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

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Presenter: Simon Lono
Private Citizen

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

C. WELLS:

The next presenter is Mr. Simon Lono. Welcome, Mr. Lono. Thank you for participating in the process and we are looking forward to hearing from you.

S. LONO:

I appreciate the opportunity to speak here today. I'm going to try and structure my presentation a little tiny bit into sort of an introduction and how we arrived here. How I have seen government evolve in terms of approach to the ATIPP legislation, and then I'm going to close up with some specific recommendations based on the legislation and some more general principle recommendations that you may wish to consider.

So, first of all, I would like to sort of open up with a few personal disclosures so that everybody knows where I'm coming from and what the story is. And my experience with ATIPPA really started in a more intimate fashion around 2002 when the legislation was produced. I was a staffer at the time in the Grimes administration, and at that time I

actually took training as a future ATIPPA coordinator, and then the government changed and my responsibility ended.

In 2007, I became re-familiar with the whole area when I started work with the Office of the Official Opposition. And at that time, we found that the ATIPPA legislation was very useful to our work in terms of gathering information from the government on behalf of constituents, on behalf of our interests and other interests.

Probably the most notable thing from my perspective that I did while I was in that position was essentially the staff quarterback on Bill 29. When that came up, that was a pretty remarkable thing to see. And I ended up doing the primary analysis and the quarterbacking on that on the subsequent debate and the filibuster. So I seen the evolution of ATIPPA from the time that it was introduced into the House of Assembly around 2002, 2000 thereabouts, to what I started to see in 2007 until I left that office, roughly a year and a half ago.

Since that time, I have still been somewhat involved in ethilizing (phonetic) ATIPPA on behalf of different patron organizations who have been seeking information from government.

So I think it is important to note how we got here. And actually, before I do that, there is actually a little side note I would like to note. And I make this because I know a few people contacted me about this yesterday. And I know this is outside your scope. I understand this is outside your scope. It is actually worthwhile mentioning, though, because it is such a significant omission from your scope of work. And that is that while you are dealing with access to information and privacy, there is one large chunk of public area in which access to information rules apply but you are not covering, and that is the peculiar set of regulations around access to information that's contained in the Energy Act which governs Nalcor. That is a separate and distinct series of access to information provisions which is not included in your scope, so, therefore, anything that you come up with will not be applying to that particular organization and will not be applying to

that particular piece of legislation. And that is what it is but I think it is worth noting that that to my mind is a significant omission in the area that you're dealing with.

C. WELLS:

Significant omission in what? Are you asserting it ought to have been included in our Terms of Reference?

S. LONO:

Yes. I think so.

C. WELLS:

I just need to know what your position is.

S. LONO:

No, I understand. I think if we're talking about access to information and privacy and dealing with it from a public policy perspective, then one of the largest area of the public policy that we have in this province is energy policy. And yet, our primary vehicle for executing that has been excluded from your mandate.

C. WELLS:

But it's excluded as a result?

S. LONO:

Of the fact that while you are dealing with the

ATIPPA legislation, the ATIPPA legislation is separate and distinct from the Energy Act which has its own access to information provision with respect to Nalcor.

C. WELLS:

And nothing in the Terms of Reference specifically authorizes assessment of Nalcor's position. Is that your point?

S. LONO:

I don't know.

C. WELLS:

You have to leave that to us to decide.

S. LONO:

Yes, sir, most definitely.

C. WELLS:

But as far as you know, that's the basis on which you operate?

S. LONO:

Yes. And I know that the topic hasn't come up so far but I thought it might be worthwhile tossing it in to see what happens. I think it is worthwhile talking about the Bill 29 and the consultations which led into it, because I think that is really the root of what we are talking about here today. When the

Cummings Commission started their walk, his work, on the ATIPPA review that was a really interesting set of consultations to watch because really the question that came out from that was, went out to the public was, do you have a problem with the ATIPPA regime? And basically, virtually no response came back. And this was interpreted as the public didn't care. Well, I think that subsequent events demonstrated that no, that wasn't really the case at all. What was really happening was people didn't have a really big problem with the ATIPPA regime at the time. They hadn't really thought about it. It hadn't become an issue. It wasn't really controversial. So there wasn't a lot of public input as a result.

I think that in some respects that led to other misjudgments. One of the primary misjudgments, I believe, was in the selection of the particular commissioner. I think it was an error to have a commissioner as opposed to a panel of commissioners. I think it was also an error to choose as a commissioner a former deputy minister of justice.

The Department of Justice has a peculiar

reputation among people who deal an awful lot with freedom of information requests. There are two sort of dark empires when it comes to information release. Two places where it is extremely difficult to get information; one of them is Nalcor and the other one is the Department of Justice. So to place at the head of the commission a deputy minister of justice who is involved in administration of ATIPPA for the department became slightly problematic.

The fact that the Office of the Privacy Commissioner was effectively excluded from a meaningful representation in that commission was also problematic. But what really became problematic to my mind was what happened afterward, because a report came out which was a mixed bag of recommendations, some of which were advocated restrictions or further restrictions on the access to information. It has some issues to do with privacy. It was sort of, it tightened up the legislation. But then what happened after that was, and this was reports that we received and that I received personally from a number of different departments, is that the report was being shopped around the senior bureaucracy within

government.

D. LETTO:

What do you mean "shopped around"?

S. LONO:

Shopped around. It was sent around. Like, what do you think? What would you add? How do you feel about this? How would this affect your department?

C. WELLS:

Why do you have a problem with that. Wouldn't that be a normal responsible position?

S. LONO:

I have no problem. Well I think that it should have been more open. I think it should not have been done in basically in secret. And the way that it was handled was every department got a crack at adding provisions, putting plugs in holes that were a particular issue for them. So, for example, and in fact if you go through the legislation I can point to amendments in Bill 29 which I can actually tie back to particular issues of particular people asking for particular kinds of information which really aggravated certain departments. One of them, for example, was a persistent request for briefing notes from ministers leading into the House of Assembly,

the House of Assembly briefing notes for ministers. It really aggravated a number of people that these requests were being made. So when the opportunity came up to produce a plug for that hole of information, the department was more than happy to provide that. So as a result, at the end of the day, you had Bill 29, which was not only a product of what I believe was a set of flawed consultations through Cummings in the first place, but then also became an aggregate of all the plugs of all the holes that any department wanted to have. And there was no sort of overall judgment in dealing with how this was going to proceed.

There's a balance that has to be performed in terms of access to information. If you're going to be closing down certain holes then there is a purpose to the production of information. And so if it's handled as sort of an aggregate of a bunch of different pieces that people have an interest in, then that balance goes out the window and what ends up as a result is that you have policy made that is not necessarily in the public interest but is made in the interest of bureaucratic interests. And I think

that was really, in many respects, the root of the issue in terms of Bill 29. Yes, ma'am? Yes, sir?

C. WELLS:

Can you just pause for a moment? Ms. Stoddart has a question for you.

J. STODDART:

Thank you. Mr. Lono, this is very interesting and I'll ask a question perhaps driven by my lack of familiarity with the detail of Newfoundland government and its processes. You're telling us that in your opinion Bill 29 is, and you're right, was driven by bureaucratic interest rather than the public interest. I'm just wondering if your categorization of two entities, the Department of Justice and Nalcor, if this categorization depends on objective facts. I know the Commissioner releases an annual report. In the annual report, he often gives a kind of score card of who releases information and so on. Have you gone through these kind of score cards or is this kind of hearsay or can we verify this factually?

S. LONO:

It would be a combination. I think an example of the kind of, in the case of the Department of Justice,

for example, you heard yesterday about the issue of the client-solicitor privilege. The 80 percent of the documents that had absolutely nothing to do with client-solicitor privilege. The fact the department was absolutely willing to go to the wall on that issue, were willing to go to court and were willing to include in the subsequent Bill 29 provisions to ensure that that never happened again. It's that kind of driving need to have its own interest protected.

Nalcor, as I said, it is a peculiar organization within government in the sense that it has its own set of provisions. It's own set of provisions says that the ultimate arbiter of what can be released and what cannot be released is the CEO of Nalcor. Not the Privacy Commissioner. Not the courts. It is the CEO of Nalcor and that's it. That's where the buck stops.

So just on an institutional basis, based on those kinds of things there's been no other department, really, that I can think of that has been as aggressive in asserting its rights. And that may be

for a whole variety of different kinds of cultural reasons. That's beyond me to say. What I can talk about are sort of the results that I've seen in my experience with it.

J. STODDART:

Okay. So in your categorization of bureaucratic interests you're talking about a kind of motivation and a reality that's independent of what we would call the political masters of those two entities and perhaps others.

S. LONO:

I can't speak to that. I don't know the internal workings well enough to be able to make that kind of conclusion. I can guess about the role of the political masters but I don't have any firsthand knowledge to be able to say that.

J. STODDART:

Okay. There is no formal, no prior to the Cummings investigation any kind of formal change in the policy or statements of the government of the day that would suggest some kind of shift? You think it kind of arose spontaneously from the bureaucracy?

S. LONO:

I've long suspected, and other people who have been

really active in FOIs and ATIPPA legislation have suspected that in some respects Bill 29 worked to ratify internal preferences and decisions which had already been made. They formalized certain processes that they had tried to implement informally. And I don't have my access to the files that I used to have to be able to list specific things, but that was sort of the general impression that we received. And that wouldn't be unusual because I've seen like a number of pieces of legislation that were like that, where the legislation was late in the day in catching up with policy and in some respects sort of ratified practice as opposed to establishing new one. If you know what I mean?

C. WELLS:

Mr. Lono, I'm just going to stop for a moment to say something to you because I'm a little concerned about your thrust so far. This Committee is not an inquiry into Bill 29 or how it came about or why it came about.

S. LONO:

Which is why I'm trying to get away from it.

C. WELLS:

Or what personal information and motivation caused

it. Although, many in the media and other places have referred to it as the Bill 29 inquiry. It is not that. That is not within our Terms of Reference. The only mention of Bill 29 in our Terms of Reference follows the explicit direction to do an assessment, a complete and independent comprehensive review of the *Access to Information and Protection of Privacy Act*, and then there is a phrase "including amendments made as a result of Bill 29".

So, we have to look at the acceptability and the overall context of access to privacy and how it functions, what those amendments cause. A passing reference to what you think drove Bill 29, I think you've covered that but I just want to let you know that I think spending a great deal of time on it would be in excess of what's set out in our Terms of Reference and our primary thrust should be assessment of the way the ATIPPA functions and how the amendments in Bill 29 altered it and how that should be revised, if any. So I don't mean to be critical.

S. LONO:

No, no, I understand exactly.

C. WELLS:

But just to let you know -

S. LONO:

I am trying to ease off of that.

C. WELLS:

- what are the parameters of our jurisdiction.

D. LETTO:

Can I ask a question which might bring us in that direction?

S. LONO:

Yes.

D. LETTO:

You said that in 2007 you found ATIPPA extraordinarily helpful in getting information for the, I guess, the opposition office.

S. LONO:

And yes, and other organizations, outside.

D. LETTO:

And other organizations. And I'm gathering by the timeline you've drawn for us that you probably left government or left employment there about a year and a half ago which would have been maybe only six months after the changes were made, is that?

S. LONO:

Yes, roughly.

D. LETTO:

Okay. So would you have had any experience in the post-Bill 29 era about what you now could get access to and what you couldn't? What were the points that were turned off, as it were?

S. LONO:

Well, let me just plow ahead. There is one point I would like to bring up very quickly, if I could, in terms of context, is the concept of an information release arms raised (phonetic). It's a dynamic process and the legislation is sort of key to the centre of that. There is a tendency to try and withhold government, where possible, trying to withhold information where possible, and there is a tendency for the outside organizations to try and access information where possible. And that becomes a creative tension of sorts where those boundaries are constantly shifting as a result of almost like an information release timer, information release arms raised, where as soon as an organization discovers a clause where it is possible to access information a counter effort starts on the other side to try and

restrict or minimize that kind of thing.

A lot of the specific changes to Bill 29 and the effects of them have been covered by the Commissioner. I can't add an awful lot to some of those of those, but there are some specific things that I have noted in the legislation and I've noted over time as being problematic that I would like to cover. One of them is a definition in section 2(q) which said that a "record means a record of information in any inform, and includes information that is written, photographed, recorded or stored in any manner, but does not include a computer program or a mechanism that produces records on any storage medium".

This has become really problematic clause for a number of organizations, because what government will say is that a particular source of data that you're seeking is a computer program and, therefore, you're not getting it. And part of the problem comes back to the idea that there is a sharp distinction that can be made between a computer program and computer data, because those distinctions are, in my respects,

arbitrary. In computer science the idea of data and program, it can be pretty fuzzy. And even on a practical level a spreadsheet, for example, can be viewed as data or it can be viewed as a program. Like, the sheet itself. Not the underlying application that produces it, just the sheet, the file itself. In databases, a database of information can be considered data or it can be considered a program.

And so, I really believe that that particular clause needs to be clarified because the tendency on the folks releasing the government is that these are all programs and they're not to be released. But the data aspect of it is being sort of left behind and there is a number of clauses that are used sort of as obstructionist kind of clauses and that was one of them.

C. WELLS:

Was this a change as a result of Bill 29?

S. LONO:

I don't believe it was. I think that was there all the way through.

C. WELLS:

It was there all along, was it not?

S. LONO:

Yes, I believe that one was there all the way through.

D. LETTO:

But you're saying it's being utilized to restrict what it is that people can get.

S. LONO:

Yes. And unfortunately, it has to do with sort of technical definitions and computer science, and, unfortunately, the folks who are interpreting this don't necessarily have that background. I actually started off as a database programmer years ago. So that's an issue that kind of goes up my nose because there is valuable data there and to say that no, it is a computer program, therefore you can't have it, is really trying to stretch a definition.

C. WELLS:

Is it readily separable?

S. LONO:

Yes, the information can be readily separable from the programming aspects.

C. WELLS:

But the data is not necessarily separable in the form it is in the computer, is it or?

S. LONO:

It can be. It is a technical issue. And that technical issue tends to get glossed over because of what it is, they say you can't have it. But it usually takes a minor transformation in order to turn it into something that is useful.

In terms of the section, there is another section which is 7(4), that's the one that is the issue of briefing notes for the House of Assembly. I would argue that in principle political embarrassment or inconvenience is never a reason to refuse information. And I would place this clause squarely in that area. It may be inconvenient for a minister to have their briefing notes revealed just ahead of a session of the House of Assembly. Doesn't mean it shouldn't be released. That kind of information tends to be factual, background, issue/analysis kind of information, rarely, if ever, having to do with decision processes within cabinet. If those parts do exist then sever them. Redact them.

C. WELLS:

What do you base that on?

S. LONO:

I have seen briefing notes from the other side. I have produced briefing notes for minister going into the House. I know what went into them. Before this clause was in place prior to Bill 29 we would receive those documents. And they were certainly not restricted under all the other restrictions about cabinet processes and those kinds of things. This became a brand new category.

C. WELLS:

This is the only thing that restricted them?

S. LONO:

It is now. And we really have to wonder why. Why is that the case? What compelling public policy reason is there to restrict that kind of information?

C. WELLS:

You say it's largely factual anyway?

S. LONO:

Yes.

C. WELLS:

Is that the original statement or expression of the facts or is it a marshalling of otherwise existing

summaries of the facts?

S. LONO:

Well, it could be either way but I would still argue that rather than having a blanket restriction on the whole class of documents that you treat that class of documents the same way you treat any other class of documents.

C. WELLS:

What I'm getting at, the factual information I would expect would be largely available from a variety of other sources, would it not?

S. LONO:

Possibly, yes. I mean they are designed so the minister has a one-page go-to spot for basic information about the department and identification of issues.

C. WELLS:

Do you see any significance to the words "solely" in each of A and B, this record is created "solely" for that purpose? Does that make a difference or should it not make a difference?

S. LONO:

You mean should that be included or not?

C. WELLS:

No, no, not should it be included or not. Does that make a difference in the way we should look at it, is what I'm getting at. You got to remember, looking at this in context the House of Assembly is at the very least competitive forum, it is not an adversarial forum, which it probably ought not to be but it frequently is, where there are competing forces on the opposition side and on the government side of the House. So, a record that's created *solely* for the purpose of briefing a member of the executive council with respect to assuming responsibility for a department or solely for the purpose of briefing a member of the executive council in preparation for a sitting in the House of Assembly. The member is going into what is very clearly a competitive position.

S. LONO:

Yes.

C. WELLS:

That's the nature of politics.

S. LONO:

But I think that the competition --

C. WELLS:

Let me finish the question, first.

S. LONO:

I'm sorry.

C. WELLS:

Yes. That's the nature of politics. And if the record, to the extent that the factual components are largely available from a variety of other sources, you had to presume that the person who prepared it is not fabricating facts, not making the summary of facts out of old cloth (phonetic), it's available elsewhere, one would think. And if comment and presentation on it is prepared solely for the performance of the Minister in the House of Assembly does that make it different?

S. LONO:

I think that when you talk about competition in the House, that competition should be about whether a policy ought be placed, ought be implemented, not over what the facts are. Hopefully, ideally, you're in a situation where everybody sort of has a broad agreement on the facts, although they may place different weights on them and different levels of importance and, therefore, what the policy should be

becomes a function of that. I am not keen on provisions that restrict access to facts.

C. WELLS:

You have to presume that facts are generally known and that's not the only source of the facts. The summary, a record that was created for that purpose is not the original record or recording of the facts. They come from somewhere.

S. LONO:

Yes.

C. WELLS:

The person prepared that record for the House of Assembly has to find the facts somewhere. So presumably those facts on that topic are available from a variety of sources and would be accessible in the ordinary course. So the person seeking that record, is he seeking it to be informed as to the facts that are under consideration? Or seeking it to be informed as to what the position the minister was going to be taking in the House? And if the facts are readily available from a variety of other sources, you have to think that the person seeking it is looking for it to find out what the minister's advice was. What the advice was to the minister

before going to the House.

S. LONO:

Well, I think if the facts were readily available from other sources that we probably wouldn't be here today because the facts would just simply be readily available from other sources.

C. WELLS:

What facts are you talking about?

S. LONO:

Well, any. Facts from within department statistics, information. Not advice to minister on what to do, not suggestions on where to go, not strategic considerations that the minister may wish to consider. Those kinds of things, I think, I mean that is properly the kind of information that a minister should have to themselves and shouldn't necessarily be released because that is strategic information useful for the House, useful in terms of making decisions and that feeds into the decision-making process in sort of a very direct kind of way. But a lot of these briefing notes don't qualify as any of that. They are background summary pieces of information and I think that there is actually public value to knowing what a minister is

basing their decisions on. Not necessarily what the process was and what the arguments were back and forth, but the basic underlying feedstock of facts and information that ministers rely upon. Maybe it could be that it's just plain wrong and we'll never know that.

C. WELLS:

Well, that applies to any Cabinet document, doesn't it? Are you suggesting that for the same reason Cabinet documents should be available?

S. LONO:

Not necessarily.

C. WELLS:

Discussions in Cabinet? Deliberations of Cabinet that may have been just plain wrong in taking those positions.

S. LONO:

Well, under Bill 29 the scope of what is a Cabinet document and resources that have gone into Cabinet decisions has been greatly expanded.

C. WELLS:

You're averting from the question.

S. LONO:

Sorry.

C. WELLS:

The question was: you say this should be available.

S. LONO:

Yes.

C. WELLS:

And I understand.

S. LONO:

Or not necessarily available blanket but should be treated as any other kind of document. Like, if there is sensitive parts, personal information, stuff that feeds into, reveals Cabinet deliberations, that gets severed.

C. WELLS:

Then somebody should, say the Commissioner, do you suggest the Commissioner should have a right to see it and make an adjudication as to whether or not it's simply a presentation of factual information or recommendations with respect to policy positions?

S. LONO:

It is a possible solution.

C. WELLS:

If this was treated as the document to which the Commissioner would have access and ability to make a decision, would that address your concern?

S. LONO:

I think so, yes. And later on I talk about or I can deal with a little bit of that later on when I talk about the recommendation of the principle.

C. WELLS:

Okay.

S. LONO:

For the specific recommendations, section 10.(1) talks about access to records in different or electronic form. If you read the text, it says that if it's an electronic copy then if you can, produce an electronic copy. In practice, that hasn't really worked out that way. This is actually, this clause has become a real problem in many respects because, for example, I have seen FOIs returned with spreadsheets that have been, where the originating document was electronic. It was printed, then it was scanned as an image and then it was released, which means that you basically have a picture of a printout of an original electronic document, which is practically useless for you.

C. WELLS:

Why?

S. LONO:

Because you can't take that .... I mean, the intention of this clause is to produce a electronic file but once you get this paper document, unless you sit down and retype it.

C. WELLS:

You can't dig for metadata.

S. LONO:

Pardon me?

C. WELLS:

You didn't dig for metadata.

S. LONO:

You can't. And if it is a page of information that's not a big problem because you will just simply retype it. But if it's big stack of paper, an inch or more, you might as well have not received it at all. And there is no reason to do that. There is no reason to produce. And to my mind that really is just a deliberate obstruction of the utility of the information because of the form in which it has been provided.

J. STODDART:

Mr. Lono, I think this is a very interesting point that you're making. Do you know of any challenge to

this practice, if, for example, I had made a request and it came out, not in aversion of its original format but in a scanned paper copy that's rendering manipulation useless, did anyone complain about this? Did it go to the Commissioner's Office?

S. LONO:

I think there have been cases with respect to that. I'd have to go back and check. I know that this was a complaint that I had frequently heard from a couple of individuals who did a lot of information requests. This was the response they received. They were quite unhappy about it. I believe that that did make a complaint. I would have to go back and check with them. I can check and I can send you the cases, if applicable.

J. STODDART:

Okay. That would be helpful. And was this a general practice or was it -

S. LONO:

Occasional.

J. STODDART:

- targeted to, let's say, frequent users or?

S. LONO:

I didn't see the scope of cases where there this

occurred but I know some frequent users that it did happen to.

J. STODDART:

Okay, thank you.

D. LETTO:

Can I ask, what's the practical problem with this again, if you can explain it?

C. WELLS:

I've missed it too, Mr. Lono.

D. LETTO:

I realize what you say about that you're getting, ultimately you're getting a scanned copy of something that's been photographed and so on. What's the practical problem?

S. LONO:

The practical aspect is that if you receive, if it is a particularly large, if it is a database, for example, or a spreadsheet, either way, you receive printed copies which you cannot do any further work on them. You can look at them but you can't, you can't do spreadsheet functions on them. You can't reorganize the data. You can't sort it. You can't search it. You can't do any of those kinds of things. Unless you re-enter all that information

from scratch it's not information that becomes immediately useful to you.

C. WELLS:

And you want the electronic program?

S. LONO:

You don't want the program, you just want the data.

C. WELLS:

In electronic form.

S. LONO:

In electronic form, yes.

C. WELLS:

So you want to be able to manipulate the data as they could.

S. LONO:

Yes.

D. LETTO:

And presumably to add new categories, because they may only have had five kind of categories or criteria that they used and you might say, well, what if I analyze the data in another way.

S. LONO:

In a different way.

D. LETTO:

Fair enough. Okay.

S. LONO:

Yes. And really what it comes down to again is why would you want to go through that process when its only function is to hang you up? It is just unnecessary. I'm not going to deal with the section 18, Exceptions to Access, because that's been well dealt by the Commissioner.

Section 20, under Policy Advice or Recommendations, it says that, "the contents of a formal research reporter audit process or audit report that is in the opinion of the head of the body incomplete unless no progress has been made on it for 3 years". We used to refer to this as the "forever draft clause". Sometimes you would receive a document from outside or you would receive a document from a unit inside of government and you would stamp "draft" on it. That draft report would become a source of policy formation. It would result in decisions being made but the document itself would not be releasable for three years, simply because it says draft. And that's an issue. You can stop the release of any document by simply stamping on it "draft". And there is no way around it. If the

policy or if the public body head says it's draft, then that's it, it's blocked up for three years, for no other reason than that. And that should be reviewable.

C. WELLS:

Reviewable by the Commissioner?

S. LONO:

Yes.

C. WELLS:

Yes. So would your concern be addressed if the Commissioner could access it, review it and express an opinion and make a determination as to whether in the Commissioner's view it was generally a draft document or that was a cover mechanism?

S. LONO:

Well, one test could be, and I'm not a lawyer and I don't consider myself an expert, so, one test could be was there action taken on the basis of this document, for example?

D. LETTO:

Because you would need some criteria to assess it, wouldn't you?

S. LONO:

Yes, you would. Yes. And probably the most useful

one is, was this document actually used for something other than we're just waiting for the next version to come out.

C. WELLS:

So, again, giving the Commissioner access to it and the ability to make a determination and possibly even an order would address the concern that you have?

S. LONO:

I think so.

C. WELLS:

Okay.

S. LONO:

42.2 is Term of Office, I'm not sure if this one has come up yet. The current term of the Commissioner is two years. This stands in pretty sharp contrast to other House Officer positions. The Chief Electoral Officer has no term specified. The Child and Youth Advocate is set to six years with a possibility of a second six-year term. The Commissioner's Representative is the same. The Commissioner for Legislative Standards is a five-year renewable term. I would suggest that the Privacy Commissioner have a term length of ten years; very similar to the Auditor General. It is a similar position in many respects.

It is an oversight position. And a two-year position, I certainly cannot and will not speak for the Commissioner but I will strongly suspect that after two years you are just really starting to get your feet wet in this and you're really starting to figure out what's going on. Two years is just way too short for this kind of post.

C. WELLS:

You heard the Commissioner yesterday say that he was originally appointed, I believe, in 2007, and renewed, there have been four renewals. The latest one this month. So, in effect, that's a total of ten years. Would you elaborate on why you consider the two-year and the two-year renewals a problem, if there is nothing that prohibits a commissioner from having a total of ten years, as he is in fact having? So do you want to elaborate on that or do you just simply want to leave it as (inaudible) should be ten years?

S. LONO:

It concerns me that we could easily be in a situation where we could have a string of two-year appointments where a government --

C. WELLS:

And why does that concern you?

S. LONO:

It concerns me because, two things. One is it doesn't provide for an accumulation of experience and knowledge on the part of the Commissioner. I think it can cause issues in terms of a Commissioner possibly self-centreing themselves. I raise that as a potential issue as opposed to a real one.

C. WELLS:

With the prospect of not being reappointed, a Commissioner could make a decision more favorable to the government agency than would otherwise be the case?

S. LONO:

Put off or even just put off a decision. I think that the terms and conditions of appointments should re-enforce the best, not the worst. And it really struck me when I went through all the other House Officer positions how unusual the Privacy Commissioner is in that respect. No other position has a two-year appointment. I think if the Auditor General had a two-year appointment I think we would think that pretty strange, and, yet, we don't seem to

really think it's all that strange for a privacy commissioner. And I think it is just as strange for a lot of the very same reasons.

J. STODDART:

Mr. Lono, in some jurisdiction, notably the federal jurisdiction, the Privacy and Information Commissioners not only have a certain length of time, in that case it's seven years specified in the enabling statute, but they also have their salary level defined and their rank within the bureaucracy or the hierarchy of public servants defined. Would you consider this to be a useful addition to Newfoundland legislation? That is, the issue could be not just for what term, for what length is your term, but what is your salary level fixed at? In the case of both federal commissions it's set in the legislation, so.

S. LONO:

Well, it's interesting to say that. I'm just looking at the legislation here now. It says, "The Commissioner shall be paid a salary fixed by the Lieutenant Governor in Council after consultation with the House of Assembly Management Commission."

I could see a provision that said that they would be treated at a deputy minister level, something like that. In theory, I guess we could see a privacy commissioner, something to be dropped to a dollar a year man or a dollar a year person. And that could certainly be like a serious theoretical problem. But it would also, I believe, be such an overwhelmingly political problem that you wouldn't see a government do that, except in the most extreme cases. To provide clarity, I think it would be very useful to resolve that issue in advance by saying okay, you'll be treated as a deputy minister equivalent. There is value to that. There is value to clarity.

J. STODDART:

Thank you.

C. WELLS:

Okay, Mr. Lono.

S. LONO:

In terms of general provisions, not dealing specifically with parts of legislation but just sort of general matters, one is time limits. You talked yesterday, I heard a lot of discussions about time limits and the 30-day limits and 60-day limits and those kinds of things. In practice, the way it's

really worked out is that if there is a 30-day limit then you're going to receive your information on the thirtieth day. If there is a 60-day limit, well you could be pretty sure that on the sixtieth day you're going to get an envelope on your desk.

C. WELLS:

Or worse still, there might be action seeking, on the sixtieth day action seeking an extension.

S. LONO:

Yes, that's just as bad. And that doesn't take into account the all too frequent cases where time limits breeze by and nothing happens. It just takes forever in some cases for things to happen. And you don't even get an explanation for it. I can think of a particular case where a freedom of information, I believe this actually went to the Privacy Commissioner. It was a request that went into the Department of Health, and this actually will play into my next point in a moment, the Minister of Health at the time decided that sure, this information shall be released but it shall be released the day of the House of Assembly closes, because it's inconvenient to me to release the document in advance of that. That's not an unusual

thing.

And that leads into the next point, and I don't know how you deal with time limits, I mean unless you want to start making it an offence to be late, or the other choice is what you mentioned yesterday which is to greatly shorten them, because if you're going to give them 30 days, it is going to take 30 days. If you give them 15 days, it will take 15 days. It will take the time that you permit them.

But the next point is the politicization of the FOI system. And I think that is really a critical point that in my experience has really become a problem. My understanding is, and I bow to your expertise on this matter, my understanding is that in the federal system, for example, the political staff don't have a hand in the FOI process. In Newfoundland that is standard operating procedure. It passes through political staff. Political staff give it thumbs up, thumbs down, and they get their opinion expressed on what should be covered, what should be included, what should be excluded, and when it's going to go out. Ministers do, too.

Freedom of information requests that go in, to my mind it should be, for example, a request that goes in to the Department of Health asking for information about particular health policy, it should be completely irrelevant whether that FOI comes from a patient, the parent of a patient, a patient organization, a pharmaceutical company, or from the health critic of the opposition. Regardless of the source of the freedom of information request, they should be treated the same. And right now, my experience has been that they're not. They could be treated very differently. In some cases, it's simply handled as a routine request - here's the information.

D. LETTO:

You effectively then have the politicians interpreting the law?

S. LONO:

Yes, you can. Or not interpreting the law but perhaps interpreting the application of the law and the timing of the law. And how do you get around that? Well, the part of the problem is we come from a pretty small province and after a while I'm sure that the people inside, you get to recognize styles

and those kind of things. I've talked to a few people about this and we've sort of been beating it around trying to find a solution and, really, the only solution that we could come up with was the idea of an ATIPPA coordination office where freedom of information requests go into a central office. That office then manages the process from there on your behalf. It removes all identifying marks so that when it actually goes to the public body responsible for responding, it does not know who it is going to. It does not know what organization you represent. It does not know what your name is. It does not know any of that. So as far as they're concerned, the most important thing is the request for the information itself, not who it is coming from. And there may be other solutions, I don't know. But certainly that's one that we kicked around and we came up with.

In review of public body decisions, in principal, like we looked at sort of three different kinds of information. There is information that's sort routinely released under the legislation. There is the information that cannot be released under

legislation. But then there is this peculiar third class of information which can be released or might not be released. It is really in the hands of the public body. One of those examples, for example, is frivolous and vexatious. If the public body decided this is a frivolous and vexatious, then that's the end of that. And I think that on principle, a public body should not be able to decide that on its own. That any decision that a public body makes to withhold information should be open to review. They don't get to say whether it is frivolous and vexatious on their own, without somebody else coming along and saying well, it is not really frivolous and vexatious, let it go. Or, yes, it is frivolous and vexatious, you're right, withhold, just progress no further. Ronald Reagan used to say about US army's negotiation with the USSR, "trust but verify". And I think that principle really applies here.

And the most stunning example to me about this is when the Department of Justice says all this stuff is solicitor-client privilege and it turns out that 80 percent of it is not, upon outside review. And I think that that outside review part, it provides,

there are so few checks and balances when it comes to releasing information anyway that we really should have established as a firm principle that every decision that gets made to withhold is subject to a check and balance by an outside party. And of course that outside party would probably have to be the Privacy Commissioner.

My last point is an operational suggestion for the Commission. One of the problems with the last Commission was how recommendations drifted from the time that the report came out to the time that the final legislation came through. And of course government always has the option of choosing and picking whatever it wishes to take out of your report.

What I would suggest, though, is that you a page from the report of Honorable Justice Derek Green. He did a substantial report called "Rebuilding Confidence: Report of the Review Commission on Constituency Allowances and Related Matters". And the really interesting thing that he did that was different from other commissions I have seen is that

he produced his recommendations in the form of a fully generated piece of legislation which government then took, which government accepted the report, accepted the legislation, took it, introduced it into the House. And I would suggest that your recommendations that you produce on the ATIPPA legislation, if not redraft the legislation to reflect your recommendations, then at a minimum that your recommendations be placed not just in prose form but actually in the form of fully formed legislative draft, legislative amendments that can be introduced in the House the way they are, without your recommendations having to go through a filter of other legislative drafters. Just do it yourself. And that way you can be sure that your intentions and your ideas are presented in the clearest most direct form possible, if you'd like.

C. WELLS:

I appreciate your comments, Mr. Lono. But you would know with the experience you've had with government that there is a division in the House of Assembly called "the legislative draftsman".

S. LONO:

Yes.

C. WELLS:

And the legislative draftsman's office contains experienced, knowledgeable draftsperson drafting legislation where words and phrases are consistent and they are kept consistent through a variety of statutes so that interpretation and expression is clear and there is a clear format and everything else. None of us are experienced legislative draftsperson. I suppose, we could engage somebody who was to try and cause it to conform. Do you think our Terms of Reference are broad enough to allow us to engage a legislative draftsperson to provide the necessary assistance? I'm a lawyer and I've drafted legislation, but I'm not a legislative draftsman with the expertise that they have in the department.

S. LONO:

Yes, I have learned over time that legislative drafting is definitely a particular skill. I don't think that your, and I'd have to double check that, but I don't think that your scope of work would preclude that possibility anymore than Justice Green's scope of work would have precluded him and he plowed ahead and did it regardless. I think that I recall back on the announcement that was made

announcing your Commission, the existence of your Commission, that the premier at the time said whatever you needed, whatever was required, let's get it done. And I think that those kinds of very positive political support that was provided at the time would certainly encompass the possibility of producing a legislative draft, if not in its entirety then certainly specific recommendations and specific amendments could be performed, could be produced in the form of specific legislative amendments.

You know what you want to do and you know what your recommendations, you don't know what they will be now but when you produce your report I mean you will have certainly a very clear idea of what you're looking to see occur. I'm not sure there is a better way of doing it than legislative drafts, particularly for this kind of technical issue.

C. WELLS:

Mr. Lono, thank you for your much for your interest in this and thank you for your presentation this morning.

S. LONO:

Thank you very much for your time.

C. WELLS:

The Committee appreciates it. Thank you. I think I'm getting a signal from the general manager of this operation that it's time to take the mid-morning break. So we will adjourn for 10 minutes. Or sorry, 15 minutes is the time.

(Off the Record)

C E R T I F I C A T E

I, Beverly Guest, of Elite Transcription, of Goulds in the Province of Newfoundland and Labrador, hereby certify that the foregoing, numbered 1 to 49, dated June 25, 2014, is a true and correct transcript of the proceedings which has been transcribed by me to the best of my knowledge, skill and ability.

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