only thing they can prosecute is a disclosure and there was no disclosure in this case or we're 1

year…it's been more than 1 year since this event occurred and I didn't even know about it until last month, you know.

These are the situations we think we can avoid by amending this language so that we can increase the time limit within which a charge can be laid. So that it's 2 years from discoverability or from discovery of the offense and as well increased to maximum penalty. If you look across Canada and some of the newer privacy legislation you're seeing, you're seeing fines, maximum fines $50,000 and more and what we're recommending $10,000 is not out of line at all. Some of the older pieces of legislation around the country that haven't been reviewed and updated are the ones with $5,000 or less as a maximum fine. And as you know, you know to give the maximum fine, when you set a maximum fine you're giving, you know the discretion of Judges to operate and to recognize when there has been a serious offense or a less serious offense and to recognize that in the sentencing, so…

Chairman Wells: Just two comments. Do you have any questions?

Commissioner Stoddart: Well, I just like to say to Mr. Murray that this was a situation…the situation that you're addressing by this recommendation is a situation that was encountered

frequently in the federal government with employees wrongfully accessing databases and it not coming to light for years or not coming to light unless there was a complaint and then the poor complainant and the public, who heard about these breaches and was understandably concerned about what was happening to their personal information in the hands of Revenue Canada. We're told, oh, we can't tell you, because this is all the personal information of the wrongdoers. Now, I would hope that Section 30 as you suggest would now, in another era, be used to give the public accurate information about what steps were taken and we've seen that in other jurisdictions but anyway I certainly recognize the situation that this suggestion speaks to.

Commissioner Letto: We don't expect you to speak for public bodies. You said they sometimes undertake random audits. So, it's not necessarily something that they do.

Mr. Murray: No and we…I know that some public bodies do. There are public bodies that are subject to both the ATIPPA and the Personal Health Information Act, which are the regional health authorities and they have established fairly advanced processes and procedures and technical ability to conduct random audits and I guess, because with personal health

information so much of it has now becoming electronic they have the capacity and we have new legislation on our PHIA, which is think, you know really has been a strong impetus for them to develop these capabilities. So, that would mostly be a PHIA situation, however, it will be anything that would occur I think of a privacy breach nature for the most part would be covered under PHIA for the health authorities. Regarding the other public bodies, I am really not aware of the audit capabilities or practices with across public bodies in this province and I really don't know.

Commissioner Letto: Well, it seems that depending on the seriousness of the breach it might not have to be reported at all, in which case you wouldn't know about it, the person whose information has been breached wouldn't know about it. It seems in a way that all this discussion about protection of people's information is a bit moot if we don't know or have no way of overseeing in a systematic way, whether it's protected or not or whether it's been breached.

Mr. Murray: That is exactly the point and that's why what we've done in this submission is we're trying to present a suite of tools that work together. So, we'll get to that later when we talk about what we're recommending in terms of improved

privacy oversight for the commissioner's office, but you know that is what you've just said is I think nub of the problem that you know so many of these things in the Act that if you improve one section, but you leave the others alone, you're really not getting any further ahead and this…if we got an amendment of this nature in order to make it meaningful, you know it would be very unlikely and it could happen, but it will be not quite as useful to have this beefed up Section 72 if people were not being told when their information has been breached or we weren't being told. So, I agree that they would work hand in hand.

Commissioner Letto: Okay, thank you.

Chairman Wells: Do you see any potential problem with your suggested paragraph A of subsection 2, attempts to gain or gains access to personal information in contravention of this act? Everybody who seeks information is not entitled to it. If it's prohibited by the Act or it's in contravention of the Act has attempted to gain it, is it too far? Just give that some consideration and see whether that's maybe a little too broad. There is also a possible concern about families seeking information in relation to another member of the family or on behalf of that member. You just got to just give…just would

you give some thought to that and let me know. You're more familiar with it than I am and just see this as a possibility that you might consider.

Mr. Murray: Yeah. I can give you a couple of thoughts off the top of my head on that. The family member situation has been it's one that the health authorities are used to dealing with and quite often it's the case, where someone has offered, do you want me to check on your results or something like that or someone goes to a relative and say, you know you work in the hospital, do you think you can look up on the computer, you know this, that or the other thing about me, because I am waiting to hear...see the doctor and I'd like to know now what the results were or something like that. In that case it's at the request or with the consent of the individual. So, it's not technically a breach of the Act per se, but it's a breach of policy. So, we will leave that to the employer as to whether they want to deal with the employee or to the extent they want to deal with the employee on that front. But you know in other cases, where someone attempts or gains to or attempts to gain access to personal information, I mean you know what do you do if you have, you know a hacker someone who works in the hospital and says, I am going to hack the system, I am

going to just find out everything that I know and you know say that get in…one time they get in, the other time they don't.

Chairman Wells: I understand that you need something of this breadth for that purpose buy my only purpose in raising it is to make sure you're satisfied…

Mr. Murray: You don't catch other things in that.

Chairman Wells: Yeah, you don't over-catch the family member, who…

Mr. Murray: Yeah. You know it's also worth pointing out that sometimes family members don't get along that well and there have been situations. There's been famous privacy breaches involving love triangles and things like that and relatives, who are at odds and they're accessing information, wives and ex-wives and husbands or one of them works at the hospital and they're in custody disputes and they want to find out something about someone's health condition and they're going to throw it in their face they think in the custody battle or something like that and you know. So, in those cases there is no consent and in fact sometimes the party, whose information has been affected, would like to have the book

thrown at, whoever looked up their information inappropriately, so.

Chairman Wells: Okay.

Mr. Murray: All right.

Chairman Wells: So, that covers your specific recommendations on the different sections…

Mr. Murray: Yeah.

Chairman Wells: …of the act. The next part of your brief deals with restoring the commissioner's jurisdiction and powers.

Mr. Murray: Right.

Chairman Wells: It's now just about quarter of 5. Did you want to get started on this today or did you want to come back on Thursday to finish this?

Mr. Murray: I think, I mean for this part I think Mr. Ring has touched on some of the key issues. I think I might…if we wanted to take 15-20 minutes, I might be able to cover it depending on

how many questions you have, but I am certainly prepared to revisit it on Thursday or whenever you like if we don't finish it today. So, I am open to taking a crack at it if you like to.

Chairman Wells: Okay. That's another reason as well the committee finds it necessary to meet on another matter about this time and if it doesn't interfere with your presentation and it's okay by you, then it might be best to defer this onto Thursday, so this might be a good point to break.

Mr. Murray: Absolutely.

Chairman Wells: There is a clear division in your presentation on this part.

Mr. Murray: For sure there is, yeah.

Chairman Wells: Okay.

Mr. Murray: All right.

Chairman Wells: Mr. Murray, the committee thanks you and Mr. Ring both for your presentation today.

Mr. Murray: You're welcome.

Chairman Wells: And for your willingness to accommodate the concerns of the committee in the timing manner.

Mr. Murray: Not a problem.

Chairman Wells: Thank you again and the committee will adjourn now and will resume at 9:30 a.m. tomorrow morning.

Mr. Murray: Thank you.

Commissioner Stoddart: Thank you.

Chairman Wells: Thank you.