ATIPPA STATUTORY REVIEW COMMITTEE 2020

Transcript Volume 1

Committee Chair: Honourable David B. Orsborn

Monday 18 January 2021

CHAIR ORSBORN: Good morning.

Welcome to the public consultation sessions of the 2020 statutory review of the *Access to Information and Protection of Privacy Act, 2015*.

My name is David Orsborn and I've been asked to act as a committee of one to conduct the five-year review required by section 117 of the act. It is my task to examine, as instructed by my terms of reference, public and public-body experience in using and administering the act.

The terms of reference include a number of other specific areas of examination, including a direction to consider and report on three specific recommendations of the Muskrat Falls inquiry chaired by Justice Richard LeBlanc. My report must be delivered to the Minister of Justice on or before March 31, 2021.

The current legislation is a product of the extensive review and study conducted in 2014 by a three-person committee chaired by the Honourable Clyde K. Wells, Q.C. Their work has been widely acclaimed as establishing a solid and principled foundation for the access to information and protection of privacy regime in Newfoundland and Labrador. That review confirmed that the public right of access to information is a high-order, quasi-constitutional right.

The report and section 3 of the act explain why this right exists: It is to ensure "that citizens have the information required to participate meaningfully in the democratic process;" and to increase "transparency in government and public bodies so that elected officials, officers and employees of public bodies" – and there are well over 400 public bodies in our province – "remain accountable."

Just as access to information is fundamental to our democratic system of governance, so, too, is the protection of personal information held by public bodies. While privacy protection, as noted by the Wells committee, does not generate the same level of public interest as access to information, it is an aspect of public body information management that will become increasingly important as more and more data comes into the electronic hands of public bodies.

There are three main components of the act. The first consists of the substantive provisions which confirm that public rights of access to information and personal information privacy and which set out various exceptions to these rights. The second is what I would call procedural: how those rights are to be exercised. The third main aspect of the act addresses the Office of the Information and Privacy Commissioner, the statutory office which is given the difficult task of overseeing the application of the act, advocating for access to information and the protection of privacy and, at the same time, providing independent review of decisions made by public bodies under the act.

I believe it is helpful to keep in mind the different nature of these aspects of the act when considering recommendations for change. This, then, is the context for this review.

The committee has a website: www.nlatippareview.ca. These public sessions will be live streamed on that website. With respect to the website set-up, please let me express my gratitude to Necie Mouland and Katie Murray both of Executive Council for their work in helping us design and populate the website. It is due to their efforts that, among many background pictures of puffins on the website, you can actually find a lovely shot of the Pinware River in Labrador.

Our ability to livestream these sessions and to accommodate video appearances is all made possible by the efforts of three folks from the Broadcast Services staff of the House of Assembly. My thanks to Cathy Simms, Calvin Tobin and Darren Churchill for their assistance to date and for their ongoing technical supervision during these sessions.

To date, the committee has received 46 written submissions. These submissions are posted on the committee website. In addition, and similar to the process followed by the Wells committee, I have received input on an anonymous basis from a number of ATIPP coordinators, the public servants tasked with the day-to-day administration of the act. I have held five in-person or Skype group sessions with the coordinators and have received 39 responses to written survey questions. These responses, with

any identifying information redacted, will be included as an appendix to my final report.

The present sessions, which are open to the public, will be a combination of in-person and virtual presentations and will respect all necessary COVID protocols. The Office of the Information and Privacy Commissioner and a number of public bodies, private individuals and interested groups are scheduled to make submissions. After those – what I would call – general submissions, I will ask the Office of the Information and Privacy Commissioner for any concluding response or comments.

There are two particular areas which have generated a lot of comment: the act's provisions related to access to information in the context of workplace investigations, section 33; and those relating to the protection of third party commercial interests, section 39. I thought it would be helpful, to me at least, to hear views on these issues in separate, focused round-table type discussions.

The Section 33 session is scheduled for Wednesday, January 27 and the 39 session for January 28. Accordingly, I ask where a presenter is intending to participate in either or both of these sessions, they delay making their submission on the section 33 and section 39 issues until that particular session. I appreciate that there is some degree of overlap with other sections, particularly section 19, so I will leave it to each presenter to decide at what point they wish to make submissions on any related sections.

We all know of course that an election has just been called. There is an unwritten constitutional convention, the caretaker convention, that places constraints on an incumbent government with respect to its continued participation in ongoing public consultation or engagement sessions. I have been advised by the deputy minister of Justice that during this caretaker period, from now until the formation of a new government, government public body representatives will not be able to make presentations. This circumstance makes it necessary to consider its effect on the committee process and schedule.

I do not consider it either fair to other presenters or necessary to simply adjourn the committee until the new government is in place. But I also consider it fair and necessary for my own consideration to ensure that a new government has the opportunity to consider its positions and to present and explain them in a public setting. Accordingly, what I'm going to do is proceed with all presentations, including the round tables, as presently scheduled, with the exception of the presentations of the ATIPP office, the Department of Justice on behalf of the Executive Council and government departments and the response of the Office of the Information and Privacy Commissioner.

As soon as possible, following the formation of a new government, I will schedule presentations from government. These presentations will include any submissions on the round-table issues. The Office of the Information and Privacy Commissioner will then be given the opportunity to provide its public response to all presentations.

Whether I will need to seek an extension beyond March 31 is a matter for later consideration. The hearing schedule allots a specific time for each submission. I have reviewed all the submissions and I believe that the time allotted should be more than sufficient for a summary of the main points of each and for discussion of any questions I may have.

These sessions are intended to provide a forum for the public expression of the views of each presenter. It is not an adjudicative forum, nor one for the airing of individual disputes or grievances. The act is a high-level public interest act intended in its access provisions to protect and advance the interest of the public as a whole in transparent, accountable and excellent governance. I would ask that your submissions reflect the objectives of the act. All submissions made, whether in writing or verbally, will be carefully considered as I later work through the issues raised by the terms of reference.

I do consider this review to be a collaborative effort, so during my consideration I will consult further, if and as I feel it necessary, to fully appreciate the concerns and positions put to me. My considerations will be informed both by the experience of the last five years and by what may reasonably be anticipated as technology advances and as changes to program delivery

challenge our ability to properly protect personal information and privacy.

Let me say at the outset that in the context of this review of the act, change simply for the sake of change does not commend itself to me. Where the 2014 review considered various opinions on a substantive issue and reached a reasoned conclusion, any adjustment to that substantive conclusion should, in my view, be contemplated only where material change in circumstances or environment or other compelling reason requires a reconsideration.

On matters of procedure, five years of experience and increased usage can be an invaluable teacher. Where that experience suggests that the on-the-ground daily process of realizing acts of substantive rights could be improved, such suggestions should be seriously considered.

To all who have and will contribute to this process, my thanks for your commitment to access to information and the protection of privacy, and for your thoughtful and considered submissions. While there will be differences of opinion on some issues, it has become quite clear to me that overall there is a common commitment to the act and its principles. That is a tribute to you all.

After that long introduction, which is only for the first day, I will in a moment ask the Commissioner to speak to these submissions of his office. Just before he starts, let me just refer to one paragraph of his letter accompanying his submissions. The letter says: In the development of the submission, we endeavoured to be thorough, fully presenting our rationale and substantiating it with references to sources wherever we could. The letter continues: The consequence is that we have surprised even ourselves with the length of the submission and the number of recommendations. I would note that the length of the submission is some 108 pages and it offers 56 recommendations.

The Commissioner continues: I have every faith that you will accept this submission in the spirit of constructive engagement in which it is offered. I referred earlier to a collaborative effort and, Mr. Commissioner, I can assure you that I have accepted your submission in that spirit.

Thank you. The floor is yours.

MR. HARVEY: Thank you for that introduction, Sir.

My name is Michael Harvey. I am the Information and Privacy Commissioner for Newfoundland and Labrador. I am joined here today with Mr. Sean Murray, who is the director of research and quality assurance in the Office of the Information and Privacy Commissioner.

I was appointed to this position in August of 2019. Sean has been with the OIPC for 15 years and really is the institutional memory of the office, and knows as much about information and privacy as I would say anybody in the province. I'm delighted and comforted to have him here with me today to support me in this presentation.

We will take a team approach to presenting to you today, in both delivering these remarks and also answering questions that you may have. I would say, Chair Orsborn, please feel free to interrupt me throughout, at any time. I'll pause from time to time, but even if I don't, jump right in.

I should also make a remark about the context that we find ourselves in, as an election was called on Friday. As an independent statutory officer of the House of Assembly, I'm not bound by the caretaker convention, as are officials in the Executive Branch of government. My appointment, even though it was by the House of Assembly, survives the dissolution of the House and I am independent in my operation from the House of Assembly.

That said, that independence goes hand in hand with impartiality and non-partisanship, both in actual practice but also in appearance. I must emphasize that I offer these comments today – first of all, primarily the comments I'm going to make are going to focus on the written submission that my office made prior to the call of the election. With that said, I wish that these oral comments be understood by yourself and by anybody who is watching, the public, to be understood to be offered in a non-partisan fashion.

I do note that when these submissions were a subject of some discussion in the media a couple of weeks ago, the Premier's office did note – through the media so I'm paraphrasing this – that these submissions were not coordinated by the Premier's office. I take that to mean do not necessarily reflect the political direction of the government as a whole. I feel some comfort in it in being able to comment upon them and have that commentary not be interpreted as being commentary on political direction and therefore not being interpreted as some sort of partisan commentary.

That said, I would say that my comments today are primarily going to focus on the written submission and summarize – as you had asked – the written submission that I had made in November. I will make, however, some introductory comments about the other submissions that have been made by other public bodies.

First, I will say that our current Access to Information and Protection of Privacy Act – commonly referred to as ATIPPA 2015 or sometimes more casually as ATIPPA – has been recognized nationally and internationally for its balance between the important rights set out in the act with the necessary exceptions to those rights. My highest priority is to see the current provisions of the access part of ATIPPA largely continue as they are. My office is dedicated to oversight of this statute and I believe there are only a few necessary changes to this part of ATIPPA.

Aside from that, I'm also proposing some modest steps forward in the privacy protections in the statute to keep pace with technological developments as public bodies begin to explore such things as the collection of more biometric data and the use of artificial intelligence. That said, while that will be my focus today, I will make a couple of comments about the other submissions because I think they help contextualize the nature of our comments and really why I have emphasized what I emphasize.

I have two sets of concerns about the other submissions. First, there are certain recommendations made by public bodies that seek to return to what you might characterize as the Bill 29 version of ATIPPA, and in doing so, restrict the right of access from where it is in the current statute. Examples that stand out most clearly are the recommendations by the Department of Justice and Public Safety to remove the ability of the Commissioner, with the context of an investigation, to compel the production of documents over which public bodies purport solicitor-client privilege. This ability, removed from the Commissioner in Bill 29, was restored by ATIPPA 2015 after considerable controversy and ultimately explicit recommendations from that committee chaired by Mr. Wells.

My office's ability to review these documents is not, as some would suggest, a piercing of the solicitor-client privilege, but rather an ability for us to provide our oversight role to ensure that the exception is being properly applied. There are examples from our past of the exception not being properly applied. The alternative proposed by the Department of Justice would provide applicants with only recourse to the courts, a more expensive and time-consuming process a few will use if they suspect that a public body may be over broad in their application of the privilege. This limitation of OIPC oversight is a clear reduction in the right of access.

The other example –

CHAIR ORSBORN: Are you going to return to that later or …?

MR. HARVEY: Yes, I will.

CHAIR ORSBORN: All right.

MR. HARVEY: Yes.

The other example of a policy-oriented reduction in the right of access reflected in the recommendations, which I won't discuss in any detail today because it will come up in the round tables, is our recommendations related to the three-part test for third-party business information.

These recommendations, if implemented, would move our statute from being on par with other jurisdictions in the country in both the protection of truly proprietary business information, but also the transparency in information that the public should have the right to know. So these

recommendations will move it from that standard to one that is less than that. We don't believe that is a necessary recommendation, and that as well would be a reduction in the right of access.

Those are two examples of more policy-oriented recommendations to a reduction in the right of access. Many other recommendations by public bodies would also reduce the right of access, but they appear to be motivated by the challenges that departments – largely government departments, but also public bodies – face in responding to the volume of access requests. So these proposals, such as a reintroduction of a nominal fee, lengthening statutory timelines and the ability of public bodies to give themselves extensions are, again, in many respects, proposals to return to the Bill 29 version of ATIPPA.

We do not, in any way, dismiss the hard work that comes with the administration of ATIPPA but we believe it is hard and necessary work. The correct response, in our view, to the challenges of this work is not to reduce the right of access, which is what these proposals would do, but to examine whether the function is appropriately resourced and whether there are any administrative processes that can be improved to increased efficiency.

What I wish to warn the committee about is that there is, to a certain extent, a self-selection bias in the structure of the engagement. I don't mean to be critical here. I don't have an alternative engagement strategy to offer. I think that the structure of your –

CHAIR ORSBORN: Just explain that to me again: self-selection bias in …

MR. HARVEY: In seeking submissions from public bodies, the people that would draft those submissions are the ATIPP coordinators, primarily, themselves and they would draft them from the perspectives in which they are working. Of course, I think it's only natural that the first things that they would comment on are the things that might make their lives difficult: the timelines, the pressure that they get from stakeholders, the volume of complaints and some complaints that they feel are nuisance complaints. I think that is, in many respects, the starting point for many of these submissions.

CHAIR ORSBORN: Do you consider that a legitimate perspective?

MR. HARVEY: I do. I consider these to be legitimate perspectives.

My concern, however, particularly, at this juncture, is that a bottom-up process – and having worked in multiple government departments over 15 years, I have a certain perspective on how these things get drafted. In particular, it's been a very busy time over the – and I will admit I'm speculating here – last number of months for many reasons, but I think such a process would normally call for coordination to get that policy imperative.

The ATIPP coordinators, they remain largely the same relatively junior group of officials that Mr. Wells and his colleagues on the committee observed in 2014. He did make recommendations that that group should be a more senior group of people and more independent in their operations, but, in large part, they remain the same group of people that he observed at that time. Of course, the people are different, but the same status within departments. I think those junior officials are likely the ones who wrote these submissions. Even though many of these submissions are signed by ministers and deputy ministers – those which were signed – they do appear to be written from that perspective. But I think there's a missing voice or a missing perspective, that higher-level policy coordination appears missing in these submissions.

The submissions focus on grievances and inconveniences, logistical problems. Again, these are legitimate perspectives, but what we don't see in these submissions – and what I've tried to offer in our submission but we don't see in the submissions of many, if not almost all other public bodies – is really a consideration of what is the purpose of the act and to what extent is that act achieving that purpose. If that purpose is the protection of the quasi-constitutional rights that you spoke of, to access and privacy, how is that mandate being advanced?

There are very few recommendations from other public bodies that seek to find ways to actually improve the protection of those rights. I see the other recommendations as primarily to focus on improving the effectiveness of the operation of the act in the interests of the public bodies and, in particular, government departments. Again, I don't mean to dismiss the concerns that have been raised, but I think there's a silent voice there.

I think the other voice that you're not hearing as loudly – although there have been some individuals that have submitted – is the voice of the public. Again, I don't think this is a deficit of your engagement. I think it would be a tall order to expect members of the public to engage in a review like this, but I think their silence also says something. I think the silence could be interpreted as a lack of interest, but I think it is more properly interpreted as a satisfaction. I think people are by and large satisfied with the operation of our act, because we certainly knew, back when Mr. Wells and that committee were doing their work, that the public was very much not satisfied.

I think so long as they're satisfied, we tend not to hear from them, but once their rights are abdicated or removed, we will hear from them and we'll hear from them, I think, quite loudly. I think we know what they'll say because we heard those voices back in 2014 when the Bill 29 amendments were so controversial and we went through a period between 2012 and 2015 of a reduced period of accountability.

I would just respectfully ask that you consider that while you're hearing certain voices, there are other voices that are likely – and, again, I will admit that I'm speculating here – to be quieter, but I think we can imagine what they would say.

We feel that we have a legislative mandate to speak on their behalf and so this is the spirit in which many of our recommendations are offered. Recommendations which, in our view, seek to improve the functioning of the act, yes, but also enhance rights of access, rights of privacy and also cognizant that this needs to operate in a way that our government can operate in an effective and democratically accountable way.

Do you have any comment before I proceed further?

CHAIR ORSBORN: I'm not sure what you're going to come back to and what you're not going to come back to. One of the comments you made there about advocating for the voices that are not chosen, not going to say very much. This comes up in some of these submissions. Do you find any conflict or trouble in the roles between advocating and the next day you're asked to adjudicate an issue?

MR. HARVEY: I don't think that I've found a significant difficulty in that. There is, from time to time, a difficulty in advising public bodies and being able to know when to stop advising them about a program that they may be seeking to implement. Knowing that if they go ahead and implement that program based on our advice and then there's a complaint about that program, I need to be able to adjudicate that, so keeping myself out of that prejudiced situation.

In terms of the conflict between the advocacy role and the adjudicative role, I think that is one of the real values of the hybrid model that the ATIPPA 2015 created for this office, because we don't have quite order-making power and so we're not a quasi-judicial body as some of our colleagues are. But at the same time, there is a certain ability to have our recommendations on certain topics transformed into orders.

Even though we have not done that, we've not actually transformed any – I believe I'm correct in saying so, we've not actually had to take the step of transforming any of recommendations into orders, the fact that we can do that and certain other aspects about how a matter will proceed to appeal, provides a greater incentive for public bodies to comply with our recommendations. We found that to be very helpful. When we compare our performance to other provinces, that works very well. As not a quasi-judicial body, we find that we're quite effective in being able to serve that advocacy role. I have not found, during my term, that there has been a conflict in that regard.

I would say that the advocacy role that I play, personally I view that as somewhat different than if I was a pure advocate in the community sector for a subject. I do, in how I function,

again try to be non-partisan. That is, I think, my starting point. I think I've achieved that. I have no partisan intent and no partisan connections and I try to offer my commentary on policy related to information and access in a manner that is calm and reasoned. That's how I try to walk the line. I'm not sure if that answers your question.

MR. MURRAY: (Inaudible.)

MR. HARVEY: Certainly.

MR. MURRAY: I just wanted to add, as well, every Commissioner's office in Canada acts as an advocate, to some extent, for the rights of access to information and protection of privacy broadly speaking. They're not operating in an advocacy role when it comes to a specific complaint investigation or a specific privacy investigation or anything like that. In that part of the function of a Commissioner's office, the Commissioner is looking at the statute that we go by, the words in the statute, the case law that exists and the facts involved in the investigation.

When it comes to being an advocate for access and privacy, I think that's very much the big picture of being an advocate for the act: to ensure people are aware of their rights, to be an advocate when it comes to novel privacy issues that are being discussed in public discourse and things like that, but not in relation to how we interpret the act in an investigation.

CHAIR ORSBORN: You would appreciate, though, the point of view of someone who is being adjudicated and that they would be concerned about the perception that it places a pretty heavy burden on you, I would think, to be scrupulously fair in the adjudicative role.

MR. HARVEY: Yeah, I appreciate that, and –

CHAIR ORSBORN: It's a perception issue.

MR. HARVEY: Yes, and so it's a line I think we walk every day.

CHAIR ORSBORN: Yes.

MR. HARVEY: In our offices, as we debate these issues, one thing that we often say to ourselves is: We have to be correct. So we'll find ourselves often wrestling issues right down to the ground and debating them quite extensively because we do feel the burden that we must be correct and we must be fair. That's how we try to walk that line in our operations.

CHAIR ORSBORN: On the order making issue, I guess the one exception to that would be your ability to order the production of documents?

MR. HARVEY: I guess order in a – when I think about order I think about that in a separate way, as opposed to a court order. But, yes, the powers of – the Commissioner has the powers –

CHAIR ORSBORN: You take compelled production of documents –

MR. HARVEY: I can.

CHAIR ORSBORN: Yeah.

MR. HARVEY: Yeah, that I have the same powers as the Commissioner on the Public Inquiries Act. Yes, that's correct.

You mentioned that you weren't sure what I'm going to come back to. I will get now into talking in more detail about our recommendations and, as you said in your introduction, there are 56 of them, so I won't discuss each one of them in any detail and –

CHAIR ORSBORN: Yeah, a lot of them are administrative. I have some questions on the administrative ones and then if we don't get to them now we can get to it –

MR. HARVEY: Certainly.

CHAIR ORSBORN: – when you come back for a response.

MR. HARVEY: I'll start out by talking about, I guess, the most substantive ones and then I'll proceed through. The one that I will talk first about is the solicitor-client privilege matter, then duty to document and then I will skip – in our written submission it is the third subject we deal with, but I'll skip it because of the round-table workplace investigations matter.

There are a number of recommendations that we make with respect to improving the privacy section of our act. Most of them are bringing the act in line with the *Personal Health Information Act*, but there are some others as well. I'll talk, then, in more detail about proposals related to biometric data and artificial intelligence and then we'll get into, I guess, increasingly more administrative matters, some of which are, I think, important to comment on and others which we can kind of move over, except if you have any questions.

CHAIR ORSBORN: Not contentious, I would think. A lot of the things you mention I would not think would be terribly contentious.

MR. HARVEY: So the first one, and perhaps one of the more contentious ones, is the first recommendation. We have only one recommendation on this related to solicitor-client privilege and that is to amend the act to add a language similar to that found in the federal *Access to Information Act* to make it abundantly and undeniably clear that the Commissioner has the right to compel the production of documents over which a public body purports solicitor-client privilege in the context of an investigation.

CHAIR ORSBORN: That was the conclusion reached by the Wells committee, I think, wasn't it?

MR. HARVEY: It was.

We have found ourselves – first I'll say, the most important part of our mandate is expressed in section 3(2)(f) to ensure that citizens have the information required to participate in democratic processes, increasing transparency to hold elected officials and government employees accountable. We provide independent review of decisions by public bodies with regard to access and privacy.

We found ourselves – the saga has been an unusual one and at times bizarre. We have, on multiple occasions, on two occasions we've had the ability to compel the production of those records, but then we've had it taken away and then restored again. Now, we find ourselves in a situation where we're facing challenges in the courts by the Department of Justice and Public Safety based on a decision by the Supreme Court of Canada, which I'll refer to as the University of Calgary.

In that decision, the court found that language in Alberta's *Freedom of Information and Protection of Privacy Act*, was not sufficiently clear to give the Commissioner the authority to review claims of solicitor-client privilege because it did not explicitly refer to solicitor-client privilege. But the 2014 statutory review report thoroughly reviewed the existing case and the policy rationale for the Commissioner to retain the authority to review claims of solicitor-client privilege and determined that this authority must be restored to the Commissioner. Previously, and under Bill 29, it had been stripped.

CHAIR ORSBORN: My understanding is that the interpretation of the present act is presently before the court, I think. Am I right on that?

MR. HARVEY: Yes.

CHAIR ORSBORN: And they want to argue that the University of Calgary has changed the water on the beans, so to speak. I guess from my point of view, I am more interested in the policy aspect of it, as you would say. I don't think it's my role here to interpret the legislation in the light of the University of Calgary case, or to suggest what the Court of Appeal may or may not do.

One question that occurs to me arising out of the University of Calgary case, and also Justice Harrington's decision back in 2011, I think it was, talked about the mechanics of the OIPC's review of documents which are alleged to be or said to be privileged. As I read the University of Calgary case, and it's mentioned particularly by Justice Cromwell, he acknowledges, from his point of view, that, yes, the Alberta Commissioner has the ability to review it, but the full documents should only be produced for review only when the commission concludes that it is absolutely necessary in order to make a determination whether the privilege applies.

I understand in years back that it was the practice of your office to accept affidavit support and descriptions of documents, sort of short of full production of the documents.

Is it your position that the Commissioner should have the untrammelled ability to order production of the documents complete, in and of themselves?

MR. HARVEY: I'll make an introductory comment, then I'll ask Shawn if he wants to add anything.

My answer to that question is, to a certain extent, yes and no.

CHAIR ORSBORN: What do I put in my report?

MR. HARVEY: The way that the act is structured it requires the public body to – or puts the onus, the burden of proof on the public body. The public body must discharge the burden of proof to demonstrate that the exception is valid. That said, we do commonly accept description and affidavits in lieu of the actual solicitor-client documents.

Since 2015, there have been dozens of cases – dozens – in which public bodies have provided us the records for our solicitor-client – records over which they purport solicitor-client privilege for our review. There have been many other instances in which we have accepted affidavits or sometimes a simple description of the records.

The key difference here is it must be at the office's discretion to determine if, to our satisfaction, the public body has satisfied its burden of proof.

CHAIR ORSBORN: In exercising that discretion, though, and again, I'm going back to the University of Calgary case, would you exercise your discretion to require production only where you considered absolutely necessary for determination of the privilege issue?

MR. HARVEY: So normally speaking, we ask for a public body to provide all of the records for review and we don't distinguish records over which solicitor-client privilege is purported from records over which other exceptions are purported. We ask them for all the records. If a public body comes back and expresses some concern about providing us with those records, then, in that instance, we would then engage them in discussion about other alternative ways in which they may wish to satisfy their burden of proof. In almost every instance, this is a very smooth process. There have been very few instances in which there have been protracted discussions on that basis.

Sean, do you want to elaborate?

CHAIR ORSBORN: Yes, a question again: Would you accept this as a matter of principle and perhaps law that you should only require production of the documents themselves when it is absolutely necessary for you to do so, to determine the matter of privilege?

MR. HARVEY: I'd say that it would turn on the word require. So if at the conclusion of those discussions we, because of the position of the public body or because of what they've offered us, and our review on whether or not this description or affidavit does indeed satisfy the burden of proof, at that point, we would consider the question of: Is it required that we would insist that on production? So if that is your meaning, then I would say yes.

CHAIR ORSBORN: Required absolutely necessary probably means the same.

MR. HARVEY: In the face of a public body insisting that they do not want to provide those records –

CHAIR ORSBORN: That's a different issue. It would strike me, assuming for the sake of argument that one follows the intention and interpretation of the Wells committee, let's assume for the sake of argument that solicitor-client documents are to be reviewed or to be produced to you, my understanding from the Calgary case is there is somewhat of a caveat to that, that yes there's a requirement to produce them to you but they should only be produced in their fullness when it is absolutely necessary to do so.

You get to absolutely necessary after having reviewed affidavits, listings, descriptions, something of that nature, but in the first instance there would be an obligation on the public body to give you sufficient, non-production of the documents with sufficient evidence for you to

make a rationale decision as to whether or not those documents are privileged.

If, in your review, that is not sufficient to sustain the argument, then it would then become absolutely necessary for you to review the documentation to determine privilege, but one would think, and my sense in reading the authorities, that would be maybe one case in a thousand.

MR. MURRAY: Can I maybe make a few comments here?

In terms of what is absolutely necessary, I think it's essential that we consider the statutory context and the purpose of the statute within which we're working. If you look at the Wells review, really the theme that came out of that was that we have to have a review process that is a speedy, efficient first-level review. They introduced a time frame of 65 business days for us to complete our review and issue a report. Almost half of that can be taken up with informal resolution. The first 10 business days are often taken up with just getting the records and response from the public body, so we have a very limited amount of time within which to operate.

If you're looking at the Commissioner's office in Alberta, which has order-making power, where there's a process of exchange – a very formalized review process, there's a process of exchange of submissions and things of that nature – also, for example, in a courtroom context, there are no time limits to these things; they can go on for months and months and years.

That was one of the things that the Wells committee realized was really wrong with the ATIPPA and that's one of the things that ATIPPA, 2015, offers that no other statute offers: We truly have this efficient first-level review of access-to-information decisions. There's nothing comparable anywhere in the world that I'm aware of, in terms of the timeliness within which we can operate.

When you're talking about introducing a process whereby we may be obligated to review affidavits and descriptions and go back and forth on that and ask them questions about it and try to figure that out, if we are going to accomplish the purpose of the act as it exists now, which is to be this speedy first-level review and to do everything within 65 business days, I think that is really going to potentially hamstring us.

One of the reasons we don't come out of the gate and say, well, can you please give us an affidavit first off and we will try that is, sometimes we get a complaint from an access-to-information applicant; we don't necessarily know what exceptions have been claimed. We might. They might tell us that; they might give us a copy of the letter they got from the public body or they might not. The public body may change their mind. Sometimes, once they come to us, they might drop one of the exceptions that they claimed first time around, or try to add a new one or something like that.

When we first get the complaint and we send out our standard letter saying please give us all of the records, we don't necessarily know what's involved at that point. There's not a lot of time built in to the statute for going back and forth and figuring all of that stuff out and the letters back and forth.

The philosophy behind ATIPPA, 2015, in terms of the review of access to information decisions is, the Commissioner's office is competent, they have experienced professionals there, let's get the records to them right away, let them try to resolve it informally or, if not, we'll get a Commissioner's report out within 65 business days and if people are not happy, they can go to court.

That's the process and I think if we introduce some sort of intermediate process within that where we have this sort of protracted back and forth – because our experience with descriptions and affidavits is sometimes they're sufficient and sometimes they're not. Sometimes public bodies don't want to do them; a lot of public bodies do not have legal counsel at hand to draft them. The Town of Buchans is not going to bring in a lawyer to draft an affidavit for them on this. They don't have the budget for those kinds of things. There are a lot of practical considerations involved here.

One of the important things for access to information is informal resolution. When you

look at all of the jurisprudence on this issue about whether Commissioners have this authority or not, or should or shouldn't have it, they are all looking at the statute in isolation and they're not considering the practicalities of how this should work in order to support the right of access that is granted in the statute.

We're not like a court, because one of the main things we do is we resolve these things informally. We can see the records that have been withheld, so we can go to the public body and say: Look, can you explain how this paragraph is privileged, or whatever other exception they're claiming. If they presented a legitimate argument, we can go back to the applicant and say: Do you know what? We're independent; we're not a part of government. We're independent from government and we've reviewed this paragraph and we can confirm for you and for your satisfaction that this is privileged. They have correctly withheld this and maybe this other paragraph over here we're going to recommend that they release that and we get the public body to agree to that because they haven't established their burden.

That's how we turn these things around in days rather than weeks, or months or years, because that's where we were before, we were into months and years. That's where every other Commissioner's office in Canada struggles with these timelines. We've got a great system here. If we build in a process that puts this intermediate step in, which is going to end up with us going back and forth between public bodies who may not be able to pull off this affidavit or description obligation, I think we're going to hamstring informal resolution, so we're going to slow down access to information. We're going to see more formal reports because we're not going to be able to resolve these things in time.

MR. HARVEY: Sir, I would say that the matter of solicitor-client privilege over the last five years has not been a practical problem. Notwithstanding that there's controversy about it and that we are before the courts, it has not been a practical problem. There have been a very small number of cases in which this has been a subject of controversy. There's one now before the courts, another one dealing with the City of Corner Brook, but more common experience is one that I experienced when reviewing a draft report about a town. There was a record in question that was solicitor-client protected, it was a legal opinion, and so I asked the analyst: Okay, have you reviewed this record? He said, no, I didn't have to, it was clearly – they told me it was a legal opinion. I had no reason to believe that it wasn't and so I didn't even ask for it, and the investigation moved on. I think that's the more normal state of affairs.

It is not like we often find ourselves at loggerheads with public bodies about the production of these documents. They either provide them or they say they don't want to provide them and then there's some discussion about them, but only in a very small number of instances have we found ourselves in some kind of conflict.

I would note that notwithstanding that the Department of Justice declined, in the cases before the court, to provide those records or – and also declined, I should add, to provide us with the description of the records or an affidavit or even to engage us in discussion about those things that other government departments had been providing us with records over which they purported solicitor-client records over the past five years on a regular basis. It's really only now that the matter has gone to court that the department has changed their approach on this matter.

So to a certain extent this is – I wouldn't say a tempest in a teacup, but this is a debate on principle. I don't mean to undermine or to suggest that it's not a very important principle, but as a matter of practice over the past five years, the informal resolution including over records, which solicitor-client privilege is purported, has operated quite smoothly.

CHAIR ORSBORN: I don't know if I'm misinterpreting what Mr. Murray was saying, but accepting the importance of the principle – and pretty clear it's a fundamental principle – are you suggesting that the principle should be sacrificed on the altar of expediency?

MR. HARVEY: I don't think that what we do is a sacrifice of the principle, because I don't believe that what we do has pierced this.

CHAIR ORSBORN: But I'm thinking in terms of timeliness, efficiency.

MR. HARVEY: Right. I think that the policy imperative is that we resolve these matters expediently where we can. I think what we offer is doing that in a way that protects, to the greatest extent possible, the privilege. I don't believe that what we do is piercing.

CHAIR ORSBORN: Yes, fair enough.

Can one build a process like that into the legislation or does one simply operate, as Justice Harrington said, on trust?

MR. MURRAY: If we receive a complaint and we forward that to the public body and the public body says, well, some of the records are solicitor-client privilege. There's nothing wrong with the public body providing us with the records, except those that are solicitor-client privilege and providing an affidavit at first instance at that point. If that's satisfactory to us and it doesn't impede informal resolution, there's no reason why that can't work.

CHAIR ORSBORN: Fair enough. But does one then build that into the legislation or as a matter of practice?

MR. MURRAY: As a matter of practice, that can already occur. But if we find that the affidavit is not sufficient and we make an effort to sort of clarify things, fairly soon in the process in order to respect the purpose of the act and the timelines in the act, which are very important, we would have to move on and obtain the records if we really can't discharge our role.

CHAIR ORSBORN: Yes, fair enough because, in that case, it would, at least in your assessment, be absolutely necessary for you to review the documents in order to determine whether they're privileged or not.

MR. MURRAY: Right.

MR. HARVEY: I would suggest that if the government was to build a process into the act, then that would become a process that would be followed in every instance, as opposed to the current status, which I would argue is working quite well. We have an excellent track record, which is largely based on the trust and the track record of this office. This is one of these situations where it's not actually broken and there's no need to fix it.

CHAIR ORSBORN: It's not really ideal to start building administrative-trust practices into legislation anyway, I would think.

MR. HARVEY: That's, I think, our view. That said – and our proposal for a recommendation is only to make that abundantly clear. Well, again, our current position is the act is very clear, but there is an additional element of clarity that the federal government brought in when faced with this question and we believe that is an option that the government should consider.

That would be my answer to your question, then, that if we built an administrative process into the act then that administrative process would be one that would be followed in every instance and will slow down the process.

So I believe that's what we wanted to talk about with respect to solicitor-client privilege. If you are comfortable doing so, we'll move on to our next topic, which is the duty to document.

CHAIR ORSBORN: Yeah, I'm not sure that's included in my terms of reference, as such, and it wasn't one of the Muskrat Falls recommendations I looked at. I know it was in the Wells committee recommendations and I'm quite prepared to talk about it, but I have to think about whether it comes four-square in my terms of reference.

MR. HARVEY: Okay, now perhaps we misinterpreted it, because our understanding was that it was one of the Muskrat Falls recommendations that were put within your mandate, but did we misinterpret that?

CHAIR ORSBORN: I was asked to look at 3, 4 and 16; 16 deals with commissions of inquiry in the *Public Inquiries Act, 2006*; 3 is Nalcor; and 4 is Nalcor withholding stuff from the Premier. So if you want to leave it and come back to it later on, if you find it there somewhere. It wasn't my sense that it was included in the terms of reference.

MR. HARVEY: Okay, that may have been an error on our part, if we essentially looked at the wrong number.

CHAIR ORSBORN: That's fine. It may become important anyways, for example, as part of your recommendations on AI, in terms of documentation of that to create a paper trail that can be checked.

MR. HARVEY: Right, and we do recommend, as part of our AI recommendations, kind of a special duty to document there.

CHAIR ORSBORN: Yeah, right, yeah.

MR. HARVEY: In our view, the duty to document, though, is something that walks hand in hand with ATIPPA. Can there be really an adequate right of access unless there is a statutory requirement to establish records over which the public would have access to? But I'll accept your request and come back to that if required.

So I'll move, then, on to the recommendations that improve privacy protection. These are recommendations 4.1 through 4.6, the six recommendations that we make there. These are to require public bodies to develop information policies and procedures and make them public; to require a notice of affirmation or confidentiality from public body staff that come into contact with personal information; to add the definition of consent; to provide whistle-blower protection; to define the use of personal information; and to allow perspective privacy complaints.

The first among these would be a legislative requirement to have all public bodies implement information policies and procedure. This is similar to the requirement under section 13 in the *Personal Health Information Act*, as I'll refer to as PHIA. We believe that this requirement would go a long way to codifying the requirement to take reasonable steps to protect information held by a public body. Written policies and procedures help public bodies clearly communicate best practices to their staff to help prevent breaches of privacy. Furthermore, with legislatively defined expectations, we believe that compliance issues are likely to be fewer. Keeping the public informed of the policies and procedures of the public body would build confidence in the security of personal information in the custody and control of public bodies.

A requirement similar to that in section 19 of PHIA for public bodies to make available a general description of the public body's information policies and procedures and to provide contact information to ask questions and obtain information about how to make a complaint would achieve this goal. The OIPC has already developed a resource for public bodies about how to establish appropriate privacy policies as part of our step-by-step privacy management program guidance.

In short, this is best practice. The supports are already available. Public bodies should be doing this already and codifying it in a manner consistent with the ATIPPA sister legislation would just be the next step in further protecting privacy rights and bringing the privacy protection by our public bodies to a greater sense of maturity.

The next recommendation in this section has to do with oaths or affirmations of confidentiality. This would involve the signing of an oath or affirmation of confidentiality by all staff who have contact with personal information. We believe that this would raise awareness among employees and hopefully improve information handling. This obligation could be extended to contractors of the public bodies who may also have access to personal information. The notion of oaths is certainly not uncommon to public employees and this would be an awareness-generating recommendation.

CHAIR ORSBORN: I should know this, but I don't: Is that practice in the health care authorities?

MR. HARVEY: Is it? I –

MR. MURRAY: (Inaudible.)

MR. HARVEY: The oath of confidentiality?

MR. MURRAY: Yes, it is.

MR. HARVEY: Yeah.

MR. MURRAY: It's also a requirement in the *Personal Health Information Act* so any custodian –

CHAIR ORSBORN: And a health care authority would cover 80 per cent of the –

MR. MURRAY: Yeah, so they do have to obtain hundreds, thousands of oaths of confidentiality and best practice there, some of them do try to renew them after five years. A lot of it is done on intake now.

Once there was a big job of going out and getting all of the oaths of confidentiality signed at the outset when PHIA first came in. Now, they've built it into an intake process for when they hire new staff. It's a part of the, sort of, introductory training.

CHAIR ORSBORN: How would you determine if someone has access to personal information? Just take an existing department – I lose track of the names now – but say the Department of Industry, Energy and Technology. I don't know how many employees they have, but how would you determine who has access to personal information and who doesn't?

MR. HARVEY: Well, generally speaking, the departments would know. My experience working with the Department of Health, it wasn't a difficult task. There wasn't actually that many of us who had access to personal information in that department and certainly those of us who did were aware of it.

Now, here I'm thinking personal health information, but personal information more broadly, that would be more common. I would expect that in many departments anyone who is client facing would be handling personal information.

I think likely what you would expect in many departments, it would be worked into an existing oath because so many of them would.

CHAIR ORSBORN: Okay.

MR. HARVEY: Our next recommendation is about a definition of consent. The term consent is not defined in ATIPPA; however, it is defined in PHIA, section 23. We believe that it would be appropriate to include a definition of consent in ATIPPA. However, our recommendation is that any definition of consent considered for ATIPPA should be limited to circumstances involving the collection, use and disclosure of personal information, as opposed to the access part of the act. Here we're just talking about the privacy part of the act.

Our next recommendation has to do with whistle-blower protection. Whistle-blower protection under ATIPPA would support employees who act to protect personal information from collection, use or disclosure contrary to the act. Currently, the *Public Interest Disclosure and Whistleblower Protection Act* do not apply to all public bodies subject to ATIPPA, such as municipalities and other local public bodies. Further, it only protects those who disclose offences dangerous to life, health or safety and gross mismanagement. It's a much higher bar.

Our next recommendation has to do with defining the use of personal information. The word "use" is found throughout ATIPPA but it is not a defined term. It is, however, defined in PHIA as "to handle or deal with the information or to apply the information for a purpose and includes reproducing the information, but does not include disclosing the information."

We recommend that a consistent definition be added to ATIPPA. Again, I don't believe that the term "use" has been problematic, that a report has ended up turning on the term "use," but I could certainly imagine that it could. Where we have this available definition in our sister act, we recommend it be adopted.

Another aspect to PHIA that we think would be quite useful – and this is something that I don't know that a report turned on it, but we certainly considered it – are prospective complaints. Section 73 of ATIPPA provides for the right to make a complaint about the collection, use or disclosure of personal information in contravention of the act, but it's referred to in the past tense where the allegation is that there has already been one of these things in contravention of the act.

Meanwhile, PHIA provides for a complaint against the prospective contravention of the act. This prospective right does exist in other health privacy legislation in Canada as well. If the government or a public body was to introduce a new, let's say, information system that people were concerned was going to be privacy invasive but had not yet actually done so, this would give them an opportunity to trigger an investigation or to make a complaint before the problem occurs. That seems intuitively reasonable to us that if we see a looming problem, then we can get involved in trying to prevent it before it actually occurs.

I'll move now to talking about some other enhanced requirements for privacy impact assessments, so these are recommendations 5.1 through 5.4. These have to do, again – PIAs is what we call them. Four recommendations: The first is to amend the definition of PIA to broaden the scope of sections 72(3) and 72(4) to include additional public bodies, excluding only local government bodies as defined in the act, to add a definition for common or integrated program or service and to require information-sharing agreements for parties involved in common or integrated programs and services.

CHAIR ORSBORN: In the current act I know it only applies to departments, but it talks about the assessments being forwarded to the minister responsible for the act, as well as the minister responsible for a particular department. If you're asking that these be extended, say, to Eastern Health or the City of Corner Brook or the City of St. John's, what does one do with that provision to advise the minister responsible for the act?

MR. HARVEY: In practice I think that PIAs are to be reviewed by the Department of Justice's ATIPP office as well as –I think that's how that ends up being brought into practice.

CHAIR ORSBORN: Yes because they're government departments. But once you get outside government departments would you have something from the City of St. John's going in to some other minister?

MR. HARVEY: I would think not, that we can provide that support. Would it be appropriate for the City of St. John's to be providing the Department of Justice's ATIPP office with that? As an independent statutory oversight office reporting to the House of Assembly, it's a little different than the City of St. John's being, in some sense, with that subordinated to a Minister of the Crown.

CHAIR ORSBORN: One has to be careful. If one extends the definition of public bodies beyond departments, one has to be careful with the wording of whatever it is – 72(1) I think it is.

MR. HARVEY: Yeah, I think that's a very useful observation.

Do you have anything to add there?

CHAIR ORSBORN: With the expansion of – that the set of public bodies that you recommend, this, presumably at some point, would or could at least, increase the demands on your office for review?

MR. HARVEY: It could but we don't think that – I don't expect that the number of PIAs that would be done would lead to a request. We don't anticipate that this would lead to a call for additional resources, this one discreet recommendation.

CHAIR ORSBORN: It's a question of going through submissions because one looks at, say, the PIAs and also, particularly, the concerns about AI, if they come to fruition. One would think that you may well need additional resources.

MR. HARVEY: I would say if there are a lot more of these proposals being done – because we also recommend, essentially, algorithmic assessments for AI; I'll talk about that later – and that PIAs be done for programs related to biometrics, yeah, we would expect to see more PIAs. I don't anticipate a significantly larger volume of PIAs, at least at the outset. Over the longer term, perhaps, and I think we can deal with that if it comes.

I think that our office has the capacity to deal with the marginal increase in PIAs at the outset. We already do see PIAs done by non-government departments, so I refer in submission to ones that we received from –

CHAIR ORSBORN: The health authorities.

MR. HARVEY: Yeah, and that's great. That's the kind of practice we think should continue. It's been in the public domain that we're in discussions now with the Town of Happy Valley-Goose Bay about body cameras. We are encouraging them to do a PIA and we would review it. The office currently has capacity to assist in that regard. I don't foresee a wave of new PIAs that would generate an immediate increase in new resources for this.

CHAIR ORSBORN: Do you have staff that can intelligently talk about AI? I can't.

MR. HARVEY: We're currently working to build capacity. That's why we're not recommending with AI right now a detailed regulatory framework. We're just looking for – we want to know what we don't know. We want to know is it happening. We know that we do need to send staff for training and we're trying to identify training opportunities within our existing budget and using virtual opportunities to the greatest extent to try and increase the capacity of the office to be able to talk about this.

If we were to encounter proposals and PIAs that required for our review a level of expertise more than we can presently offer, we do have the ability, the AG's office does, to contract expertise to help us understand that. That's not a normal practice for us, but it is something that we would have the ability to do.

If we were to find over the course of the coming years that to properly perform a regulatory task we do need to seek incremental resources, then that's something that we could look at, but it's not something that I see in the next year or two.

CHAIR ORSBORN: Tomorrow, no.

Okay, let me jump ahead a bit. Can you explain to me the difference between your view and the ATIPP office's view on the common integrated program of service? You said there's a difference of opinion between you.

MR. HARVEY: Maybe I'll ask Sean to speak in detail on this.

CHAIR ORSBORN: I know one refers to Alberta; one refers to BC.

MR. MURRAY: You know what? There's a pretty fine line there. If you want, when we come back for our supplementary submission, I can bring something on that.

CHAIR ORSBORN: That's fine.

MR. MURRAY: The end result is that I think the ATIPP office's definition means that we get few, if any, PIAs; whereas, the definition that we believe is applicable from Province of British Columbia is a bit more practical. We'd actually see it –

CHAIR ORSBORN: There's no definition now, right?

MR. MURRAY: Yes, there is no definition.

CHAIR ORSBORN: You need one.

MR. MURRAY: The PIA definition that we have right now just refers to the government departments and is very brief about it, but common or integrated is where I think the difference is.

CHAIR ORSBORN: There is no definition right now of common or integrated.

MR. MURRAY: That's right. Common or integrated, yes.

MR. HARVEY: That, in fact, is one of our recommendations, is to develop it.

CHAIR ORSBORN: Yes, I was wondering what the difference was between Alberta and BC. Alberta, I think, was a practice definition more so than a statutory one, I think, wasn't it?

MR. HARVEY: Yeah.

Maybe I'll go back and I'll just try and walk through the full recommendations we have in this section. I'll try and do that briefly.

The first recommendation in this section, 5.1, is to provide a definition of what a PIA is. Here we look at the definition in the bill introduced in the Northwest Territories coincidentally called Bill

29. I hope that it's just a coincidence. They offer a definition there which we thought would be helpful.

We've already talked about Recommendation 5.2, which is the extended applicability of PIA requirements. The way that we characterize this extension was to exclude local public bodies covered by the Municipalities Act to recognize the capacity of those municipalities, or the more constrained capacity of those municipalities, with the exception of the three cities, which, of course, are not governed by the Municipalities Act but by their own statutes.

We think that other public bodies either are unlikely to have – so small public bodies that would fall under this definition are almost certainly not going to have common or integrated programs, or else would be part of a common or integrated program with a larger public body, like a health authority, for example. We feel that this approach to casting our net over this set is one that is meant to recognize capacity, as well as likelihood of actually doing a common or integrated program.

Was that clear?

CHAIR ORSBORN: Yes.

MR. HARVEY: Okay.

You just raised a question of a definition of a common or integrated program and we suspect that the lack of a definition is a factor in why we don't get many core review from government departments because they're not recognized as common or integrated. Although, the last couple of years may have led to a certain change in this because now I think that we're being consulted on the government's digital-by-design initiative, which clearly was undeniably a common or integrated program and that seems to have led to an increase in awareness or an increase in understanding, if by no other party than the OCIO, the Office of the Chief Information Officer, about common or integrated programs. Again, they're involved in them because they provide the information assistance. So now we've been consulted on a couple of others since then, so that maybe growing, but we do believe that a clear definition in the act would be helpful.

The last recommendation in this section has to do with information-sharing agreements. We feel, and it's not an unusual practice at all, I think it would be a best practice for the parties involved in common or integrated programs to enter into information-sharing agreements here. That is simply because the collection of personal information as part of an information system by a public body is for a lawful purpose within that department's mandate. But common or integrated programs involve the transfer of that information from one public body, which collected it for its legitimate legal purpose, to another. An Information-sharing agreement is just a way, in my view, to keep that chain of accountability that is so fundamental to the rule of law intact. We think that would be a best practice that could easily be introduced and implemented.

If you're okay, then, I'll move on to recommendations 6.1 to 6.3 related to biometrics. There are three recommendations in this section. One, that we expand the definition of personal information to specifically include biometric information; that we add a definition of biometric information as has been done in Alberta and PEI; and we create a requirement for programs or initiatives that collect, use or disclose biometric information to complete a privacy impact assessment to be provided to the OIPC for comment and review.

Biometric information, such as fingerprints and facial recognition, represents some of the most sensitive personal information. One of the reasons for this is immutability. So if information derived from a person's fingerprint or face is compromised, then there is no possibility of replacing that information. So if I lose my MCP card out in the parking lot, then I can get a new MCP card, but if a public body has my facial recognition data breached, then I can't get a new face. Also, of biometric information, facial recognition is a particular concern for my office, but also for privacy professionals around the world because of the potential for collection of the information without the knowledge, let alone, consent, of the individual.

This is in the private sector, but there recently was a report issued by the federal Privacy Commissioner and the Privacy Commissioners

in, I believe, Alberta and British Columbia on Cadillac Fairview malls, which the report found that Cadillac Fairview was collecting, or had collected, the facial recognition data of five million people without their knowledge or consent. They'd simply put a basic privacy policy on the front door of the mall and they had collected this facial recognition data to use for tracking and marketing purposes. People generally were not aware that their facial recognition data was being collected.

Facial recognition is easy to collect because it can be baked into the video surveillance technology that we find increasingly pervasive everywhere in our society, and being used more and more by public bodies. Indeed, you can apply facial recognition technology after the fact to video or images that have already been collected. Facial recognition is already being used by public bodies in this province. It's being used by Motor Vehicle Registration as part of its driver's licence collaborative initiative with other Atlantic provinces. Now, again, it's not being used in the mass surveillance way that I've been suggesting, but, nevertheless, there's a foot in the door for facial recognition technology.

Of course, biometric is not just facial recognition, so there's the prospect for mass collection of other kind of metrics like heat signatures and weight sensors. Even though that may seem to be kind of outlandish and futuristic, I would argue that it's not because those proposals were a part of the Google Sidewalk initiative, that is now defunct, but became quite close to being implemented in Toronto. These kinds of things are a feature of smart cities type of proposals around the world.

We want to stay ahead of this curve. To stay ahead of it, all that we're asking at this juncture is simply that if a public body is planning to collect, use, store or disclose biometric information that they do a privacy impact assessment and that they share it with this office. In our view, the use of biometric information, because of its special nature, should meet that high necessity threshold that we find in our act, that the use of personal information should be the minimum necessary to achieve the public interest goal. But the ease of collecting this data and the power of it means that public bodies, if they don't have to meet this threshold, may do it for convenience and efficiency. We feel that needs to be put under significant scrutiny.

As I mentioned before, the time may come in the future for a more elaborate regulatory framework for biometric information, but even though the need is acute for action now, we feel that it is still early days. Right now, we just want to start to get our heads around it and know how we need to train ourselves up to better understand biometrics. That's why our recommendation at this juncture is merely to make it a requirement for public bodies to do PIAs in such instances and to share it with our office for a review.

I'll move on now. We've already talked about artificial intelligence and it's the subject of five recommendations – recommendations 7.1 through 7.5. They are: to incorporate a definition of AI into the act; to require algorithmic assessments to be conducted by any public body prior to implementation of a program involving the use of artificial intelligence; to require public bodies intending to develop and implement a program involving AI to notify my office in the early stages of development; to establish the OIPC's ability to comment on all implications for the use of AI, such as data-ethics factors, and not just those involving privacy and access to information issues; and to introduce a special duty to document requirement for AI applications that requires maintenance of records for processing activities.

Artificial intelligence, or AI as I'll refer to it, is a term used to describe an evolving approach to technological solutions which includes the use of automated decision-making processes. So advancement of AI has been used during the course of medical treatments to sort applications for government aid and to assist in sentencing in criminal cases, to name a few instances.

What is different about AI, that automated processing which itself is not particularly novel, is that AI provides an information system not with a set of criteria on which to make a decision – that itself is not, I don't think, particularly controversial – but AI provides the information system with instructions on how to adjust those criteria in response to the ongoing collection and processing of data, so, in essence,

to learn. This is novel because the traditional approach still had humans that we could hold accountable for the decisions, and the decision in that instance was: Here are the criteria. If the criteria are mutable, if the criteria are changing as a computer system learns, then the decisions are not actually being made by the humans, so how do we hold them accountable? This is really the critical accountability link that we need to preserve.

We don't know if public bodies in this province have or intend to implement AI because there is no legislative requirement for them to tell us. I think, often, when we think about artificial intelligence, we think about big computer systems; but increasingly, the way the technology is developing, smaller programs can become smart. It doesn't need to be a big computer system to have AI in it. You could have AI in something as small as the software for your wireless headphones, for example. I know this isn't a public body type of example, but wireless headphones could learn when or when not to let ambient noise into your ears based on the time of day, for example.

This kind of smart technology can be found in programs big or small. Again, we don't know what we don't know, because there is no requirement for anyone to tell us, or, indeed, anyone else, if there are aspects of artificial intelligence starting to be found in government programming. Moreover, the government is increasingly partnering with third party vendors with its information systems and some of them may have smart aspects of the software that they use.

Around the world, regulatory and oversight bodies are encouraging governments to make legislative changes to personal data protection laws in order to elucidate and clarify legal obligations in the development and use of AI. Canada's federal Privacy Commissioner recently released recommendations concerning AI in the private sector.

Another challenge with AI is that part of its very premise is diametrically opposed to one of the foundational principles of privacy, and that is the basic privacy principle that the collection of personal information should be the minimum amount required for the identified purpose. The challenge for AI is that it works on the premise that more data is better. That's how it learns, that's how it becomes better. It needs red meat, it needs to churn this data to learn and that seems, to us, to be incompatible with the principles in our legislation.

It's important, I think, to understand the position we're putting forward. We're not opposed to AI; in fact, we recognize that AI can offer the potential for improved government services, improved public services delivered by public bodies. We're not suggesting that greater regulation of AI be put in place to prevent the use of AI by public bodies, but to create a clear and legitimate legal framework so that this AI can be implemented in a manner that's safe and consistent with the laws. That may mean creating a special legislative framework for AI.

That actually is not what we're recommending at this juncture. Even though the federal government is recommending a more elaborate regulatory framework for AI – even in Quebec Bill 64 does have elements of a broader regulatory framework for AI – at this point we're at the early stages. I said I don't know that any government department or public body is introducing AI. I suspect that there's none or almost none in place. I think unlike biometrics, these really are early days. As you suggested before, truly being able to provide that regulatory function with AI is something that if we're going to get into this business, we're going to have to grow into it.

At this juncture, all we're asking is for an algometric assessment be done and shared with our office, similar to our recommendation with respect to biometrics, so that we can begin the job of understanding where we may be going with this and crafting an appropriate regulatory framework in maybe a legislative review five years from now or 10 years from now.

CHAIR ORSBORN: It's probably a good time to take 15 minutes.

MR. HARVEY: All right.

CHAIR ORSBORN: Thank you.

See you at 11:17.

Recess

MR. HARVEY: If you're ready I can resume –

CHAIR ORSBORN: Please.

MR. HARVEY: – talking about recommendation 8.1. This is a single recommendation. This is related to political parties and namely that they be added to the definition of public body with restrictions on the applications of – with a restricted application, let me just say.

In Canada, no public sector access and privacy legislation applies to the collection, use or disclosure of personal information by political parties, with the exception of British Columbia, where its private sector legislation applies to political parties.

CHAIR ORSBORN: And that's in their private information act, is it not?

MR. HARVEY: PIPA.

CHAIR ORSBORN: Yes.

MR. HARVEY: Otherwise, political parties are not covered. Political parties do, however, engage in micro-targeting of potential voters based on their demographic characteristics and many other indicators, and it is clear that personal information of Canadians is now at the core of campaigns at the provincial and federal level. Of course, I can't say in detail to what extent it is in this province because, of course, we don't know.

The collection of personal information by political parties should be, in our view, subject to some privacy protection. It is our view that this could be accomplished by amendments to ATIPPA that would ensure that political parties comply with basic privacy principles. It would allow for independent oversight of compliance with privacy principles and ensure individuals have access to their own personal information that is in the custody and control of political parties.

The value of bringing it forward in this context is that ATIPPA, 2015, is the statute that is currently under review. This can be accomplished in an incremental way, and we provide the detailed proposal in our written submission.

It's important to note that we are only proposing a narrow degree of oversight into political parties, limited solely to their collection, use, storage and disclosure of personal information. The access to information section of the act should not apply to them. We don't believe that political parties are public bodies, as understood for all the other public bodies that we're discussing.

An alternative that could be considered and that has been discussed across the country among my colleagues would be to have the Chief Electoral Officer provide oversight via amendment to the Elections Act. We're not opposed to that option. Our proposal is that there should be some oversight. We're offering to do it through ATIPPA, and as I said, it is ATIPPA that is open for our examination now. Of course, we also think that we would be a good candidate to provide that oversight because we do have expertise in the area of privacy regulation.

CHAIR ORSBORN: Given that you said they're not public bodies, why are you picking on them as opposed to some commercial entity? Is it because of their sort of inseparability from government, as such?

MR. HARVEY: Well, commercial entities are covered by the federal legislation. It's just that there is this regulatory hole that currently exists where political parties stand alone as being unregulated entirely and we know that political parties around the world are deliberately engaged in the collection of personal information. There's no reason to believe that political parties here would be any different than their federal or international counterparts. And so because we're aware of increased activity in this area and because there is an absence of regulatory oversight, we're suggesting that regulatory gap could be closed in this instance during the amendment to ATIPPA.

CHAIR ORSBORN: I don't know if you've seen the response from the PC Party. That's the only response that we got from a political party. We advised them of the position and that's the only response we had. Essentially, they said: (1)

they're a private body; (2) they have a significant resource issue and most of their work is done by volunteers. I guess, they pose a practical problem as to how they might comply with any legislative requirements.

MR. HARVEY: So we just read that the other day and we'll have a more formal response to that.

CHAIR ORSBORN: Okay.

MR. HARVEY: I will say that just because the organization is small doesn't mean that it – if it is collecting personal information, in our view, it should be collecting it in a manner that is safe for the people that it's collecting personal information from. The safety consideration shouldn't take a back seat to how small they are. In fact, you could argue that all the more reason that their attention be brought to this subject. We'll have –

CHAIR ORSBORN: Is this issue being considered in other provinces, other than BC? Do you know?

MR. HARVEY: I am unaware that it's kind of come to the fore of consideration. Certainly, other provinces have brought the proposal forward and FPT Commissioners, federal-provincial-territorial Commissioners, have referenced it in two communiqués that we have done over the recent years. But I don't know that it's been considered by a legislature in another province one way or the other.

CHAIR ORSBORN: You can respond in your later responses to the particular position of the PC Party?

MR. HARVEY: Yes, will do.

CHAIR ORSBORN: Okay.

MR. HARVEY: I'll move on now to talk about recommendations 9.1 through 9.3, which have to do with section 9 of the act, coincidentally, and the public interest.

Section 9 of the act provides two caveats to the exceptions to access in ATIPPA: The non-application of some discretionary exceptions where it is clearly established that the public interest is in disclosure of the information outweighs the purpose for the exception; and second, a requirement for proactive disclosure, regardless of whether any exception would apply, of information about a risk of significant harm, where the disclosure would be in the public interest.

We made three recommendations on that topic. The first is with respect to section 9(1), to clarify that the burden of proof does not rest solely on the applicant or public body, but that any party is obligated to bring forward evidence that could be relevant to this determination.

CHAIR ORSBORN: So who decides?

MR. HARVEY: Who decides who can bring forward that information?

CHAIR ORSBORN: No, no, who decides if the public interest outweighs the exception?

MR. HARVEY: That's an interesting question. I think in most instances if we were to consider during an investigation that in our view the public interest did not, or that the consideration of the public interest was insufficient, let's say, by a public body, I think in a first instance during the investigation we would put that question back to the public body. At first, we would seek evidence that they indeed had considered the public interest question in their process.

It's essentially a three-step process. The first step is does the exception apply. The second step is has the public body considered its use of discretion. Then the third question is after considering its discretion, has it considered whether the public interest essentially removes the discretion from the public body, takes it away by saying that you must disclose.

We would need to see evidence that the public body had considered these. If we think it did, we would need to see evidence that the public body had considered it. We do have these discussions with public bodies in the context of investigations.

CHAIR ORSBORN: What if you disagree with their conclusion?

MR. HARVEY: I don't believe we have been in a position where we've disagreed with the position.

CHAIR ORSBORN: What if you did?

MR. HARVEY: What if we did? I think it would have to be very abundantly clear to us. I would have to be very much convinced then, before making a recommendation, that my definition of the public interest outweighed the position of the public body.

CHAIR ORSBORN: The Wells committee said that decision, in terms of public interest, had to be made at a high level, as I recall.

MR. HARVEY: I think it would and I –

CHAIR ORSBORN: Which would be in the high level, I presume, within the public body.

MR. HARVEY: Yeah I think it would have to be made by the head. That would need to be considered.

In seeking evidence that the public interest had been – and certainly before I made any recommendation about that, I would want to understand the thinking of the head of the public body. But I would say that in almost every instance I would defer to the head of the public body to understand the public interest within their mandate. They would be in a better position to understand their own mandate than me. With that said, the structure of the act does provide for me to make recommendations contrary to that made by the head of a public body.

CHAIR ORSBORN: I understand that. Are you suggesting a particular legislative amendment?

MR. HARVEY: The only legislative amendment – and I don't think we recommended legislative wording.

CHAIR ORSBORN: You're talking about the burden of proof and everybody should have a crack at it, kind of thing.

MR. HARVEY: The challenge with the burden of proof – and I can ask Sean to speak to it. He can probably speak to it more eloquently then I do. The challenge with the burden of proof as it applies to the public interest is that the burden of proof generally throughout the act, as I've discussed before, rests on the public body. But if the applicant believes that there's a public interest that would override an exception to access of records that they haven't even seen, how do they advance that burden of proof?

CHAIR ORSBORN: That's the problem that faced Justice Murphy in Corner Brook, I think. He concluded from the act, at least, that the burden was on the applicant and it's pretty difficult to meet.

MR. MURRAY: Well, that's one of the reasons why we're bringing this forward is that placing the burden of proof on the applicant is pretty difficult. The applicant doesn't have all the information that a public body would have necessarily – they may or they may not – about, let's say, a policy issue or some other matter that government is involved in and making decisions about. The individual might know the tip of the iceberg and really might not have access to other information that would make it clear that there is a public interest in disclosure,

As the Commissioner pointed out, the burden of proof in the statute, to refuse access, is on a public body. So I recognize that there are also cases, as Judge Murphy pointed out, where the applicant would be in a better position to bring forward reasons why public interest should be considered. No doubt they may do that when they're making a request. There may be publicly available information that anyone can see that could be factored in as well.

CHAIR ORSBORN: Yeah, I'm just trying to visualize how you're suggesting it should work in the event that it were to come to court where the public body has already decided and already established that the exception applies.

MR. MURRAY: Right.

CHAIR ORSBORN: Are you asking a public body then to say what exceptions shouldn't apply?

MR. MURRAY: Well, if they maintain their position, we may put to them during the investigation: Here are the factors that were

raised by the applicant, here are some factors that we can see from the news media or publicly available sources. Did you consider those?

CHAIR ORSBORN: Yeah, I have no issue with that in terms of the back-and-forth process, but when push comes to shove somebody has to decide.

MR. MURRAY: As Michael mentioned, if it comes down to it and the evidence is clear – because that's what the statute says, it says where it is clearly demonstrated. It's noteworthy that the statute doesn't say where it's clearly demonstrated by one party or another. It just says where it is clearly demonstrated that the public interest in disclosure outweighs the reason for the exception.

Michael may be called upon to make that assessment. Even though he would prefer to defer to the head of a public body to make that assessment, there could be a circumstance where he would have to assess all of the factors that are available to him.

CHAIR ORSBORN: Okay.

I have another question: Are you suggesting a legislative change, or do you want to come back to that?

MR. MURRAY: One of the things that we're dealing with here is that the courts have weighed in about where they think the burden lies. I'm not sure if it's fair to say that it should lie on the applicant. So saying what the legislative language should be, we have not turned our minds to that. The recommendation is simply that the burden should not rest solely on the applicant or the public body or any party, but that it should be clear. If the evidence that's available clearly demonstrates that the public interest in disclosure outweighs the reason for the exception, how that gets constructed into the statutory –

CHAIR ORSBORN: That's a tough one for an adjudicator.

MR. MURRAY: Well, yeah, maybe.

CHAIR ORSBORN: A little broader question on section 9: What does that add to the discretion that's built into a discretionary exception?

MR. MURRAY: A discretionary exception functions where the exceptions apply, but the head of the public body says: I know I could claim this exception; it does apply – let's say it's advice or recommendations – but if I disclose this information in this record, it will help this individual understand why we made this decision. So that's exercising their discretion for a proper purpose.

CHAIR ORSBORN: What I'm getting at is, is there, sort of, a general public interest assessment that could be or should be built into the exercise of discretionary?

MR. MURRAY: I think there already is.

CHAIR ORSBORN: Yes.

MR. MURRAY: But the thing that section 9 adds is it says that when you reach a certain level and it's clearly demonstrated, that means there's no longer a discretion scenario anymore. It says that the exception no longer applies.

It's going to be a very high-level circumstance. It's not going to be one where the exercise of discretion is: Well, I'm balanced when I consider the purpose of the exception and then I consider the value of disclosure. I'm going to exercise my direction and disclose it.

Section 9 establishes what will be admittedly a rare circumstance, where the exception on its face applies but other factors – and they are only public interest factors; they're not factors involving an individual and their particular interest in the record. Someone who is in a one-on-one dispute with a public body, section 9 doesn't come into play then. It's only for public interests' purposes.

CHAIR ORSBORN: If it's just a straight discretionary exception, there's nothing to prevent the head of the public body taking public interest into account.

MR. MURRAY: There's nothing to prevent them from taking it into account, but section 9 throws a switch. You're moved beyond

discretion. It's a bit of a continuum there, as Michael mentioned earlier.

MR. HARVEY: In my experience working within the government departments, public interest is considered as a matter of the exercise of discretion. I think that's something that heads of public bodies, who in the most instances are exercised by deputy ministers within provincial government, are comfortable with. I didn't see within my time within the Executive Branch and I have not seen in my time since being appointed as Commissioner an example of where a record over which the discretion was considered and then overridden by the public interest. I haven't seen that used. I don't know that we have, have we?

Really, how intellectually the head of a public body goes through that mental exercise of saying: Okay, the exception applies. I'm thinking it's within my discretion to release it even though the exception applies. I've decided I don't want to release it, but here I have to release it anyway. I don't know that intellectually, I don't know how easily that is for deputy ministers to be and other heads in the public body to be doing that mental exercise. I think it would be a very important thing to ask them about, to find out how they – to the extent that they actually do – do it.

The complicating factor, as well, is that there's a harms consideration that is involved here. The exercise of discretion isn't just an exercise about do I want to or do I not. The exercise of discretion is does the benefit of releasing outweigh the harm of essentially undermining the exception. Then you have to have an entirely different kind of harms miscalculation at the second level. We're expecting our heads of the public body to contort themselves mentally into having two different intellectual discussions with themselves.

CHAIR ORSBORN: Well, you're asking the courts to do the same thing.

MR. HARVEY: Yes.

CHAIR ORSBORN: If the exception is challenged and the court says then, well, yeah, I think the exception applies and then you raised the public interest and then you say, well, –

MR. HARVEY: Of course, we would have to do the same thing if asked to adjudicate a complaint on a matter, right?

We recognize, I think, it's a tricky thing.

CHAIR ORSBORN: Our section is not the most common one across the country I take it, is it?

MR. HARVEY: Ah –

CHAIR ORSBORN: There are only two provinces with a general override – two or three: Ontario, Quebec and Newfoundland. Others have a limited override in the third-party section, I think.

MR. MURRAY: Yeah.

The value here I guess for section 9, as well, the part we're talking about is it is a bit of a fail-safe. When we consider the fact that a lot of public bodies operate in a political context and we can't always assume that decision-makers, even though we can hope that they generally operate in good faith, we can't always assume that they will make decisions in the public interest in every situation because there are political pressures and considerations as well. I think it's useful to have this option even though it's not something that's been used to date.

MR. HARVEY: Interestingly, it doesn't seem to be something that's been raised by many complainants either.

CHAIR ORSBORN: No.

MR. HARVEY: To make an issue of it.

CHAIR ORSBORN: (Inaudible) for complainants approved, maybe other than the media perhaps, I don't know.

MR. MURRAY: That's one of the challenges with it and that's why we raised the burden of proof issue.

CHAIR ORSBORN: Can you conceive any situation where public interest would require the release of solicitor-client privilege information?

MR. MURRAY: Well, that's been a topic of discussion, would we ever, could we ever get there? If we ever thought it was that important to recommend that, I'm sure it would go to court.

MR. HARVEY: But it also doesn't apply, right? No, it does apply. Sorry.

CHAIR ORSBORN: It does apply.

MR. MURRAY: It does apply. It is (inaudible) right now.

MR. HARVEY: It is one of the discretionary exceptions. Yeah, exactly.

We have thought about it because we did engage in this kind of brainstorming activity in comparing and thought about that very question. It would be a very high bar, yeah.

However, we did think about the application of section 9(1) to an exception to which it does currently not apply and that is third party business information. Section 9(1) applies to the discretionary exceptions but not the mandatory exceptions. Section 39, which relates to third party business information, is a mandatory exception if the three parts of that test can be met; therefore, section 9(1) does not apply to it.

But we could imagine situations in which there was information that met the three parts of that test, but would be in the interest of the public to disclose. Things that would, for example, come close to meeting the tests in section 9(3) of risk of harm to the public. So we propose for your consideration that recommendation.

CHAIR ORSBORN: That is the case in four or five provinces also. The ones where they have the override, I think only have a one-part test I believe.

MR. MURRAY: I can't say for sure now. You're talking about the jurisdictions where this public interest override is in the third party –

CHAIR ORSBORN: In the third party commercial interest section there is an override there.

MR. MURRAY: Okay. I don't see –

CHAIR ORSBORN: But my belief is that they're one party, one (inaudible).

MR. MURRAY: Yeah, I don't see the override as really a factor in assessing which model of section 39. As we mentioned earlier, the section 9 override is a fairly high bar; it's not something that's going to occur much, if at all. Adding it in there is simply just saying: Here's another possibility. This is something else that could occur and there could be an appropriate circumstance where section 9 should apply to information that would otherwise be protected by section 39.

CHAIR ORSBORN: (Inaudible.)

MR. HARVEY: If there was a notion that the application of section 9 would be a replacement for the relaxation of the stringency of the three-part test, we would, I think, warn against that.

MR. MURRAY: Yes.

CHAIR ORSBORN: No, no, I wasn't suggesting that, but I was struck by the fact that the only provinces that had section 9 override for that third party thing were one-part tests.

MR. HARVEY: Maybe that's in recognition that the test is pretty weak if it only has one part.

MR. MURRAY: Yeah.

CHAIR ORSBORN: Perhaps so. Given what I've read over the last five years – we can talk about this at a later date, but you're never going to get there, are you? You haven't seen any cases where section 39 has been upheld.

MR. MURRAY: We can talk about that.

MR. HARVEY: Yeah, we will.

MR. MURRAY: We almost got there recently, but it turned out it wasn't proprietary information, so –

CHAIR ORSBORN: Well, there you go.

MR. MURRAY: – if it's not proprietary information then why are we protecting it?

CHAIR ORSBORN: So you don't need to worry about the override.

MR. MURRAY: Right.

MR. HARVEY: Okay.

I'll move on now to the third recommendation under this part and that has to do with section 9.3, mandatory proactive disclosure. This is for active disclosure in the absence of any access requests whatsoever. This is if a head of a public body comes into possession of information related to a threat to the health and safety – whether the health of a group of individuals or public health, safety or environmental harm.

One of the challenges here is it's not immediately clear, the way that the act is written, if there's a temporal aspect, so if there is an urgency. I think I would read the language of the act, as it's there now, to imply a certain sense of urgency because it talks about when this information must be disclosed –

CHAIR ORSBORN: That's the interpretation of BC, I think, wasn't it?

MR. HARVEY: – as soon as possible.

CHAIR ORSBORN: Yeah.

MR. HARVEY: Yes.

CHAIR ORSBORN: Do you have any wording to suggest it?

MR. HARVEY: I think there is a word in our (inaudible)?

MR. MURRAY: We haven't suggested –

CHAIR ORSBORN: Do you suggest taking out "without delay" because I couldn't get my head around how that would help you?

MR. MURRAY: I don't think we've proposed specific language in the recommendation.

CHAIR ORSBORN: (Inaudible.)

MR. MURRAY: I'm basically seeking an amendment to remove the potential for a limitation of its applicability to matters that are considered to be urgent.

CHAIR ORSBORN: Right, I –

MR. MURRAY: So we don't –

MR. HARVEY: We could try to come up with –

CHAIR ORSBORN: Yeah, I have the sense you might be asking for the words "without delay" to be taken out, but I wasn't sure where that would get you.

MR. HARVEY: We can turn our minds specifically and offer you, as a part of a supplementary submission –

CHAIR ORSBORN: That's something that I think would be hotly contested. I don't know. I don't think anybody has objected to it.

MR. MURRAY: No. Yeah.

MR. HARVEY: No, I don't think anyone has recognized it.

MR. MURRAY: I think it will clarify things. I mean, when we've talked about this and when we've looked at some of the interpretations from other jurisdictions, I think it might be helpful to have some clarity on it is all.

CHAIR ORSBORN: Sure.

MR. HARVEY: So, if you're comfortable, I can move on to our next topic, recommendation 11.

CHAIR ORSBORN: Thank you.

MR. HARVEY: This is a simple one. It's a very high-level recommendation, and that is to recognize that right now under section 34 there is a reference to the Nunatsiavut Government as part of the intergovernmental relations section. We suggest that it may be appropriate for you to consider whether other types of Indigenous entities, organizations and governments in particular –

CHAIR ORSBORN: I think that seems to be accepted, from what I've read, by the

government position, in terms of certainly the self-governing Indigenous organizations.

MR. HARVEY: It appears to be. A similar recommendation shows up in a number of instances.

CHAIR ORSBORN: Yeah.

MR. HARVEY: Our recommendation, therefore, is quite broad in simply that we don't feel that it's to the OIPC to say exactly. I think the first instance in considering how to address Indigenous organizations and governments in this act is to talk to the government, but also to talk to Indigenous organizations and governments. We're not suggesting that they be considered to be public bodies per this act. I think that's not what we're suggesting at all. Rather, are there appropriate ways to consider them to be addressed in this act? And leave it at that.

Recommendation 12.1 – this is just a single recommendation in this section – is to amend ATIPPA to ensure that the position of Commissioner will not be vacant for any period of time, so as to allow for oversight functions of the act and for PHIA to continue normally in situations such as the resignation or retirement of a Commissioner.

The challenge that we face there is that in two instances when –

CHAIR ORSBORN: Makes sense.

MR. HARVEY: Right. There's been a gap. If I don't need to discuss that, that's fine. We identify a couple of different options, but I don't think we're married to either one of them.

CHAIR ORSBORN: Okay.

MR. HARVEY: With that, I'm going to turn the matter over to Sean, who's going to talk about recommendations 13 and then onwards for a bit.

MR. MURRAY: Some housekeeping and clarity is basically what we're looking at here. It may get a little bit tangly. We may have to look back and forth to different sections of the act. Let me know whenever you're ready.

CHAIR ORSBORN: Yes. Some of the tangly stuff I think I appreciate.

MR. MURRAY: Yes.

CHAIR ORSBORN: And it doesn't seem to be contested. At what stage do you want to talk about appeals?

MR. MURRAY: That's where I want to go right now.

CHAIR ORSBORN: Let me ask you one basic question: In terms of the direct appeals to the Trial Division, is that needed?

MR. MURRAY: I think it's probably useful for third parties. If they are determined that they want to pursue an appeal and they want to pursue it sort of urgently, our process is not a lengthy one. It takes 65 business days. But if they want to go directly to court and they want to spend the money on that – and not very many applicants will go directly to court. In this case, the third party would be the –

CHAIR ORSBORN: You lose the opportunity to resolve it, don't you?

MR. MURRAY: We do, but third parties that are determined to file an appeal are generally not that – we do accomplish some things on informal resolution with them. We do resolve them informally. But the companies that tend to want to sort of pursue it, it's pretty clear from the outset that they're not interested in an informal resolution. There are situations where they just want to go directly to court.

CHAIR ORSBORN: I have no idea what the number is like. Do you have any idea of the numbers of direct appeals that have been taken by third parties?

MR. MURRAY: Not very many. There have been a few.

CHAIR ORSBORN: Any by applicants?

MR. MURRAY: Again, there might be a few. Individuals who may be sort of repeat applicants and complainants who already are guessing where we might go on an issue might decide to go directly to court.

MR. HARVEY: First of all, we'll get you the answer for that question.

CHAIR ORSBORN: It doesn't matter. I'm just curious.

MR. HARVEY: The notion of repeat applicants – over the years we have some applicants who we deal with a lot. I sometimes think that there's a small group that – I hear about one of the small group almost every day. Sometimes our relationship can be quite challenging, particularly if there's a series of reports that tend to not go in the favour of the applicant.

It certainly gives me a certain amount of comfort to know that the applicant has an alternative, although it's not one that we see used very often. That gives me also another source of comfort that even though things might get tough with these applicants, they do keep coming back, even though they could be going to court. Some of these applicants, it's not that they don't want to go to court, they often end up going there anyway but they keep coming to us first. Knowing that they do have an alternative is something that at least makes me feel comfortable that their rights are being maximized.

MR. MURRAY: All right, so I'll try to be brief on this.

Section 47(b), we'll start with that one. That's the one where we have one of the alternatives of the Commissioner to recommend that a public body reconsider its decision to refuse access. We haven't used that one yet. A likely situation would be where the public body has claimed an exception. We think the exception applies. Let's say it's a discretionary exception, but we think that really there's no reason why they shouldn't be disclosing this information. We really want them to refer it back to them to reconsider their exercise of discretion.

But in doing so, we're not clear – and because it's the applicant's rights that are at stake, whenever we've encountered a situation like that, which is not frequent but when we have, we're more likely to use our standard approach which will be the exception applies. So we'll recommend to the public body that they continue to withhold the information.

That clearly gives the applicant a right to take the matter to court, if they wish to do so, when we make a recommendation like that. If we make a recommendation under 47(b) for a public body to reconsider, we're not clear that the applicant has a step – the language in the statute creates a path for them to go forward to file an appeal.

CHAIR ORSBORN: Should they?

MR. MURRAY: They should because it would be a circumstance where we've decided that an exception applies, so we're basically agreeing with the public body. In fact, it doesn't matter what our conclusion is, I think the applicant should always have an ability to put the matter to a court.

CHAIR ORSBORN: If you get to the point where you're asking the public body to reconsider, essentially, you're asking for another decision from the public body.

MR. MURRAY: Well, this is what we'd say. If we used 47(b) and the public body had to make a new decision, our fear is – because we have seen public bodies try to read the appeal's provisions very narrowly. We're just trying to get ahead of a circumstance where we might see a public body try to say there's no right of appeal in this circumstance because it's a recommendation under 47(b). I can see this being dragged out in court and then some discussions about whether – well, a new decision has been made so …

But if that new decision –

CHAIR ORSBORN: What is it if we go to court?

MR. MURRAY: This is the issue. A decision under 47(b), if we ask the public body to reconsider a matter, reconsider its decision, they might say our decision was not to exercise our discretion so we're going to continue not to exercise our discretion. That's not reviewable in court.

The only thing that's reviewable in court is whether the exception applies or not. We just want to be able to make sure that can get before a court if the applicant wishes to pursue that.

MR. HARVEY: The scenario we're worried about is: Our recommendation is the exception applies, but the public body should reconsider its discretion. Then, because we make that secondary recommendation about the reconsideration of discretion, we somehow negate the original right of appeal, which would have adhered to our concurrence with the public body that the exception applies.

Essentially, what we were worried about is that the application of 47(b) would inadvertently and unintentionally remove the right of appeal and that a public body may interpret it in that way, that it's almost like a loophole.

CHAIR ORSBORN: Okay, just help me work through it.

MR. MURRAY: Section 54 is the public body's decision after receipt of a Commissioner's recommendation.

CHAIR ORSBORN: Yes, I understand the issue with the legislation. I'm trying to work through who was appealing what. After a recommendation to reconsider, okay, you come to court. What am I dealing with?

MR. MURRAY: We don't want them to have a right to appeal the decision to reconsider; we want them to have an opportunity to go to court on the original decision to deny access.

CHAIR ORSBORN: Okay, so they're going to court. At the same time, you've asked the public body to reconsider?

MR. MURRAY: No. This is the problem. We want there to be a clear path to court on the original decision to deny access, subsequent to our recommendation to –

MR. HARVEY: A simple recommendation that the exception applies and that the public body should continue to withhold access is a recommendation under 47(a) and they have a path to court. But if our recommendation is under 47(b), then there's a risk that the public body can say: That's not an appealable recommendation and so there's no path to court whatsoever. We don't agree that is a proper interpretation of 47(b), but just that we think that it should be clarified that, indeed, the right to court is preserved.

CHAIR ORSBORN: All right.

If that right is preserved, what happens to the obligation to reconsider?

MR. MURRAY: Well, the recommendation would be for the public body to reconsider. If they look at their decision again and they decide maybe we shouldn't release the information, then they release it, the matter is done. If they look at it and say we've reconsidered, but we're not going to change our decision, maybe there is a statutory thing where after a recommendation under 47(b) the public body must either change its decision and release the information or reconfirm its decision. Maybe at that point that reconfirmed decision is then what is subject to the appeal.

CHAIR ORSBORN: Yeah because an obligation to reconsider suggests that they're either going to come back and say yes or no.

MR. MURRAY: Right. So if they come back and say no –

CHAIR ORSBORN: At that point I would think the appeal would be triggered.

MR. MURRAY: Well, that's what I think should be – I think that's how– if a public body was to dispute this and say: Well, we think, as the Commissioner said, that 47(b) doesn't function that way and because we recommended a reconsideration, there's no decision there that's subject to review. Because in going to 54, the decision that can be appealed is a decision to grant or refuse access.

CHAIR ORSBORN: Yeah, and I understand –

MR. MURRAY: Right.

CHAIR ORSBORN: – the issue with the wording, I'm just trying to work out the mechanics of it.

MR. MURRAY: It's a mechanics issue, is all (inaudible).

CHAIR ORSBORN: Because the request to reconsider is really an attempt to straighten this out without having to go to court.

MR. MURRAY: Yeah. And it's also a way of doing it in kind of a public forum. We issue a report and we say that we think the exception applies, but we don't think that there's much harm to the public body in disclosing this. The reason for the exception is not very strong in relation to the value to the applicant. It would really help them understand why they've got to do this thing that the government is requiring them to do, what have you.

CHAIR ORSBORN: If you had a request to reconsider, would it make sense to have a very short time frame – pick a number, five, 10 days, or whatever – within that period of time to reconsider? And within that time –

MR. MURRAY: Yeah.

CHAIR ORSBORN: – I understand that the applicant cannot go running off to court –

MR. MURRAY: Oh, yes.

CHAIR ORSBORN: – to appeal the decision –

MR. MURRAY: Absolutely.

CHAIR ORSBORN: – that the exception applies. That would make sense.

MR. MURRAY: Oh, yeah, because then it would just get tangly then.

CHAIR ORSBORN: Yeah.

MR. MURRAY: I think if the decision is to – if it's a recommendation under 47(b) and the public body decides to basically – and I think maybe this would be helpful to have in the statute is that a public body must consider that and then if it decides to reconfirm its decision then that's clearly a decision, you know, that's appealable.

CHAIR ORSBORN: Yeah.

MR. MURRAY: I understanding, that's all.

CHAIR ORSBORN: Okay.

MR. MURRAY: All right.

The next one is regarding the applicant's right of appeal, again, as well. I think what we're talking about here is, again, making it clear that there is a path to an appeal for an applicant regarding a decision, act or failure to act. Okay, because you can go to the Commissioner, under section 42, and file a complaint about a decision, act or failure to act in relation to an access to information request. You can also go directly to court under …

CHAIR ORSBORN: Fifty-two, is it?

MR. MURRAY: Yeah, I think you're right, 52 and again the language is: the applicant may appeal the decision after failure to act. But when it comes to the processes that unfold from there, as we indicate in our submission, we have had a public body come to us and say that unless it has to do with a recommendation to deny access to or to disclose a record, that really nothing else can be subject to an appeal, that goes to court. There's a little bit of a lack of clarity there.

One of the circumstances that we're concerned about are circumstances relating to the adequacy of the search. We do see this and it's a common matter that we tend to resolve informally; however, there could be circumstances and there have been where we've asked the public body to redo a search. You'll certainly see this in any of the Commissioners across Canada that this does arise from time to time and jurisdictions with order-making power will order a new search and things of that nature.

If we sort of envision a circumstance where an applicant makes a request, the public body says, there are no such records or we don't have that information, and the public body comes to us, we then go to them under section 13; there is a duty to assist the applicant. They have to respond to the applicant in accordance with section 13, the duty to assist, which means doing an appropriate search.

It's sort of been established, in the early days of access to information in Canada, that an adequate search is one that is conducted by a knowledgeable staff person in places where the requested information or requested records are reasonably likely to be found.

We can assess whether their search was adequate or not based on those standards and we can ask some questions about where they searched but if they don't want to co-operate with us and they say, we think we've search appropriately, the matter is done. We want to be able to make that recommendation and as well, even if it doesn't come to us, even if the individual wants to go directly to court, again, section 52 just says that the individual can file an appeal relating to a decision, act or failure to act.

A failure to conduct an appropriate search is, I think, a failure to act. It could even be a decision –

CHAIR ORSBORN: So the remedy for the appeal would be a court order regarding the search?

MR. MURRAY: Yes. So whether it comes first through our shop and then the court or whether it goes – because we can make that recommendation now. What the public body we're dealing with in this regard has said is that, yeah, you can make the recommendation, but that's purely an ombuds recommendation. Our concern is that a public body could just decide not to do a very good search, or they could just be not responsive to their duties under the act very well. Whether it's intentional or not, the end result, if their statutory rights are not being adhered to, then I think there should be an opportunity to make a recommendation that has some force, and, potentially, the person could pursue their rights in the courts.

So I think the statute could be amended to make this clear, because I think eventually we're going to be in court on it at some point. A judge might look at it and interpret the statute broadly and say, well, I think that this is encompassed within a refusal of access, implies a lot of different things, including it could be a failure to do a proper search. Someone could also say, well, if it's not in the statute, the statute is a complete code and it's presumed that the Legislature intended to put whatever was intended to be there in there.

We just think it should be clear. We think that one of the means of doing that, for example, would be through an amendment to 60(1). So this is the disposition of an appeal. Right now, 60(1)(c): where it determines that the head is not authorized or required to refuse access to all or part of the record. So basically they're saying the exception doesn't apply. The court can order the head of the public body to give access to all or part of the record, and make an order that the court considers appropriate.

We are thinking about a certain sense where it has not yet been determined, nobody is – the court hasn't seen the records yet, the applicant has put forward evidence to convince the court that an appropriate, proper search has not been done. Maybe we've already been through that and it may have already been outlined; the reasons for that may already be outlined in our report. We think that the court should be able to make an order that the court considers appropriate and separate that from 60(1)(c). That could be an order, as you said, to go back and redo a search.

CHAIR ORSBORN: If you, in your consideration, feel that the duty to assist has been met and an adequate search has been made, would you see an applicant who disagrees with that having an opportunity to appeal?

MR. MURRAY: I think so.

CHAIR ORSBORN: Why?

MR. MURRAY: I think they always have to have that opportunity. I mean, we're pretty good. I can't say that we're right a hundred per cent of the time. We could be wrong. We could not quite get there sometimes.

CHAIR ORSBORN: Adequacy of search is, to some extent, subjective, based on your experience in dealing with public bodies?

MR. MURRAY: As I said, the standard is well accepted. We would certainly investigate, to see where records were searched, who conducted the search, what evidence is there that they conducted an adequate search. We would certainly pursue that. There have been circumstances where we're satisfied that there has been an adequate search but the applicant has wanted to pursue that at court.

CHAIR ORSBORN: Yes. And what's happened with those?

MR. MURRAY: There's one that I know of that is involved in a tangle with a bunch of other access requests.

CHAIR ORSBORN: I guess what I'm trying to get my head around is –

MR. MURRAY: We don't have a decision from a court on that at this point.

CHAIR ORSBORN: We talked about efficiency and effectiveness, and where it's something that only peripherally affects, perhaps, substantive right of access and you have already made a considered decision based on your examination that there was an adequate search.

MR. MURRAY: Right.

Well, what about circumstances where if we think there was not an adequate search?

CHAIR ORSBORN: That's a different issue. If you think there was an inadequate search and a public body says no, then where do you go?

MR. MURRAY: This is the thing.

CHAIR ORSBORN: That's a different issue.

MR. MURRAY: That's the most important one: where we think that there's not been an adequate search and is the act clear that's an issue, because I don't think it is. For example, the –

CHAIR ORSBORN: Let's assume it's not, then, and you have concluded based on your examination that there was not an adequate search; there was a breach of the duty to assist. Public body says: No, we disagree. Who does what then?

MR. MURRAY: Right.

Section 50 is where I would look then. We've issued a report. We've made a recommendation that they conduct a new search, but section 50(1) just says that, for a declaration, they have to file a declaration under one of these circumstances, and conducting a new search is not there. Does a public body conclude that there's no need to file a declaration and –?

CHAIR ORSBORN: Maybe they're looking for a declaration that they've done a good search.

MR. MURRAY: Yeah.

CHAIR ORSBORN: Okay. Who's on the other side of the argument, the applicant?

MR. MURRAY: Well, that's another thing is that –

CHAIR ORSBORN: But you've decided that the search wasn't adequate.

MR. MURRAY: Well, we've made a recommendation that they do a new search.

CHAIR ORSBORN: Yeah (inaudible).

MR. MURRAY: So they would have to file for a declaration that they need not comply with that recommendation.

CHAIR ORSBORN: And who's on the other side of the argument?

MR. MURRAY: We're going to get into that next because a declaration under sections 50 and 74, in our view they're an ex parte application to court. So basically the public body is going to court and saying, look, here's this Commissioner's recommendation and here are the reasons why I don't that we need to comply with it.

When an application for a declaration is made, the Commissioner is served with that application. The statute says that we have a right to intervene. So we're not the respondent for such an application. Although we've been confused –

CHAIR ORSBORN: So you wanted ex parte, but you want to be there.

MR. MURRAY: Yeah, we want to be there but it's not our job –

CHAIR ORSBORN: You don't want to be a party.

MR. MURRAY: Yeah, we want to be a party; we want to be able to point out. But there may be a circumstance where the recommendation doesn't warrant us intervening. But, for the most part, we have intervened as a practice.

That's a fairly minor point, the fact that applications for a declarations are ex parte and we've asked for that to be made clear. That is not dependent on that.

CHAIR ORSBORN: Are there other examples of this failure to act other than in the search context?

MR. MURRAY: I mean, we've made recommendations that a public body review its practices regarding the duty to assist but that's more of a going forward thing. That doesn't need to be something that's subject to an appeal.

MR. HARVEY: The challenge with reasonable search is we can make arguments about granting or refusing access to a document, but we need to see that. That document needs to be unearthed and examined for us to be able to make recommendations about it. So we can also accept for the moment, I think, in the absence of a duty to document that if no documents exist then – even if the documents should exist and we would think that for proper public administration there should be documents but if they don't exist, then they don't exist.

Our worry here is that if there is no, really, path to court on reasonable search, then there's a possibility for a public body to just do a lousy search and for the records to continue to exist. But our ability, therefore, to make recommendations about refusing or granting access to them is negated by the fact that they just are sitting in a filing cabinet somewhere or an electric filing cabinet somewhere.

MR. MURRAY: And this happens more than you might think. That an applicant comes to us and says: Look, I was told that there are no records, but here are the reasons why I think there should be records about this.

CHAIR ORSBORN: Because I already have them.

MR. MURRAY: Well –

MR. HARVEY: That happens a lot.

MR. MURRAY: That's happened a few times.

MR. HARVEY: I've got this record. If they did a good search, then they would have turned up this record. Why didn't they?

MR. MURRAY: Right.

MR. HARVEY: So we hear about that. We have written records that the – I think the number of times that public bodies actually go looking for the written records, as opposed to just relying on electronic records, I think that happens quite a lot.

MR. MURRAY: But it's more often – the circumstance where the applicant may already have the record is one thing. But there are also circumstances where the applicant says: Yeah, I've got this record which says that there was a report written about this and I asked for that report and they said it doesn't exist. So, you know, we've seen that happen as well.

Also, even things like: I've got a copy of the policy which says that when X-type of decision is made there has to be a briefing note sent to such-and-such a person and it has to be signed off and things like that, and I've got evidence that this type of decision has been made and that the policy is that this type of record is subsequently created, but they're telling me it doesn't exists.

CHAIR ORSBORN: Okay.

MR. MURRAY: So we're following up on those processes and –

CHAIR ORSBORN: Just play it out for me, then, in terms of the practicalities of it. The information is produced and refers to a report and the public body says it doesn't exist.

MR. MURRAY: Right.

CHAIR ORSBORN: Presumably, you then recommend an additional search.

MR. MURRAY: Well, yes.

CHAIR ORSBORN: Okay.

MR. MURRAY: I mean, this would happen during informal resolution.

CHAIR ORSBORN: Right. You recommend an additional search and the public body comes back and says: No, it doesn't exist.

MR. MURRAY: Yeah.

CHAIR ORSBORN: What happens then?

MR. MURRAY: Well, it's not just as simple as a new search. I mean, we're asking things like: Who searched the information for the records? When was this record created and where are records of that kind now stored? Asking about: Who would have created the record? Have you asked that person? Are they still around? There are a lot of different questions you can ask to pursue that.

MR. HARVEY: They could well be reluctant. So, for example, let's say that we're dealing with a regional health authority and we and the applicant believe that if they searched in the office of one of the vice-presidents that there may be records responsive there. The health authority might say: No, we're not that doing. That's a busy vice-president. There's too much involved in going through that type of office. We're not going to –

CHAIR ORSBORN: That's a different issue. Essentially, they're saying they're refusing to do it.

MR. MURRAY: But they're also arguing with us what's a reasonable search. If we're pursuing this, you do get to the fringes of the issue of what's a reasonable search and the applicant is trying to convince us that if the search took that one further step, that's where we might find the record. The public body is saying: Look, we've already searched these 20 places; we've searched 30 different email accounts. We think we've conducted a reasonable search. There are circumstances where you get to the fringes of what's a reasonable search. That's where there is a disagreement.

CHAIR ORSBORN: But you're contemplating some kind of an evidentiary hearing, then, before court?

MR. MURRAY: Well, that could be what it could come down to. Again, pretty rare, but we just think that the right needs to be there because there is the potential for public bodies to fail to conduct a reasonable search, either through incompetence or other reasons.

CHAIR ORSBORN: Are you suggesting the onus should be on the public body to bring it to court?

MR. MURRAY: I guess it happens both ways. Sometimes, as I indicated earlier, we may find there was a reasonable search. The applicant may not be satisfied with that and they may want to go to court, but we're talking about a circumstance where we don't think there was a reasonable search.

We want to be able to make a recommendation that they conduct a new search or a specific search, a specific aspect of a new search. If we're to follow that through and make that meaningful in the way that our other recommendations about access to information are, that would mean that a public body would have to seek a declaration. How that specific –

CHAIR ORSBORN: Yes, that one I can work through. I have more difficulty with the one where you've already found there was a reasonable search.

MR. MURRAY: Yes, I think the bigger priority would be the circumstance where we don't think a reasonable search has been conducted, if we had one of the two.

CHAIR ORSBORN: Yes, I see there you would recommend a further search if the public body says no.

MR. MURRAY: Yes. On the other hand, I think we have a good track record, but we don't want to see an applicant have no right to pursue it, even if they think that we've not gotten it right.

That's something for you to consider.

CHAIR ORSBORN: Thank you.

MR. MURRAY: We've put forward our thoughts on it. I don't know if we can explain it any further.

I did mention the declaration piece, sections 50 and 74. It would be helpful, I think, in making it clear to public bodies just to be able to say in the statute that this is an ex parte application. I think it's pretty clear from the context that it is because, otherwise, if we were to be the respondent, we wouldn't have to be served and given a right to intervene as we have. I think it makes sense for it to function the way it does.

A couple of other little things: section 56, I think it's at subsection (3). In an appeal, "The minister responsible for this Act, the commissioner, the applicant or a third party may intervene as a party to an appeal under this Division by filing a notice to that effect …." We're thinking about the circumstance where the appellant is a third party. Under subsection (2) they're required to serve notice of that appeal on the Commissioner and the minister responsible for the act, which is fine. But under subsection (3) the applicant actually has a right to intervene in that appeal. Now, as a practical matter, the third party does not even necessarily know the identity of the applicant because of the anonymity requirements in the statute.

If my neighbour wants to file an access request and it turns out that some of the requested information triggered a notification under section 19, a third party is objecting to the disclosure of that information and they want to go to court on that, the access to information applicant doesn't necessarily know that they have a right to intervene for one thing, or even know that the appeal is going forward. I think the public body should be notifying the applicant that this is why you haven't gotten the information yet and I think that there could be a letter, I would presume, indicating that much.

Whether the application for an appeal from a third party would get to the applicant and whether they'd understand that they actually have a statutory right to intervene, I don't think that's clear at all. We propose a suggestion there that the public body be required to provide a copy of the appeal to the applicants. I think they should be informed that they have a right to intervene if they wish.

The final thing I'll mention there is that we have encountered circumstances where we have a third party appeal that's gone to court after being through our office, and the third party has raised the idea that the applicant may no longer be interested in this information because we may be two or three years down the line from when the original access to information request has been filed by the time it gets in court. Sometimes you see various applications are made in the course of the process, so that can delay it. It can take that long.

Even if the third party has maybe communicated with the public body, the public body has said: We sent them an email last year, they didn't respond and we haven't heard anything further from the applicant, the third party can't just say, okay, we'll withdraw our appeal. If they withdraw their appeal that means the public body has to send out the information to the last address on file.

On the other hand, access to information applicants, they only thing they're obliged to do, and I think the only thing they should be obliged to do, is to file their access to information requests. If there needs to be some clarification about what the request entails, then they do need to respond to that. If the request itself is clear – I want access to X contract; the request is black and white – there's no need for the access to information applicant to engage in the process further until they get a decision as to whether they're getting the record or not. In the case of a third party appeal, they would've gotten a response from the public body saying that we notified the third party, they have filed an objection, they've gone to the Commissioner's office, they've gone to court, what have you. The applicant can just sit patiently and wait for that response.

Unfortunately, we do have circumstances where the public body has doubts as to whether the applicant is still interested and they're not responding to emails. We've had situations where the email address is bouncing back. There may be a letter that may go out to the mailing address that's been provided. We can tell that it's been picked up by –

CHAIR ORSBORN: Are you suggesting a combination of circumstances after a period of

time that would essentially allow a court to determine that the request has been abandoned?

MR. MURRAY: That's all. This has been suggested by public bodies in other contexts as well, that they feel that the applicant should be obligated to respond all the time.

CHAIR ORSBORN: Right.

MR. MURRAY: Which I don't think that's always necessary. Certainly it's not necessary, I don't think, for public bodies to be able to deem a request abandoned at the request stage. But I think at the court stage, everybody is spending a lot of money and time. We recommend that to deal with these circumstances, which we have seen arise, that there should be an opportunity for somebody to file an interlocutory application to deem the request abandoned if there is evidence available to the court that the applicant cannot be reached and is no longer interested.

CHAIR ORSBORN: Not interested, okay.

Presumably that would be an ability by the third party or the public body to bring that –

MR. MURRAY: Yes, I think that would be most likely.

That's it for those appeal provisions. We do have a piece in there about local public bodies and transparency. I don't know if we need to go through it in great detail. I'm not sure if you have any questions about it, but the relevant statutes would be the Schools Act. There are a couple of provisions: section 12 and 62(2).

CHAIR ORSBORN: Yeah, I asked about those. There is that act and I read somewhere that the Health Research Ethics Authority – those two acts are under review, I'm told. The Schools Act may have proceeded further than the other one.

MR. MURRAY: Yeah.

CHAIR ORSBORN: What's your sense on dealing with those Schedule A matters here rather than in the context of a full review of the legislation, which I understand your office is involved in?

MR. MURRAY: We've been asked to –

CHAIR ORSBORN: You just consulted, yes.

MR. MURRAY: Yeah, we provided a submission on the Schools Act review. They may come back to us and engage us further, it's hard to say. But that review has been on the go for a couple of years now. This one is going ahead right now. Really, all we're talking about, we're not talking about any changes to their statute; we're only talking about changes to Schedule A of our statute. That certainly is within the mandate of the review.

CHAIR ORSBORN: It stands in the mandate; I'm just wondering about the wisdom of doing it outside the context of the overall, say, Schools Act.

MR. MURRAY: Well, I don't think there's actually any danger, particularly on the section 62(2) – sorry, the section 12 part of it.

CHAIR ORSBORN: The privileged meeting one.

MR. MURRAY: No, the section 12 one, I think, is the right of access, if I'm not mistaken. Yes, the section 12 one is about people trying to get access to their school records.

CHAIR ORSBORN: That's the student record (inaudible.)

MR. MURRAY: Right.

We can see from other jurisdictions that the two statutes really sit side by side or, in some jurisdictions, the access to information statute is the one that is used for making formal requests for access to student records. Section 12 of the Schools Act is about viewing a record and it sets up a process where you go in and you sit down and view the record.

CHAIR ORSBORN: (Inaudible) access issue.

MR. MURRAY: Yeah. So filing an access to information request is a more formal process and exceptions come into play and things like that. Whereas viewing a record is more of an informal process. You don't have to consider some of the other exceptions that might come

into play, except other people's personal information.

CHAIR ORSBORN: Have you had this discussion with those who are looking at the act?

MR. MURRAY: Well, we have. We put this in our submission to them. But prior to that, we've had a couple of complaints to our office which we referenced in our –

CHAIR ORSBORN: You dealt with them under section 40, I think.

MR. MURRAY: In our review, yeah.

I mean, basically the school district disagrees about how we think the act works, because we don't think section 12 is actually really in conflict with the ATIPPA very much, if at all. Because, again, section 12 is about viewing; whereas the ATIPPA is about receiving a copy of records. We think, for the most part, they can sit side by side. So there's actually no need to have section 12 in there. They can still have the ability to allow students or their parents to come in and view records without having to file an access to information request, and it's appropriate to have that process available. But if –

CHAIR ORSBORN: Anything achieved by taking it out?

MR. MURRAY: Clarity. Because the school district thinks that the entire process of obtaining access to a student record is within the Schools Act because section 12 takes precedence over the ATIPPA. We don't think that's right. We think the exceptions in ATIPPA are sufficient to allow information to be withheld, that's required to be withheld, in a case of a formal access request.

Now, certainly, as I've said, the Schools Act should be sufficient in most cases. Unless you've gotten into sort of really big problems and issues with the school. In which case you may feel that you haven't gotten all of the records and you want to file an access to information request, and you may want to be considering other steps in some dispute that you're having with the school district, things of that nature. So it's not something that arises frequently, but we think that this model would work better.

The public meeting issue is really the same one as for the …

CHAIR ORSBORN: Municipalities.

MR. MURRAY: Yeah, for the towns as well.

Section 62(2) of the Schools Act says that the minutes are not available, the minutes of a privileged meeting. So there's already a section 28, which allows them to withhold minutes of a privileged meeting. Their concern, I think – and I happened to skim through some of the responses as well – is that there's a 15-year time limit on that.

All the municipalities and other local public bodies function within that circumstance, so the school boards would be the only ones that don't, because they have this special provision in 62(2). Any other local public body that has privileged meeting minutes, the exception does expire eventually.

That's not to say that other exceptions might not apply within that. If solicitor-client-privileged information is present in those minutes, that doesn't expire. The other exceptions can still apply; it's just that section 28 does eventually expire and, as I say, other entities have to continue to function within that context.

Regarding municipal governments and privileged meetings, our concern there is that you can hold a privileged meeting for any purpose at all and withhold the information. Certainly, through a cursory review of some council minutes, the minutes can be pretty vague and high-level during a public meeting of council. Are we at an appropriate level of transparency for the operations of our public bodies when a lot of the discussion and decision-making happens in the privileged meetings?

We realize that certain topics need to be discussed in a privileged meeting, but, certainly, it has been the case in Ontario and Nova Scotia that they've felt it appropriate to prescribe certain topics that are appropriate for a privileged meeting. That's what's being proposed here by us because the ability is

already there under ATIPPA to create a regulation.

CHAIR ORSBORN: Yes, I'm trying to figure out how this all fits together. Because you have provision under the Municipalities Act, but they can hold a privileged meeting when they declare they want a privileged meeting?

MR. MURRAY: Yes.

CHAIR ORSBORN: Then, under ATIPPA, you can have a privileged meeting if there's a regulation, basically, to support it. How does it fit together? Or does it?

MR. MURRAY: I don't know whether other work would have to be done to make that happen, but maybe section 28 would need to be revised in some way. I'm not sure. We do know that there's regulation-making authority under section 116 of ATIPPA.

CHAIR ORSBORN: Yes, there have been no regulations there.

MR. MURRAY: No, no regulations.

CHAIR ORSBORN: No regulations regarding publication schemes.

MR. MURRAY: No.

CHAIR ORSBORN: I'm just trying to figure out, with municipalities and meetings, how it fits; what you're asking me to do with respect to that and how it fits with the provision in the Municipalities Act.

MR. MURRAY: Well, the regulation-making authority is there that can specify the purposes for which a local public body may hold a privileged meeting.

CHAIR ORSBORN: Yeah.

MR. MURRAY: I'm presuming that if section 116(f) says it can do that, then a regulation saying that will do that. So if a regulation saying that you can hold a privileged meeting to discuss legal matters, human resources – list off the three or four things that would be appropriate – then other matters that don't fall within one of those categories would not be able to be withheld as a privileged meeting.

CHAIR ORSBORN: So you'd have to go back to the Municipalities Act and limit their ability to hold a privileged meeting?

MR. MURRAY: I'm not sure if you would or not. I guess I'll leave that to you.

CHAIR ORSBORN: Thank you.

MR. MURRAY: I'll carry on.

So the next one is about publication schemes. There's been a provision along the lines of a publication scheme in the act since day one, and it's never been effective, and it's never been really enforced. The ATIPPA, 2015, effort, I think, certainly recognized the value of creating publication schemes. As you mentioned, what's required in order to enact it is a regulation designating a public body being subject to it. That's never been done.

So in our submission we describe some of the other jurisdictions' approaches to publication schemes and personal information banks, details of personal information banks, things of that nature. We mention a couple of the other international jurisdictions where there's more of a functional process in place: Scotland and Bermuda. We've made some recommendations there that would, I think, see the publication scheme process come to life. So, basically, eliminating the requirement for designating in the regulations that certain public bodies –

CHAIR ORSBORN: For an uneducated layman on these matters, could you explain to me in simple terms the difference between publication scheme and what you were talking about earlier in terms of formation of information practices and policies?

MR. MURRAY: They could certainly be related. I think information practices and policies would be high level and generic and they would apply to whatever records a public body may or may not have.

CHAIR ORSBORN: It wouldn't just be personal information?

MR. MURRAY: They would be about personal information, yes, because anything beyond personal information is the *Management of Information Act* purview. So it's not within our purview to decide how public bodies should handle information that is not personal information.

A publication scheme is simply a method to let the public know what information holdings a public body has and some description of that information.

It's very simple. It's useful from a privacy standpoint as well because you have to be able to say, well, we have information banks of personal information as well as other business information. That helps applicants know where they can ask for their own personal information, but it also helps public bodies have a better handle on what information they have and then they know that they need to protect it as well.

We've made some recommendations there that public bodies should be required to prepare a publication scheme and, instead of having them designated in the regulations, all public bodies should be given just an opportunity at the beginning whenever the amendments are made, if there amendments following from this review, perhaps given a year to implement a publication scheme –

CHAIR ORSBORN: Including those under the Municipalities Act?

MR. MURRAY: Unless an argument can be brought forward that that's not feasible. They would have fewer records so there'd be less to it; the job of preparing a publication scheme might be less.

CHAIR ORSBORN: They already have an obligation under the Municipalities Act, I think, to make certain –

MR. MURRAY: Certain information public.

CHAIR ORSBORN: –information available, at least.

MR. MURRAY: So a certain amount of it is sort of already done and maybe the municipalities department can assist municipalities by sort of preparing sort of a model for them to go by. We can certainly assist with that as well.

CHAIR ORSBORN: Yeah, maybe a discussion for a later day.

MR. MURRAY: Yeah.

CHAIR ORSBORN: Time is going to be an issue for us, but we've heard various treaties and you've seen them certainly from small municipalities with small part-time staff that that –

MR. MURRAY: Yeah, and we can appreciate that. I mean, obviously the priority for us would be the larger public bodies. The smaller they get the less important this is because you're dealing with public bodies that have a vast amount of information holdings and it's important for that to be (inaudible.)

CHAIR ORSBORN: Might give some thought before you come back as to, practically speaking, what can a small municipality do when – because I think it's probably fair to say that in the smaller areas there is more potential for personal disputes between individuals. You get these issues, perhaps, between a councillor and a resident and whatnot, and that mushrooms after a council meeting into 10 ATIPP requests the next day.

MR. MURRAY: We've certainly seen that kind of thing.

CHAIR ORSBORN: Which places a pretty heavy burden on a part-time staff.

MR. MURRAY: Yes.

CHAIR ORSBORN: We can talk about that at some point.

MR. MURRAY: Yes.

I don't know if there's much more we can add on publication schemes. We have proposed that –

CHAIR ORSBORN: Your submission is supported by the Department of Health, by the way. You probably saw that in their submission,

they agree with it. I don't know if they knew that the obligation was already there; maybe they just said a regulation hasn't been …

MR. HARVEY: How I interpreted that submission was that they felt that life needed to be breathed into that section of the act as well. I was pleasantly surprised to see them advocating for that.

MR. MURRAY: All right, Michael, do you want to …

MR. HARVEY: Sure –

CHAIR ORSBORN: How do you want to handle the timing of this? Because we're not going to get through your recommendations today and we have the Centre for Law and Democracy coming in at 2 o'clock.

MR. HARVEY: Certainly. Where we are now is nine recommendations, many of which are minor and administrative in nature, so we can deal with that during the block of time when we return, unless there are any of these that you want to discuss right now.

Many of them, I think, are relatively straightforward and our policy intent behind recommending them is probably self-explanatory. For example, recommending that the AG be covered for the administrative records of the Office of the AG, but, of course, not the audit records. I think the investigatory records would be protected. I think that's probably self-explanatory and I believe the AG is also supportive of that, although she can speak for herself.

CHAIR ORSBORN: Yes. The timeline issue, I know you're comfortable with extending the timelines on the disregards. As you indicated earlier from the other presentations, there's a pretty concerted push to get some more flexibility at the administrative level and that may warrant a longer discussion.

MR. HARVEY: I think our response is probably a great place to have that discussion. I'd say, at a high level, 20 business days is the national standard.

CHAIR ORSBORN: Yeah, I'm not going to argue with you, but there's also a pretty consistent thing across the country where there's some, at least, limited ability to extend that.

MR. HARVEY: Yes, and we do extend it.

CHAIR ORSBORN: No, no, but self-extend it.

MR. HARVEY: Yes, I appreciate that. But what we were surprised by – and, again, we can talk about this in more detail – was a notion put forward by a number of submissions that there's a lengthy process involved. In our experience, filling out our form to seek an extension is one that can be done in very short order.

So we were really surprised to see submissions from some public bodies saying that they needed the clock stopped for two or three days while they did that. I mean, that is not, at all, our understanding or experience. An extension request can be put together in very short order, and we approve, in full or in part, almost all of them. All we ask is for some evidence to be put forward that it's legitimate.

If a new self-extension deadline is put in there, we know what will happen. That will become the new deadline, and what will occur is a reduction in the right of access.

CHAIR ORSBORN: Do you trust coordinators to do their jobs?

MR. HARVEY: It's not so much coordinators, it's the chain of command through a public body. That, in particular in government department, they have to get it out of their deputy minister's desk or, in a public body, over their CEO's desk. Their deputy minister will ask: When is this due? And they will say: Okay, well …. Then they will adjust their priorities accordingly. These are very busy people and they will adjust their calendars based on what they need to do on any given day. If what they need to do is get the request out by day 20, then they will do that. But if they have an option to go to day 30, then they will adjust their priorities accordingly. I've –

CHAIR ORSBORN: Is that the experience across the country?

MR. HARVEY: I mean, I can speak about my experience within government departments. But I think the experience across the country is that in jurisdictions where there is the ability to give themselves extensions, there's very long wait times for access requests.

We dealt with our colleagues in Nova Scotia recently and their experience compared to ours is like night and day. The comparison was made by certain public bodies to the federal government's system. The federal government's system, which has the ability to give itself extensions, is notorious for having extraordinarily long times to fulfill access requests.

CHAIR ORSBORN: Yeah, I think they got – I don't know if it was up to 90 days or something (inaudible).

MR. MURRAY: Well, they're going months and months, some of them. I mean, the current Information Commissioner and past Information Commissioners have issued reports about how bad the delays are there. We, in this province – and we'll address this in our supplementary submission – have had issues with that during the Bill 29 era. We had Commissioner Ring on two occasions issued news releases about delays that were being experienced by access to information applicants, and that's one of the reasons why we ended up with the process from ATIPPA 2015, which is working well.

CHAIR ORSBORN: Do you know in the other – forget the feds, but in the other jurisdictions where they can self-extend for a limited period of time, is there any reporting of any decisions to self-extend to the Privacy Commissioners? Any monitoring of it?

MR. MURRAY: Not to my knowledge.

I know that the Manitoba ombudsman did do a report on this issue and we're going to be referencing that in our supplementary submission. The issue is that even if we could sort of do an assessment after the fact, the result has already been that these extensions will have applied.

The other thing with coming to our office for an extension is that we can actually assess whether it's necessary or not based on asking questions and seeing what their submission entails. We can also help to ensure that the extension that's being requested is for the amount of time that's needed and not for an unnecessary amount of time.

CHAIR ORSBORN: Does that take up much of your time?

MR. MURRAY: It depends on the week. I guess if we get a lot of extension requests in one week, I mean –

CHAIR ORSBORN: This past year was somewhat different, I think, was it not in terms of –?

MR. MURRAY: Yeah, that was different. Putting aside pandemics and Snowmageddons –

CHAIR ORSBORN: You still had a couple of hundred before that all kicked in.

MR. MURRAY: Yeah, for the most part, the process is that the senior analysts will receive them, the requests for extensions and will meet with me. Between the two of us, we will review the application, decide if we need any other information from the public body and make a decision.

CHAIR ORSBORN: Do you give reasons?

MR. MURRAY: We only very briefly. We don't usually give detailed reasons. It's just a time thing. If we were making a decision that was substantive, like denying access to information or something like that, we would feel obligated to give reasons. But an extension is not something that can be appealed and it's a short period of time.

CHAIR ORSBORN: Makes it easy.

MR. MURRAY: Well –

MR. HARVEY: It's easy in the case of almost all the time because almost all the time, the extension is granted.

MR. MURRAY: Right.

MR. HARVEY: Even though what Sean has described is a practice in 90 per cent, if not more of them, I've asked to see all of those that are refusals. Any refusal will come to me. Even though they're not appealable, I will, on occasion, hear from the public body if there has been a refusal, in which case I do end up providing greater justification for why we do refuse the extension, but we generally don't. In fact, the times that I can remember recently where we have refused an extension are when it's the third extension in a row and we say: No, you know what? Enough is enough. You just have to get it done.

By and large, the system works. It may present some administrative inconvenience, but it's not, in our view, the level of administrative inconvenience that you – we don't agree with the assessment of the administrative inconvenience in the submissions and, moreover, we don't think, if the response of that is to extend the deadline, that response is a reduction in the right of access. We don't believe that's justified.

CHAIR ORSBORN: Okay.

MR. HARVEY: Again, we're very aware of the time here. I'm just scanning down through this list of recommendations to see if there are any of the others that I might want to highlight.

Perhaps in the way of conclusion, before I do come back to the duty to document question, we did on the break just examine – and I do apologize for the error to a certain extent – that we thought that was one of the Muskrat Falls recommendations that had been referred to you in part of your mandate, but that was a slip-up on our part, a mistake. That said, perhaps we were overeager because we've been quite concerned about duty to document, since it is one of the recommendations of the committee chaired by Mr. Wells that was not ever implemented, and that, we think, is unfortunate. We do believe that it is connected to ATIPPA because how can you have effective access to information if the information is not properly documented in the first place?

I would argue that there are at least two reasons why you may wish to consider an expansive approach to your mandate. The first being that clearly this was something that was a view of the Wells committee at the time, that a proper duty to document does walk hand in hand with proper access to information. Even though the recommendations that he made at the time were for an amendment in the *Management of Information Act* – and, indeed, that's what we recommend as well: an amendment to the *Management of Information Ac*t – that helps the ATIPPA work properly. That's the first and, I guess, higher level reason.

The second-level reason is I think you can imagine a model whereby there is a discrete recommendation to this act that refers to oversight ability over the duty to document that both the Wells committee and then Commissioner LeBlanc as well said should rest with the OIPC, to recognize our authority in that regard.

So I think duty to document is relevant. I don't know that I need to speak to it in a great level of detail. The model exists for how it would be introduced through an amendment to MOIA. British Columbia has this model. One difference with the British Columbia model, rather than the one that we propose and the one that the Wells committee and Commissioner LeBlanc have proposed, is that in British Columbia it's the chief archivist who reports to a Minister of the Crown that has the oversight responsibilities.

In our view, without an independent statutory officer having oversight responsibility, that would be an ineffective duty to document, because if a member of the public had concern that decisions were not being properly document, their only recourse would be to ask the government itself, and the answer would presumably be trust us, or not. So for the same reasons that we have independent oversight under this act, we think it would be called for with a duty to document.

That said, the level of duty to document that we call for is not similar to that which we would apply to access investigations. What we would envision is a review at the policy level to ensure that public bodies have proper duty to document policies implemented, as opposed to doing investigations at the document level.

So perhaps I'll limit my comments there to that.

The other thing I think I might want to reference in the interest of time – and this relates to Muskrat Falls again – is section 5.4 of the *Energy Corporation Act*. Commissioner LeBlanc called for that to be amended, and in our view, ATIPPA also needs to be amended in Schedule A.

The challenge that we face, and I believe Nalcor has proposed an entirely different model, and I think we –

CHAIR ORSBORN: Well, I think they want the thing left there. They're proposing some kind of an informal sort of practice approach where they'll make a decision then send you the information to see what you think about it and then you send back comments and –

MR. MURRAY: I think they want to send us a description or a summary or something. I don't think they want to send us the actual records.

CHAIR ORSBORN: The way it's structured presently, there's some ability for the Commissioner to review under 5.4. As I read it, that is simply limited to your assessment of whether the information is commercially sensitive.

MR. MURRAY: Yeah.

CHAIR ORSBORN: Which is almost everything.

MR. MURRAY: Correct

MR. HARVEY: Here's the challenge I face because – I recently faced this for the first time, under my appointment. The definition of commercially sensitive information under the *Energy Corporation Act* is extremely broad and the determination of that is really at the discretion of Nalcor's board. So I failed to understand even what the purpose of the certification of my office's certification is. It's almost like it's a process that was put in place without any real meaning whatsoever that this material will be sent over for me to review and determine if it meets the exceedingly broad definition that they give to it. I mean, that seems like an almost meaningless process.

MR. MURRAY: The definition includes financial information, so that's pretty much –
CHAIR ORSBORN: But your role, as it's presently set-up, as I understand it, is simply looking at whether the information is commercially sensitive. It's for the CEO and the board to decide whether there's any harm resulting from this release and you don't even look at that at all. That's my understanding of it.

MR. MURRAY: That's my understanding.

CHAIR ORSBORN: Very gentle question: When you look at an operation like Nalcor, and you put that in the context of the objectives of the act, which is democratic governance, transparency and accountability, how do you fit a primarily commercial operation into that? Does it become sort of public interest simply because the shares are owned by the Crown and there's some loan guarantees or what?

MR. HARVEY: That's an interesting philosophical question. It speaks to the nature of what is a Crown corporation.

CHAIR ORSBORN: And whether or not it should be subject to the same information accessibility as the department of fisheries, which it's not right now.

MR. MURRAY: I think the burden really should be on them to say why it should not be subject to the same.

CHAIR ORSBORN: Well, they probably will. I'll ask them the same kind of question.

MR. MURRAY: Yeah. Then if they should not be, they should only not be to the extent necessary to protect their operations and not more than necessary.

So one of the examples that I hope you have an opportunity to present to them is Manitoba Hydro. I've confirmed with my colleagues in Manitoba that Manitoba Hydro operates within the *Freedom of Information and Protection of Privacy Act*.

CHAIR ORSBORN: They only got a one-part test, though, right?

MR. MURRAY: It's still better than section 5.4 –

CHAIR ORSBORN: No parts.

MR. MURRAY: – of the *Energy Corporation Act*. They operate within that context and they have no special legislation protecting their information.

I'm not going to discount the possibility that there may need to be some special protection, but I'm not willing to concede that there necessarily has to be either. I think that's something that needs to be looked closely at. Section 35 exists to protect public bodies from financial or economic harm, as well. So between section 39 and 35, I'd like some consideration to be given to how much more protection is really needed for an entity like Nalcor.

CHAIR ORSBORN: Yeah, I presume we'll probably get into the discussion to some extent at the round tables, in terms of the effect on Nalcor.

MR. HARVEY: So that said, I think that's mainly what we wanted to bring forward today. The other recommendations, aside from those, that we, I think, have all agreed are relatively self-explanatory or that will otherwise come back in our response when we come back to speak to you in response, we can talk about in the round tables.

CHAIR ORSBORN: Yeah, I will have some questions when you come back that we didn't get time for today. Smaller questions in terms of suggestion in terms of the compatibility of people at your office, certainly in terms of a section 115 offence.

MR. HARVEY: Yeah.

CHAIR ORSBORN: Right now, you're not required to give evidence.

MR. HARVEY: We're going to address that.

CHAIR ORSBORN: Yeah, okay. Presumably at some point somebody will explain to me what section 8.1 of the *Evidence Act* does and how it affects anything under ATIPPA. That explanation will come.

MR. HARVEY: Yeah, there is a bit in our submission about –
CHAIR ORSBORN: Yeah, I know.

MR. HARVEY: – section 8.1, where we recommend that basically I think it would be –

MR. MURRAY: Just leave it alone.

MR. HARVEY: – leave it left alone. I think the Department of Health had it in there.

CHAIR ORSBORN: I haven't got it through my thick skull yet what would change if it came out.

MR. MURRAY: Not much.

CHAIR ORSBORN: I'd just like to understand it, that's all.

MR. MURRAY: I think it's very unlikely that anything would change. As we indicated – because once PHIA came into the picture, the types of information where the rationale for having this provision in there are mostly under PHIA now and PHIA deals with it in a more direct way.

CHAIR ORSBORN: Yeah, and it simply speaks to the admissibility in the context of a legal proceeding.

MR. MURRAY: Yeah.

CHAIR ORSBORN: That's all it does.

MR. MURRAY: I think it's the possibility that it's – under the *Evidence Act* the definition of a proceeding is pretty broad and it could be considered to be included, proceeding before a Commissioner and –

CHAIR ORSBORN: Yeah, I'm trying to think of it. There is reference in the ATIPPA, I can't quote the section number, but it talks about a proceeding before a Commissioner. Is there such a thing as a proceeding before a Commissioner?

MR. MURRAY: I think we'll have to look at that. It depends on – the *Evidence Act*, though, has a definition of a proceeding, does it not?

CHAIR ORSBORN: (Inaudible.)

MR. MURRAY: I don't know if you can recall that off the top of your head.

I think that there was a belief that we could be considered to be a proceeding, that is why I think they needed that reference to 8.1 in there.

CHAIR ORSBORN: I can't quote the section number. It doesn't matter, but it does talk about a proceeding before a Commissioner. I'm wondering what kind of a proceeding that could be.

MR. MURRAY: Okay. I don't know. There are all kinds of dusty corners of this act.

CHAIR ORSBORN: Yeah.

MR. MURRAY: Every now and again you find something that you haven't had to deal with before.

CHAIR ORSBORN: And five years' experience sort of points a light on some of them.

MR. MURRAY: Yeah.

MR. HARVEY: I haven't seen anything so far that I would characterize as a proceeding, but that's not to say that –

CHAIR ORSBORN: No.

MR. HARVEY: – some of what we do, others might characterize as a proceeding and –

MR. MURRAY: Particularly if there's a statutory definition of proceeding somewhere that –

CHAIR ORSBORN: Talks about investigation or proceeding.

MR. MURRAY: Right.

MR. HARVEY: Well, we definitely do investigations.

CHAIR ORSBORN: Investigations for sure. Yeah.

MR. MURRAY: Yeah.

CHAIR ORSBORN: Thank you very much.

The Centre for Law and Democracy is on at 2 o'clock. I guess, in terms of your presentations, I'll see you at the round tables and then, I think to be on the safe side, we should probably set aside a day for your responses.

MR. MURRAY: Definitely.

MR. HARVEY: Yeah.

CHAIR ORSBORN: And I have no idea when that's going to be. It depends on if there's a change in government, it may take a little longer. We'll just have to wait and see. Whether I have to seek an extension for the report beyond March 31, I don't know yet.

MR. MURRAY: Yeah.

MR. HARVEY: Well, we remain at your service and convenience.

CHAIR ORSBORN: I appreciate your help.

Thank you very much.

MR. MURRAY: You're welcome.

MR. HARVEY: Thank you.

CHAIR ORSBORN: We'll reconvene at 2 o'clock.

Recess

CHAIR ORSBORN: My name is David Orsborn and we're resuming the public sessions of the 2020 ATIPPA, 2015 review.

This afternoon we have a presentation from the Centre of Law and Democracy. I believe we have Mr. Mendel and Mr. Hoh. Do I have that right?

MR. MENDEL: Yes.

MR. HOH: That's correct, yes.

CHAIR ORSBORN: Thank you.

I can indicate to you, gentlemen, I have read your submission, so I ask you to give me a summary of your main points and we can address any questions that I may have on the way through.

The floor is yours. Thank you very much.

MR. HOH: Thank you very much.

I'm going to begin the presentation. My name is J. Y. Hoh. I'm the legal officer at CLD. We're just going to run through a few points for emphasis and then hand it over to discussion.

I'm just going to talk about three points, first to do with the fees that are intended on making requests. Second, the powers of the Information Commissioner and third, the scope of the law. Then I'm going to hand my time over to Toby who's going to talk about exceptions.

In the first point, which is about fees, CLD's position on fees is really that any fees to request with respect to the process really should be as low as possible, if not completely free. Really the principle that underlines that position is that access to information is a fundamental human right and we think that it shouldn't cost money to exercise that fundamental human right.

With that in mind, we would really like to applaud Newfoundland and Labrador for taking the step five years ago to making requests free. That brings the province in line with over 110 jurisdictions around the world and many in Canada. We think that's a positive step forward and we would like to urge the committee to retain that change.

On top of that, however, the two other points where we feel as if the law could be further improved with respect to fees, the first is making sure that any other fees on top of requests are really restricted to the cost of reproducing and delivering the information, so any further copying costs, say, for instance. I think what we want to avoid is making sure that every fee is being levied in terms of time spent locating the information because they can then charge members of the public for what might be inefficient record management practices.

The second other reform that we would like to propose has to do with restricting charges, in terms of charges for any, say, photocopying or printing, making sure that a sort of range of pages are free, let's say 20, for example. So someone who just wants to print one or two pages doesn't get charged. That's it for fees.

My second point is about the powers of the Information Commissioner. We're seeing globally that a robust Information Commissioner that has all the powers to do his job properly is a cornerstone of any effective information regime. We think that's definitely the case in Newfoundland as well.

The specific reform that we would like to propose is making sure that explicit language is inserted into the law to make it clear that the Information Commissioner can review documents to which the claim of solicitor-client privilege is attached.

Just to make it clear, we already think that the current statute, the current law, already gives the Commissioner that power. There are many sections in the statute that simply don't make sense if the Commissioner did not have that power. For example, we have section 97(6), which says that public bodies can place no restrictions on the Information Commissioner's ability to inspect the record, except for designating a site to inspect records to which claims of solicitor-client privilege attach.

A site can be designated for them to review these records; clearly, they're able to review these records. We think it's very clear, the statute already gives the Information Commissioner that power, but what we want is language that would really establish for greater certainty, explicit language that says 100 per cent, the Information Commissioner can inspect such records.

Thus, because the Supreme Court case and the University of Calgary case has created some uncertainty over what kind of language is needed before a Commissioner can inspect such records, we think from a policy perspective it makes sense. But if the Information Commissioner cannot inspect these records, public bodies could easily make all kinds of spurious claims of solicitor-client privilege and

the only recourse a requester would have would be to launch a court appeal, which is pretty costly and time consuming.
My third point is about the scope of the law.

CHAIR ORSBORN: If I can just go back, Mr. Hoh, to your issues on privilege. One of the examples that you give is the RCMP's civilian s commission in section 45.4 of the act.

MR. HOH: Yes, that's correct.

CHAIR ORSBORN: Maybe I haven't read that right, but they have a rather involved process that goes to the minister for the appointment of a retired judge and that judge makes observations and then they decide whether or not they're going to judicial review. The way I read it, I did not see in that legislation any power of the commission to compel the RCMP Commissioner to pass over solicitor-client-privileged documents. Did I read that right?

MR. HOH: Just give me a second here. Let me pull up the provision in the law.

MR. MENDEL: Could I suggest that we let J. Y. finish his presentation and then, while I'm making mine, he could respond to that point?

CHAIR ORSBORN: That's fine. I'm happy with that. Thank you.

MR. MENDEL: Why don't you continue, then when I'm making my presentation, you can look that up. I think that might be efficient.

MR. HOH: Sure, I'll do that. That's a good idea.

CHAIR ORSBORN: Thank you.

MR. HOH: The last point that I was going to make before I hand my time over to Toby is about the scope of the law.

CLD's position on that is that we want to cover, really, as many public bodies and functions as possible under the law to impose that duty to disclose. We understand that in many cases, some of these bodies will hold documents that are sensitive and that maybe shouldn't be disclosed, but the right place to view all of those documents is in the exceptions.

Right now, it excludes certain bodies entirely; for example, some courts (inaudible) from the law at all. That would be section 2(10)(3). So some courts are just not included in the law at all. We understand that it may very well be the case that some of the documents or many of the documents held by these courts shouldn't be disclosed because it might affect administration of justice. But that issue is more elegantly dealt with by subjecting these courts to the law and then addressing that problem with an exception, an exception that says you don't have to disclose these documents if disclosing them would cause a serious threat to the administration of justice.

Really, the benefit of including these bodies in the law and then using the exceptions is that you've got the triple safeguards of the harm test, the public interest test and, if applicable, any sunset clauses. We think that's a better option. It ensures that any refusal to disclose goes through the harm test, the public interest test and any of the sunset clauses. We would urge the committee to take that approach for all the bodies that are currently excluded from the scope of the law.

Those are the three main points I was going to make today. I'm going to pass my time over to Toby and I'll look up that point that the Chair asked me.

MR. MENDEL: Well, thank you very much. On behalf of CLD let me thank you for hearing us.

I would note that on my screen I can't actually see you, I can just see myself twice. I guess I'm on your screen and that's coming back to me. It would be kind of nice if we could see you while we're speaking.

CHAIR ORSBORN: I can see you but I am here.

MR. MENDEL: I trust that. I did you see briefly. Anyway, I'm going to focus on exceptions.

I would just, as a prelude to my comments, mention that we have developed – as we mentioned in our report and as you may have seen otherwise – what we call the RTI rating, the

right-to-information rating. It's a very detailed tool for assessing the strength of legal regimes through access to information. If you're interested in seeing how other countries deal with a specific issue, there's a utility on the RTI rating. The RTI rating is broken down into 61 separate indicators, each of which looks at a very specific feature of a strong RTI regime, like the time to respond to requests, the fees that may be charged and the exceptions broken down into all kinds of different categories.

You can go into the tool indicator by indicator and just look at that one indicator – so, for example, time limits – and see exactly not only what countries earn on that indicator, but their actual legal provisions. It'll rank the top-scoring countries alphabetically. Let's say Afghanistan might be the top with the full two points on that indicator and it will then have the legal provision from Afghanistan. It's a really fantastic research tool. If there are issues that you want to probe into in more detail and see what's happening globally, we don't do that within Canada because it only is the national law, but Canada itself, of course, is on the rating.

I would note that on the RTI rating the regime of exceptions is the category from among the seven – the 61 indicators are grouped into seven categories. That is the category where Newfoundland does by far the least well, earning only just under 57 per cent of the points versus 75 points – nearly a 20-point gap for the next lowest category. So according to our standards that identifies that as a weak area.

Trying to understand from a process point of view, I think the key problem is that with respect to exceptions the approach taken in 2015, where there was very significant revision and dramatic improvement in the strength of the law, the approach taken on exceptions was more gradualist or conservative, if you will, whereas in some other areas really innovative approaches were undertaken. Just to mention one, the whole of Canada talks about – and this is the term they use – the Newfoundland approach when it comes to the binding nature of the Commissioner's decisions. Newfoundland crafted a unique approach to that which has been recommended and discussed widely in Canada. That didn't happen in the area exceptions. I think that's, to some extent, understandable. If the procedures or powers of the Information Commissioner have been a little bit too ambitious in a revision, that could cause some problems but it's unlikely to cause serious harm. If the exceptions are too broad, that really could cause harm, so I do understand the caution in 2015.

On the other hand, I have extremely extensive experience working all around the world on this issue and I would say that a much tighter approach to exceptions is not going – sensibly done, obviously, but a tighter approach to exceptions is not going to cause harm. What we actually see around the world – and this applies almost universally from a geographic point of view – is that public authorities in particular are very conservative about applying exceptions, such that they are far more likely to err on the side of caution and not release information that should be released, rather than release information that should be protected.

J. Y. referred to the three standards for exceptions. I'm going to put forth a slightly different three-part test under international law. Our standards do come from international human rights law and that is – and we did, of course, cite this in the report but I will repeat it – that exceptions should meet three standards. The first is that they should be crafted in clear and narrow terms and protect legitimate interests in the first place. Of course, they should be comprehensive in their protection of legitimate interests, but they shouldn't go beyond that.

The second is that information should be allowed to be withheld only if its disclosure would cause harm to protected interests, if disclosure would harm national security rather than that the information is about national security which, of course, is a much broader range of information. The third is that even if release of the information would cause harm to protected interests, if the overall public interest weighs in favour of disclosure – in other words, the benefits from disclosing are greater than the harm from disclosing – the information should still be disclosed. That is a core part of the guarantee of freedom of expression under international law. Whenever freedom of expression comes into conflict with any other

social interest, under international standards there's always a balancing test.

I would just briefly highlight five areas where I think the regime of exceptions in the current Newfoundland law could be improved; the first is in relation to section 5, the blanket exclusions. According to our standards – and J. Y. already kind of mentioned this – blanket exclusions are never okay. The right to information or access to information law should cover all public bodies and all information, and then anything that needs to be protected should be protected through the regime of exceptions. That's the first area. We would call, really, for the complete removal of section 5 and, where necessary, elements of that could be reflected in other parts of the law.

The second area is section 7(2), what I will call paramountcy clauses. That's the preservation of exceptions in other laws. Now, in theory there's nothing wrong with that, as long as those exceptions conform to the three-part test that I just outlined. Unfortunately, we haven't reviewed all of them comprehensively but we did a fair sampling of them, and many of those exceptions have elements or entirely fail to respect one or another part of the three-part test.

There are different ways to approach this, but one approach that we would recommend would be that in the primary access to information legislation, all of the types of interests that need protection are mentioned – we believe that's essentially already the case – and subject to harm tests and public interest override, which is not quite the case yet.

Then other legislation could be allowed to extend those exceptions – not to extend those exceptions, to elaborate on those exceptions. Privacy, for example, could be elaborated in some detail and in that protection act it's common to have other legislation that elaborates on what national security means. Nothing wrong with that. But we would keep those other legislations subject to the primary standards in the access to information law. Kind of see it as a quasi-constitutional role, which we believe, at least under international law and to some extent under Canadian constitutional law, it is.

The third area is about harm. A lot of the exceptions in the Newfoundland law don't refer to harm, don't include a harm test, and that problem is, to some extent, (inaudible) throughout the regime of exceptions, leading to Newfoundland getting a score of zero points out of 4 on Indicator 30, which is the indicator that deals with harm.

In several cases, the exceptions do not refer in the first place to interests. We can only protect interests against harm and not categories of information. To give an example, Cabinet secrecy is not an interest. It's a phenomenon. One could not sensibly design a harm test to protect Cabinet secrecy against harm. It doesn't really make any sense. On the other hand, Cabinet collective responsibility is an interest. It's a way we organize Cabinet and we would want to protect that against harm. We could craft an exception which protected that interest against harm and would exclude at least the possibility of abuse of that exception, as something that we have seen in a lot of jurisdictions.

The fourth area I would mention is that we see in the Newfoundland law a number of exceptions which are somewhat vague and duplicate other exceptions. For example, section 32 on evaluations seems to me to be almost entirely covered by the right to privacy. Formally speaking, there's nothing wrong with that, as there isn't with preserving exceptions and not the laws, as long as the three-part test is respected. But there's a strong tendency that we have seen pretty much everywhere: Where you duplicate exceptions and have more specific regimes on privacy, often they become overbroad. We point out some examples in our analysis of that in the Newfoundland law.

The fifth area I'd like to talk about is the public interest override. Our starting point for this, as for many of our other points, is that the right to access information held by public bodies is a human right, so it should have the characteristics of a human right. I would note that among the interests that are protected in the Newfoundland and pretty much all of the access to information laws that we've review, only privacy and perhaps safety can be characterized as rights. It's only in respect of those two interests that we have a clash, if you will, or a potential clash between a human right and another right.

National security is an important interest in society, but it's not a human right.

In any case, our standard is that the public interest override should apply universally. The right to access information is a human right. It can be defeated; it's not an absolute right. But not where the interest that's protected by it is larger than the other interest that's being protected, that can never be a ground for defeating a human right.

We believe that the public interest override should be universal and we also think that it should be applied at least on a level playing field. That is to say that where the balance of interests weighs in favour of public interest disclosure, disclosure should be mandated. The standard in the Newfoundland law is that it is clearly demonstrated that disclosure is in the public interest, that it is not a level playing field, that's a playing field that's weighted against the public interest override.

I will end my comments by mentioned that the regime of exceptions did improve in 2015. The score on the rating went from 14 to 17, so we're not suggesting that there weren't improvements and that that wasn't engaged as an issue, but we believe it was much more of an incremental tightening up than some of the more bold steps that were taken to reform other parts of the law. After five years of working with that erstwhile new legislation, we think now is the time to be bold in that area as Newfoundland was in other areas. We believe that a strict adherence to the three-part test is really the way to go. We mentioned in our submissions some of the other standards. J. Y. mentioned the overall time limit on exceptions of 15 to 20 years and there were other features of the regime of exceptions that the three-part test is really essential to it.

I'll stop with that and we hope that you might have some questions for us.

CHAIR ORSBORN: With the public interest override, what is your sense of the decision-making process that would engage that? Also in our context of the review of that decision, our Information and Privacy Commissioner spoke this morning and we talked a little bit about the burden of proof in the public interest override issue and didn't have any firm conclusions other than that he recommended that basically everybody should put their best foot forward and see what happens. But, in the first instance, to determine whether or not the public interest would override access, whose decision should that be and what process, in your experience, is used to challenge that decision?

MR. MENDEL: Right, so the first point is that, from our point of view, the public interest can never override access, it can only mandate access.

CHAIR ORSBORN: Yes, I'm sorry.

MR. MENDEL: So it only works one way. You have an exception, subject to a clearly defined interest and a harm test, and those two are met and then the public interest overrides them and mandates openness anyway.

Some laws, although very, very few, have a kind of an open public interest secrecy override so that whatever is in the public interest for secrecy – and we don't believe that that's warranted. We believe that it's possible to, as every Canadian jurisdiction does, define a comprehensive regime of interests which need protection and not to allow others to creep in through a (inaudible) public interest override.

I think it's a very good point that you raise. We would advocate for the public interest test to apply at every stage of the decision-making. So an individual or an applicant applies for information and the information officer considers that, or there's a process within the public body for consideration of that request, and the public interest override should be applied at that stage and then again when it goes to the Commissioner, and again, of course, when it goes to the courts. Review in Newfoundland before the courts is de novo, so that all works out.

Our experience internationally has been that while you do find some instances mostly where the public interest override is really clear, for example, because there's corruption or wrongdoing or some clear sort of wrongdoing on the file, most of the time information officers do not disclose based on the public interest. I kind of understand that. I think that the incentives inside of public bodies are mainly lined up

against disclosure and it's a bit of a risk for them to engage in public interest disclosure because they're kind of saying, well, this information should be secret according to the main part of the regime of exceptions, but I'm saying, by myself, that a bigger public interest exists out there.

But I think it's important for that to happen at the first stage, first of all, to give them the possibility of doing that, and also to emphasize that at every stage of the decision-making this is the proper decision-making process or proper factors to consider. Then, of course, when the Commissioner considers it, that is where we see a lot of application of the public interest override in practice. I'm not sure if that exactly answered your question.

CHAIR ORSBORN: Well, put yourself in the position of a judge. The public body has found that an exception applies but presumably the applicant says, well, I think it should be released in the public interest. You're sitting as a judge, you got the applicant and the public body and the Commissioner in front of you, who do you expect to prove what?

MR. MENDEL: Okay.

Well, I think that another very welcomed feature of the revisions in 2015 placed the onus on the public body before the Commissioner and before the courts to prove that non-disclosure was appropriate. I think that, formally speaking, as a procedural matter, that onus should apply as well with the public interest. As a matter of practice, though, it's a little bit delicate to ask, given the vagueness and the scope of the public interest override and this sort of thing. There is another quite important point to be made here. We believe very strongly that applicants should not be required to provide reasons for making a request. If I make a request for information, I don't have to say why I want the information, but obviously those reasons may be very relevant to the public interest override.

If I'm asking for information because I want to use it for commercial purposes, that's one thing and if I'm a journalist and I'm exposing wrongdoing within the public sector, that's quite another thing, from a public interest point of view. So our position has always been that applicants should be allowed to indicate what their reasons were if they feel that will bolster their public interest override chances. Myself, for example, I regularly do that when I'm making what I believe is a public interest request.

I think even though you can put a formal onus on the public body, it may well be that the information and evidence that's required to prove that point rests with the applicant because that's the person who knows where this information is going and what it's actually going to be used for.

I'm not a judge and it's been a long time since I studied evidence at law school, but I think that we could preserve the onus on the public body, yet, of course, allow practical evidentiary burden, if you will, to fall with the applicant. Certainly, in many cases, the applicant would have information but there are also cases where the applicant doesn't understand when they make the request what the true public interest behind it is and it's only the public body and then the Commissioner, after he or she sees the information and realizes. If a journalist asks for information, they may be following one story, but there may be another story embedded in the information that they're not aware of that could be a very strong public interest story. I think that we do need to put the burden primarily on the public authority in the first place.

CHAIR ORSBORN: If you have exceptions that are discretionary, is there any need for a specific override provision apart from that? My understanding is that when a public body is looking at a discretionary exception, they're in effect required by law anyway to see whether or not the public interest would override it. I'm just wondering about whether or not our section 9 is needed at all.

MR. MENDEL: Right. And your position is correct, and the Supreme Court of Canada in the 2010 case which establishes, as a human right – one of the most important elements of that decision was that the discretion was not just an open discretion and that the public authority was required to take the overall public interest into account when applying that.

I think that it's still important to have the public interest override for mandatory exceptions, must-refuse exceptions. We believe that the public interest override should apply to all of the exceptions, not just the discretionary exceptions, including the exceptions which protect private interests. Privacy and commercial interests, where there's a larger public interest, it should still be disclosed. That is the standard under international law. Section 9 doesn't apply to mandatory exceptions, but it should, according to us, and it would be needed for that.

I also think it's of value, just to make it perfectly clear, and also, like in your law, some of the considerations to be taken into account in the public interest override are spelled out, and the way that it should be considered. That sort of builds on, to some extent, and clarifies, especially for information officers.

I would also note, we very much welcome the absolute override for the environment and – there was one other interest that has an absolute override in section 9. I was just looking at it on mine right now – the environment and health and safety, that's great. We would also recommend expanding that to cover issues like human rights abuse, and crimes against humanity and war crimes are found in some legislation internationally.

I guess we wouldn't expect to find those sorts of wrongs taking place too often in Newfoundland. But corruption, or at least serious cases of corruption, could be another absolute override, given the scourge that corruption represents for society. Absolute exceptions have – I mean, obviously, they're powerful in the sense that they don't allow for any exception to stand up against them. You could have a quite important, potentially, national security issue that was then automatically overridden by these, so you have to be a little bit careful with them. But they do at least provide clarity to information officers. An absolute exception is an absolute exception and you apply it.

But directly to my true question, I still think section 9 and the public interest override is important, both for mandatory exceptions and to make it very clear. Not all information officers may be aware of the decisions by the Supreme Court.

CHAIR ORSBORN: In your, sort of, overall submission is that the statute should more focus on the harms-based non-disclosure, as opposed to a class based. That, I would think, would have some considerable effect on the administration of requests in terms of the types of analysis and determination that would have to be made on the basis of every request and could perhaps delay the processing of requests and make –

MR. MENDEL: Well, you have 20 working days in Newfoundland, which is on the longer side of the period of time that's allocated around the world. Many jurisdictions within Canada and many other jurisdictions internationally do have that 30 calendar days or 20 working days, which is about the same.

CHAIR ORSBORN: I think you're suggesting 10, aren't' you?

MR. MENDEL: I believe – sorry?

CHAIR ORSBORN: You're suggesting 10.

MR. MENDEL: We suggest a shorter time period, yes, with the possibility of exceptions for more complicated cases. We recognize that not every request can be dealt with within 10.

I don't think that the assessment of harm is that complicated, to be honest. I mean, what's required of information officers is to do a fair and honest job. That's the standard, to perform their job in good faith and in a reasonable way, in line with the standards that are expected of them in any other area of their work. They are not expected to be super legal experts; they're not expected to get it right all of the time.

If we look at – I don't know the statistics from Newfoundland, but say the statistics at the federal level, there are about 2,000 appeals or complaints to the Information Commissioner of Canada and about half of those are exceptions based and half of them are other issue based, mostly procedural issues. From the exceptions based, a large majority – I don't know the exact figures in the last couple of years but in previous years it was between 75 and 80 per cent – go against public authorities.

They are routinely and regularly overinterpreting, overapplying exceptions. I can speak from a personal experience as well; I made many, many requests to Canada and a number of provincial jurisdictions in different parts of Canada. I have had experiences where I get requests refused on the grounds that are fairly obviously illegitimate to me. I write back to the Information Officer and I say: You may not know this but I'm an expert on these issues. I work internationally on this issue. I know perfectly well that exception that you claimed is not legitimate. I will go to the Information Commissioner if you don't give me this information, but let's be decent and sort this out between ourselves. It's happened, not infrequently that the information officer at that point has thrown in the towel, as it were, and given me the information.

I don't want to be too negative about the public officials. I think a lot of them are trying to do their job very properly and whatever, but there is a culture and an attitude that gets rooted inside of government in relationship to these sorts of acts. This is not a Canadian problem, it's a global problem. I think it's worse in western countries for some reason. I think a lot of developing countries are – perhaps counterintuitively their public authorities are more willing to disclose things. They sort of get oppositional on the disclosure of information and that sort of negative attitude about the whole operation of the act. A lot of the time you feel they're trying to find an exception to hang their hat on rather than strictly applying the exception.

I think asking them to assess power is a reasonable thing to do. We hope they will do it reasonably honestly and to the level of assessment that they can do within the time limit. Then they make a decision and take it out and then we go from there as it were.

CHAIR ORSBORN: It's not really a fair fight when you make an access request, is it?

MR. MENDEL: I'm operating under the law and I have my human right to get that information. It doesn't happen all of the time but I have – we don't have time to go in, but there are some amusing stories that I could relate about this.

It's even worse with delays, by the way. The grounds that I've been given for delays – and sometimes it's very difficult to know, until you actually get the final response to the request, whether the request for a delay was legitimate or not, because you don't know what they had to look through and what they had to consider and all that kind of that stuff. Another wonderful feature of your legislation which we very strongly endorse is the requirement to apply to the Commissioner before you can extend the time period. I think that's a really great safeguard. We push for that in other jurisdictions.

I do think that as you go through your review – and not to take a negative position on this – the power balance between requesters and the public sector needs to be taken into account. The requesters really need all of the protections that they can get because they don't have a lot of power in the system, apart from the rights that are established in the law. Even those rights are interpreted, applied and understood primarily, at least at the first instance, by information officers. We do need to design a system that is as user-friendly as possible to deliver the goals of the act, which are to open up government.

CHAIR ORSBORN: Related to that, the power imbalance is an interesting comment, because certainly in terms of supply and demand, the demand for the service is essentially infinite, I would think in that the requesters have no limits on the demand side. On the answering side, practically speaking, there are limited resources to deal with the requests.

With the matter of fees, I take your point on the fees. I don't know if you've seen the submissions that have been made, but from the public bodies, they're all looking for putting in nominal fees and what have you. It is not from a revenue-generating perspective. The stats that I've seen for last year, I think throughout the province some $600 was collected in fees. It's hardly worth keeping track of it. Everybody is looking for fees in order to dissuade people from making 10 or 12 requests in one day or making repeated requests for the same information.

It is a problem, so I'm told. We have some very small municipalities that are subject to the act.

They have limited staff; they have limited days of operation. With small communities, the potential for disputes between, say, a councillor and an employee or a resident or whatever, is, I think, magnified. They can be faced with, practically speaking, challenging situations. Do you have any sort of concrete, on-the-ground suggestions as to how issues like that might be addressed, other than putting in a requirement for everybody to pay fees, which would essentially punish those who use the system properly? It's the court equivalent of a vexatious litigant. Do you have any experience on how public bodies, particularly the smaller public bodies, could address that?

MR. MENDEL: I think that you mentioned the word, already, "vexatious." I think one solution which I have always endorsed, especially in the way that it's reflected in the Newfoundland act and that now is the case federally as well, is that the public body can apply to the commission to reject the – not to reject but to not process the request on the basis that it's vexatious. There are a number of other words; I don't know exactly what the provision is.

I support that approach. There's some subtlety to this and I know, because people approach us sometimes frequently about these issues, if you happen to get into a battle with the public service, eventually you will run out of your formal appeal or complaint or whatever it is that you have, because you will have used them all. You will never run out of the right to keep making requests.

What we see are people who get into this sort of archetypal battles with the public service for whatever reason, they might have gotten fired or they might not have accepted the position that was taken on something that might benefit their (inaudible), whatever it might be. Reasonable people just drop it after a while, but there are a few people who just can't drop it and go on and on and on. They keep making requests and they'll never run out of that option. I do think the ability to parry and not process vexatious requests is appropriate. I think commission oversight of that protects against any possible abuse, so that, I think, is a good feature.

I am conscious – we, in Nova Scotia, have small communities just like you do in Newfoundland. I grew up in one myself, a community of about 1,200 people where everybody knows everybody. Of course, things are a little bit more difficult, especially when you get into contentious disagreements about things. I don't think putting in place a fee requirement is going to prevent that at all, a lodging fee, those kinds of – especially if it's $5. It shouldn't be more than that.

I think J. Y.'s point about the fees – and it's interesting that you mentioned that only $600 was ever collected. Really, to reinforce J. Y.'s point, what is the point of having this whole complex regime about fees if you're not actually collecting anything anyway? I would wager that far more than $600 was spent levying those fees than the $600 that was collected, if indeed that was collected. It doesn't make any sense from any point of view.

I think the argument typically about lodging fees that you made is it deters problematical requesters, I think that's not essentially correct. I think that everyone who's determined can stump up $5 and can stump up $5 20 times, if need be, it's still only $100. What we don't want is those people who are perfectly legitimate, who've never used the access to information law before and who say should I pay $5 or go and get an ice cream instead of doing that. I think that the deterrence for the good requesters, the worthy requesters, the people we want to engage in the system so that they're engaging more with government, they're finding out more about what government is doing. I think the impact of front-end fees is much heavier on them than on the problematical requesters who manage to find the small amount for requests anyway.

CHAIR ORSBORN: Is it fair for me to conclude that in the context of the sort of contentious disputes, the smaller community disputes and requests going back and forth, unlimited number of requests, is it fair for me to conclude that requests of that nature do not really fit the objectives of the act?

MR. MENDEL: I would be a little bit hesitant to make the worse status a broad conclusion without looking more – I've certainly seen examples of concerted request campaigns, if you will, that have been very legitimate and will you need that to open up something that does need to

be opened up that government is reluctant to open up. So there are cases of that.

It tends not so much to be in small communities, more on larger development projects and that sort of thing, but I suppose it could take place in a small community. I would want to see the facts of a case before I would endorse that general conclusion. But certainly I would say that there are cases like that. I think that you have the tools, essentially, within your act already to deal with that.

CHAIR ORSBORN: Yeah. Very small point, you mentioned when you talk about the public bodies that should be subject to the act, you mentioned the constituency office of a Member of the House of Assembly. Could you just expand on that a little bit, because, as I appreciate it, that's essentially an office where a Member may meet members of his or her community, listen to their concerns and then do whatever needs to be done within the machinery of government to look at those concerns? In what sense is a constituency office sort of engaged in the practice of government, if you will, in the larger sense?

MR. MENDEL: We read our submission carefully this morning and I did perk up my ears a little bit at that one. I think we would probably withdraw that. I think that the operation of the constituency office, in terms of the interactions with the public, obviously the funds that are provided to support the constituency office, those are arrived primarily publicly or primarily exclusively publicly and reporting on that and all of that sort of thing, should be covered by the act but the interactions with members of the constituency office we think that's (inaudible.)

CHAIR ORSBORN: Okay, thank you.

A similar question with political parties, once I saw the position of the Commissioner was that political parties should be included on the privacy aspect of the legislation, we invited the political parties to make comment on it, we only heard from one party, essentially, taking the position that this is not a public body as such, it's a privately funded and volunteer-operated operation. I guess, again, if you had supported the position taken out in B.C. to include political parties in their, I guess, private legislation, any views on that?

MR. MENDEL: Yes, I mean, our submission was not primarily on privacy. I believe that privacy legislation should cover private bodies as well as public bodies if they purchase large amounts of data, which most political parties do so I endorse that from the point of view of privacy.

When it comes to access to information, it's a little bit complicated actually. Our position is that private bodies which receive significant public funding need to be truly covered under the act because the act should follow the money, as it were. I don't know the situation in Newfoundland, actually, but in most jurisdictions political parities get a lot of public funding and certainly federal, in addition to (inaudible) funding.

And for that matter, a lot of NGOs, non-profit, non-governmental organization, we're a company limited by guarantees, so technically a company but we're a non-governmental organization, we don't actually receive funding from the Canadian government or not much but a lot of NGOs do. We believe that they should be covered by the act as well. That's always been our position and it's reflected in our RTI rating.

At the same time, and going back now to focus specifically on political parties, political parties hold certain strategic information about how they're going to prosecute a political campaign, which is of the essence of their operations that they keep that secret. So they're going to win the election by doing this and that's their strategy.

That is not the type of information which we would accept that a regular public body would keep secret. The Ministry of Education has a strategy for enhancing education, and it's not something they're going to spring on us and fool us into enhancing education. They're going to discuss that publicly. We're going to have a debate about it; then they're going to consult and whatever.

There's a fundamental difference, is the point I'm making, between core public bodies on this strategic area. I don't want to see an exception

which protects strategic directions, if you will, applied to the Ministry of Education or we would never know what they were doing until they did it. I think that kind of exception would be necessary for political parties and, to some extent, necessary for NGOs. Sometimes we have a strategy to achieve an advocacy goal – how we're going to get Newfoundland to improve its access to information law – and we don't want to announce that to the world before we roll it out, as it were.

We're getting into rather sophisticated and theoretical area here and I don't even know if any country has done this, but you guys have broken some new ground in other areas so why not this one.

What I would say is I think that it would be interesting to bring, as we recommended in our submission, bodies which receive significant amounts of public funding under the act. I also think that you might need to think about a special exception for them, where necessary, to protect their strategic interests. Obviously, we cannot have one political party getting the strategic or policy documents from another political party about how they're going to prosecute the election, but that is exactly the sort of information which we would expect a regular public body to disclose. I don't know if that's clear.

In principle, I do support the coverage of political parties to the extent that they receive public funding, but I think that we need to be a little bit careful about protecting their co-operations.

CHAIR ORSBORN: Thank you.

While I think of it, thank you for pointing out what is a minor drafting error. I think in section 40 they've probably put in a (3) instead of a (5) in that section, so thank you for that.

You suggested there should be statutory language preventing the appointment of Commissioners with strong political connections. How would one word that and how would one decide it?

MR. MENDEL: I mean, there's standard – I wouldn't say standard, but I mean we can look to other areas of legislation, particularly internationally, for language. For example, an elected official, a post holder in a political party, so not a member of a political party, but somebody holds a position within that party. We could put a one-year or a two-year time lag between leaving the civil service and being appointed. We could follow up, perhaps, with some specifics on that if that would be of interest to you.

CHAIR ORSBORN: All right.

Yes, I think the other aspects of the report are – it's very well set out and essentially self-explanatory. That's all the questions I have.

I don't know if Mr. Hoh has any other comment on the RCMP legislation?

MR. HOH: Yes, just to get back to the (inaudible). Your reading on the statute is – I agree that perhaps it's not a bad example because although the RCMP commission can review that information, it can be refused and then, as you described, an entire process by which a separate judge or (inaudible) decides whether or not it should be disclosed to them. So perhaps (inaudible) federal Commissioner, that example is not such a clear example of being able to review (inaudible).

CHAIR ORSBORN: No, I just wondered if I had missed something. I saw the use of the example –

MR. HOH: No, no, no.

CHAIR ORSBORN: Okay.

MR. MENDEL: We would just reiterate our general position on that, which is we believe that the position already under the Newfoundland law is that solicitor-client privilege information can be reviewed by the Commissioner. That's necessary for them to make a sensible decision as to whether that information claims to be covered, but it really is covered. We think it would be beneficial to make it crystal clear to the extent that it's not – we feel it's pretty clear, but there has been a debate in Newfoundland and it's better to be clear.

CHAIR ORSBORN: Yeah, it was canvassed by the 2015 committee. My understanding, and it was I think set up by our Court of Appeal in 2011 and echoed in the University of Calgary case, that accepting that legislation can indeed abrogate the right and can empower a Commissioner to view information of which a privilege is claimed. Looking at the University of Calgary case, it seems to suggest that even though that right may exist that it should only be exercised, that that veil should be pierced only when it is absolutely necessary to make a determination as to whether the information is solicitor-client privileged or not. That's a step that would suggest that the public body has essentially an obligation to provide affidavit material, listing material, descriptive material and what have you.

If my understanding is correct in that, in that the Commissioner can't just say give me the whole thing regardless, how does one build that kind of intermediate step into legislation?

MR. MENDEL: Well, just a preliminary point to that, we have suggested with respect to – so there's solicitor-client privilege that applies for third parties, between third parties and their lawyers, but then there's solicitor-client privilege held by public bodies themselves in their interactions with their lawyers. We have suggested a narrowing of that because when I speak to my lawyer, I'm paying the lawyer's fees. I only speak to him or her when I really need to about a fully legal matter, all of which is covered by solicitor-client privilege in the normal sense of the word. But, obviously, public bodies hire lawyers and have lawyers on staff, lawyers on retainers and get advice from lawyers about all kinds of things.

CHAIR ORSBORN: Yeah, the premise of my question was that the information is, in fact, likely subject to privilege, it just wasn't a policy discussion. I take your point on that, that they do all kinds of things –

MR. MENDEL: (Inaudible) solicitor-client privilege because I think that there's – well, not I think, we've seen very overbroad claims of what constitutes that.

CHAIR ORSBORN: I understand, yeah, but –

MR. MENDEL: The former Information Commissioner of Nova Scotia, Darce Fardy – he was Information Commissioner for many, many years, very highly respected – pointed to that as one of the most serious problems in the Nova Scotian act in practice.

Anyway, coming back to your question, I guess you need to consider whether that needs to be written into the act in formal legal terms, or there could be an understanding on the part of the Commissioner that he or she should exercise discretion on that and on other areas of information as well.

National security perhaps doesn't apply so intensely at the provincial level, but certainly at the federal level Commissioners have to – the Information Commissioner of Canada has the highest level of security clearance; she can see any information as a security clearance matter. But I know from discussions with successive Information Commissioners of Canada that they are very careful about what information at that level they review. Of course, they need to take careful security protections, which you have formalized within your act, about how they view that information. They don't just call down top-secret information into the office for example; they go to the place where it's securely stored.

I think that you might consider whether you need a formal mechanism for that. To be honest, I don't think I have ever seen something like that in a piece of legislation so I don't have a ready example to draw on. I'd have to think a little bit about it. We're not just brainstorming, so take this carefully, but perhaps there could be some language added to the act where to have access to confidential information is free for the Commissioner, subject to him or her considering that it's necessary to decide the application strength.

CHAIR ORSBORN: Do you agree with the proposition, again, from the case log – believe that even if the Commissioner does have the power, that it is a power that should only be exercised when it's absolutely necessary to see the full document in order to determine whether or not it's privileged?

MR. MENDEL: I think absolutely necessary is a higher standard than I would propose. I think

that the Commissioner needs to have the tools to do the job. Where it's necessary to make a proper decision and allowing public authorities to provide alternative evidence to the extent that they can – affidavits as you mentioned, or whatever it may be – that's a good way to go. But if the Commissioner deems it necessary, then I think the Commissioner should have that absolute necessary (inaudible).

CHAIR ORSBORN: I use that phrase because that's what's used in the University of Calgary and also by our own Court of Appeal. That's where the phrase comes from. It's not original thought.

MR. MENDEL: No, I think that's putting too high a burden on the Information Commissioner. The Commissioner is bound to secrecy in relationship to that information, so I don't see it as never a burden in the Canadian context (inaudible) confidentiality. I think it's not a serious risk.

CHAIR ORSBORN: Those are my questions. I don't know if you have any concluding comments or not.

MR. MENDEL: We hadn't prepared concluding comments, but I would like to say that we spent years and years trying to get a Canadian jurisdiction to break out of the mediocre standard of access to information legislation in Canada, and we were unsuccessful, until 2015, with Newfoundland. I don't know if you've looked into some of the circumstances.

At that time, we had some quite rowdy debates in the Legislature concerning us. We were called a two-bit operation by the minister that was responsible for the legislation, for example. We responded by saying that we had been subject to attacks by elected politicians around the world, in Kazakhstan and Afghanistan, but never quite as strong an attack as that, which I think was fair at the time.

We were incredibly pleased and grateful, I would say, that Newfoundland took the initiative and sort of broke the glass ceiling, if that's an appropriate way of putting it, and introduced some really innovative reforms, which I think have served the people of Newfoundland very well in terms of openness. I regret that no other Canadian jurisdiction has done that yet. We keep pushing. We engage frequently at different jurisdictions in Canada when we have the chance. We have pushed forcefully here in Nova Scotia to try to get our government to amend its act, which it has so far refused to do.

I think that was great in 2015 and I think it would be great if Newfoundland could continue in that tradition. Your act is a very strong act but there are still lots of ways that it could be improved. The exceptions, which I focused on, are one of the most important areas where I think you could introduce improvements. We're not expecting all of the recommendations that we've made, but I think some of them are less controversial than others, perhaps. We really urge you to build on the 2015 review and do it again basically.

I've put forward some fairly forceful recommendations. Hopefully, the government will pick them up and Newfoundland can move further up the rankings and expose the other jurisdictions in Canada more forcefully to their failures in this area. That's what we really hope to see. I'm from the Atlantic provinces myself. That's why our organization is based here. I love to see leadership from this part of the world. It's very gratifying.

CHAIR ORSBORN: Thank you, Mr. Mendel.

Thank you, Mr. Hoh.

That will conclude our session. We'll reconvene tomorrow morning at 9:30.

Thank you very much, Sir.

MR. HOH: All right, thank you.

MR. MENDEL: Thank you very much.