ATIPPA STATUTORY REVIEW COMMITTEE 2020

Transcript Volume 3

Committee Chair: Honourable David B. Orsborn

Wednesday 20 January 2021

CHAIR ORSBORN: Good morning.

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

There are going to be two presenters in this morning's first session, which will run until 11 o'clock.

I can advise the presenters that I have read the submissions. I really only need a summary of the main points, and that should leave enough time for any questions that I may have.

The first presentation is from the Royal Newfoundland Constabulary, and on behalf of the constabulary, we have Gorvin Greening, Kim Harding and Dale Evans.

Welcome and thank you.

MR. GREENING: Thank you.

Good morning, Chair Orsborn. I'm presenting here today, as previously said, on behalf of the Royal Newfoundland Constabulary.

CHAIR ORSBORN: Your mic is on? Okay.

MR. GREENING: I am the audit and compliance manager, as well as the access to information and protection of privacy coordinator for the Royal Newfoundland Constabulary.

As you mentioned, I am joined in the room today by Ms. Kim Harding, executive director, support services, for the RNC, and Ms. Dale Evans, director of information management for the Royal Newfoundland Constabulary.

The Royal Newfoundland Constabulary has put forward a number of recommendations to the 2020 Access to Information and Protection of Privacy Statutory Review Committee in our submission on November 27, 2020. The Royal Newfoundland Constabulary believes that recommendations put forward to the committee will help to better protect the privacy of individuals, allow for more complete and efficient processing of access to information requests, better protect sensitive information and create consistency across government departments and other public bodies when administering access to information and protection of privacy processes.

The Royal Newfoundland Constabulary consistently remains one of the leading public bodies when it comes to the volume of access to information requests and considers access to information and the protection of privacy very important. For those reasons, the RNC has cited the following areas of concern and, where applicable, recommendations have been put forward.

The nature of personal information at the Royal Newfoundland Constabulary is often very sensitive in nature. The act does not require a verification process of applicants who apply for information. Therefore, the Royal Newfoundland Constabulary has recommended that the ATIPP application process be updated to better screen applicants for personal information requests as a safeguard, to ensure that the information being sought is being released to the appropriate person or persons.

Currently, ATIPP legislation required that an applicant of an access to information request be provided a final response within 20 business days, which is typically sufficient. A request for a timeline extension may be made to the Office of the Information and Privacy Commissioner in writing, no later than 15 business days after receiving an access to information request; however, occasionally extenuating circumstances may exist that are sometimes not known until after the 15th business day, such as the identification of additional records. Therefore, the Royal Newfoundland Constabulary has recommended that ATIPPA, 2015 be updated to better allow for the extension of response times only where you meet and justified circumstances exist after business day 15.

As previously mentioned, large amounts of information held at the RNC is often very sensitive in nature, but it's also very important to applicants who wish to obtain that same information. Sometimes access to information requests are misused, often unknowingly, to obtain particular information. An applicant is not required to disclose why they may be seeking information; however, knowing this information

can help to either ensure that an applicant gets the appropriate information or that they are directed to the proper channel to obtain the information as per section 3.3 of the act. Therefore, the Royal Newfoundland Constabulary has recommended that ATIPPA, 2015 be updated to better allow for knowing the reasons why information may be sought at the discretion of the applicant to allow better and more effective assistance to the applicant.

Throughout government, information and staff often flow between departments through partnerships, contracts, information-sharing agreements and more. Therefore, sometimes the rules of custody and control of documents is not always clear despite current definitions, consultations and reference to decision-making guidelines provided in the Access to Information manual. Therefore, the Royal Newfoundland Constabulary has recommended that ATIPPA, 2015 be updated to better define and determine accurate custody and control of responsive records and to include a clear and definitive decision process when custody and or control of a record remains unclear.

The exchange of information between government departments and other public bodies is crucial to providing services to the people of Newfoundland and Labrador. There is currently no legislative requirement to consult with other departments or public bodies when documents held by the responsive public body originated from another area. This can result in information being withheld or disclosed inappropriately as a public body may not know all circumstances surrounding the document, such as criminal investigations by the RNC or ongoing legal proceedings. Therefore, the Royal Newfoundland Constabulary has recommended that ATIPPA, 2015 be updated to include a section that outlines the requirement to consult with applicable government departments and public bodies to ensure the release of accurate and complete information and to ensure that all possible exceptions to disclosure are considered that may not be considered by the public body that received the request.

The Royal Newfoundland Constabulary works to ensure that all information it holds is complete and accurate. Unfortunately, sometimes information may exist that has not yet been vetted to ensure its accuracy. Therefore, the Royal Newfoundland Constabulary has recommended that ATIPPA, 2015 be updated to include an exception to disclosure that allows for the refusal of the release of information that is proven to be inaccurate. Additions to the section can be made to ensure that the information is corrected at the time of the request and subsequently released.

Rules set out in the Access to Information and Protection of Privacy Act must be followed by all public bodies; however, applicable policy and procedure manuals highlight guidelines that public bodies may follow when administering processes related to the act. Because these are not mandated processes, requests across public bodies may be inconsistent and therefore the Royal Newfoundland Constabulary has recommended that the policy and procedure manuals that accompany the legislation clearly and concisely outline the required process when applying ATIPPA.

The Royal Newfoundland Constabulary recognizes the importance of the Office of the Information and Privacy Commissioner in ensuring accountability of all public bodies and the Government of Newfoundland and Labrador to the people of this province; however, it is felt that there is room within the act to allow for the Office of the Information and Privacy Commissioner to ensure their own accountability and involvement in privacy investigations. Therefore, the Royal Newfoundland Constabulary has recommended that additions be made to the act to ensure that the OIPC is held accountable for their work and requirements put in place to ensure effective and timely communication regarding their investigations, including status updates of the investigations be made to both the affected individuals and public bodies.

The Royal Newfoundland Constabulary is also recommending that section 99, in its entirety, of the Access to Information and Protection of Privacy Act, be updated to allow the OIPC to actively be involved in other forms of investigations and proceedings outside of their own.

The RNC receives multiple requests per year for police-investigative files. Previous updates to

the Access to Information and Protection of Privacy legislation have allowed for the exclusion of some Royal Newfoundland Constabulary records, assuming that certain conditions are met. These exclusions have proven to be very useful in protecting the RNC investigative process in most cases.

However, it is felt that the same should apply to other law enforcement agencies under the Access to Information and Protection of Privacy Act with records of a similar nature to those noted in sections 5(1)(k) through (m) of the act within the province. Therefore, the Royal Newfoundland Constabulary has recommended that the wording of sections 5(1)(k) through (m) should be updated to read "law enforcement agency" instead of "Royal Newfoundland Constabulary," to better protect all records within a public body or other law enforcement agency within the Province of Newfoundland and Labrador of the same nature.

Additionally, section 5(1)(m) of the act indicates that the act does not include a record by the Royal Newfoundland Constabulary where there is a "suspicion of guilt of an identified person" but no charges ever laid. It is important to note that an investigation by the Royal Newfoundland Constabulary can be reopened at any time. The provision, as it exists now, could jeopardize future investigations on files where suspects were not previously identified. Therefore, the Royal Newfoundland Constabulary has recommended that section 5(1)(m) of the act should be updated to include any record where a suspicion of guilt is present, regardless if a suspected guilty person or persons are identified at the time of an access to information request, to protect the information that could eventually lead to and jeopardize a legal proceeding.

As noted in our mission statement, the role of the RNC is "to build safe and healthy communities." Section 37 of the act indicates that a public body may refuse to disclose records that could reasonably be expected to cause any type of safety or physical or mental harm of a person, whether it be the applicant or someone else.

Information held at the RNC, as previously said, is very sensitive in nature and often includes information about, but is not limited to, threats, assault, sexual assault, mental health calls and homicides. It can easily be assumed that these files are traumatic in many ways for the victims and others involved. The reaction of an individual cannot be predicted once the information is released. Therefore, the RNC has recommended that in an effort to protect all citizens under jurisdiction, it is recommended that ATIPP legislation be updated to allow the refusal of information that could be expected to cause any harm to one's physical or mental health, as well as a potential risk to anyone's safety. It is noted that an exception of this result would still need to exist and a certain level of assurance still met.

As part of our submission to you on November 27, the RNC recommended that sections 10 through 17 inclusive of the Royal Newfoundland Constabulary regulations be included in Schedule A of the ATIPP Act to better promote transparency of the RNC internally. However, subsequent to our submission, the Office of the Information and Privacy Commissioner issued report P-2020-003 on December 14, 2020, wherein the Privacy Commissioner confirmed that the RNC internal disciplinary proceedings are subject to an open court principle. As a result, the RNC withdraws a recommendation to include the above noted sections of the *Royal Newfoundland Constabulary Regulations* in Schedule A as the Privacy's Commissioner's report, P-2020-003, confirms the position of the RNC and provides the necessary clarification respecting the application of ATIPPA within the context of RNC disciplinary proceedings, rendering the inclusion of the regulations in Schedule A unnecessary.

In addition to the aforementioned, though, the Royal Newfoundland Constabulary would like to note its heavy use of relevant sections of the *Highway Traffic Act* and the fatalities act when completing access to information requests. For this reason, the Royal Newfoundland Constabulary also recommends that sections 173, 174 and 174.1 of the *Highway Traffic Act*, as well as subsection 24(1) of the fatalities act, be maintained in Schedule A of ATIPP legislation.

As legislation currently exist, an access request can be made for free until the first 10 hours of

locating a record for a local government body and the first 15 hours of another public body. The RNC is fortunate that many requests for information is repetitive and therefore sometimes able to be completed with only a minimal amount of time spent on the request; however, that does not mean that, collectively, a number of resources, including other employees, are not engaged in the process of completing their request.

Many of the requests submitted are never eligible for a fee. The Royal Newfoundland Constabulary has recommended that a standard base fee for access requests be implemented in the legislation to help offset the significant strains that are sometimes endured by a public body in administering the act. Additional costs may be added, as seen appropriate by the public body, as set out by the act.

Lastly, wording of legislation is often open to interpretation. As it relates to the definition of personal information, sections 2(u), (viii) and (ix), the Royal Newfoundland Constabulary has recommended that these two sections be updated to be clearer for anyone who interprets the legislation as it involves personal information.

With that, I would like to thank you for taking the time to listen to our submission and presentation. We'll take any questions you may have.

CHAIR ORSBORN: Thank you, Mr. Greening.

A very concise summary of what you have put together there. I have some questions.

In terms of the verification of applicants, would you suggest that be legislated? If so, how might it be done?

MR. GREENING: I don't know if the legislation is going to completely fix it. I know with our certificate of conduct process now, we require submission of a government-issued ID or something along those lines. Another option is just a signature on the application form as a verification that this is the person applying for the process. Quite often, we only interact with these people through email and, unfortunately, it's pretty easy to make a fictitious email and know enough information about a person to successfully obtain that information if your only communication is email.

CHAIR ORSBORN: Are the majority of your requests for personal information?

MR. GREENING: I would say about 80 per cent is personal information.

CHAIR ORSBORN: Yeah, okay.

You have a different situation than most of the public bodies where their requests are for general information.

MR. GREENING: Exactly.

CHAIR ORSBORN: The particular personal information you have is, perhaps, of a different variety than some might …

MR. GREENING: No, exactly.

CHAIR ORSBORN: Okay.

In terms of why somebody wants the information, you said at the discretion of the applicant. So if you say why do you want that and they say, get lost, what do you say?

MR. GREENING: Well, I think at that point we are still obligated to provide them with the information. I think what we're hoping to be able to do there is mitigate some of the requests that we get and resolved in a less waste of time. What happens is we'll get a request, for example, for a vehicle collision police file for insurance purposes, and the vehicle collision report, which is obtained through Motor Registration Division, is really the document they need. Sometimes we might be answering a request unnecessarily because it's not exactly what they're looking for.

CHAIR ORSBORN: Are you able to work on that through a clarification process? Call them and say is this really what you want?

MR. GREENING: On occasion we do. Sometimes the applicants very openly say what it is exactly they're looking for; other times they do not. I think the thought is if you can generalize – and, again, we're a unique public body for the types of requests we get – it even

on the form: personal use, insurance use, things like that. It's applicable to us probably more so than other public bodies, which makes it a little more complicated. I get and respect that.

Another example there, just to help you clarify: We are not allowed to release any reports where there has been a death. The fatalities act requires that be released by the chief medical examiner. We quite often get access to information requests for those files from next of kin, and without them telling us that it's for life insurance purposes, something like that, we are needlessly reviewing a file that really is not what they're looking for.

CHAIR ORSBORN: A fatality file?

MR. GREENING: Yes.

CHAIR ORSBORN: Can you release it anyway, given the fatalities act?

MR. GREENING: We generally don't. We pass that off to the chief medical examiner to release their report.

CHAIR ORSBORN: Okay.

MR. GREENING: The way the act is set up, the Royal Newfoundland Constabulary – any officer who investigates a fatality is technically working for the chief medical examiner.

CHAIR ORSBORN: I see.

MR. GREENING: Yeah.

CHAIR ORSBORN: You mentioned the issue of custody and control and resolution of disputes. What kind of a mechanism would you see for that?

MR. GREENING: Upon further consideration, the definitions of custody and control that are in the policy and procedures manual are very clear. I found it strange that they aren't actually included in the act.

What we feel might be appropriate is that a submission to the OIPC of the two public bodies who may be in disagreement of who has custody and control might be the proper route for determining who should be responsible for the access to information request of those documents.

CHAIR ORSBORN: Okay.

You spoke about the requirement to consult, presumably, where one public body is about to release information that could conceivably be (inaudible) to something the RNC is doing.

MR. GREENING: Yeah.

CHAIR ORSBORN: How would they even know?

MR. GREENING: The other public body?

CHAIR ORSBORN: Yeah. Are you suggesting that one public body should consult all of the other 400 public bodies that we have?

MR. GREENING: Well, no. When you get an access to information request, depending on the nature of the request and, in our case, the file, we may have documents that come from other public bodies; say Occupational Health and Safety, for example, fire commissioner reports – those types of things.

Subsequently, it can go in reverse as well; some of our files sometimes go to other public bodies for their investigations. It's very important, I think, that when you have documents that another public body created and provided to you, that a consultation occur.

CHAIR ORSBORN: The coordinator would be aware that they had come from or (inaudible).

MR. GREENING: Yeah. When they do that record search and obtain all the necessary information, they should be fairly aware that this is an RNC document, for example.

CHAIR ORSBORN: Is that really a management issue for the coordinator rather than one for legislation?

MR. GREENING: I don't think it's a management issue because right now there's still no requirement to have to do it.

CHAIR ORSBORN: Yeah.

MR. GREENING: Right? That's a concerning piece.

We've had situations where we've been consulted, there have been proceedings going on related to those documents and that particular public body had no idea. So then, we had to recommend they be withheld because of ongoing proceedings. Had they not consulted us, they would have been released.

CHAIR ORSBORN: How do they know to consult you? Because it was clear the documents originated with you or involved you?

MR. GREENING: It was clear that it was our document. I can't get to into that particular situation because it is ongoing.

CHAIR ORSBORN: No, no. Would it not be then, as a matter of good practice, that if a coordinator is considering releasing a document that is somehow identified with another public body, that public body be …?

MR. GREENING: Right now, we consider it a professional courtesy to do so.

CHAIR ORSBORN: Okay.

MR. GREENING: But I think the requirement does need to be there.

CHAIR ORSBORN: I'm interested in your comment on the release of inaccurate information. Are you suggesting that you know the information is inaccurate at the time you release it?

MR. GREENING: I'll give you an example, actually. We had a request a few months ago that was statistics in nature. We had to review that and then we discovered that the statistics were originally recorded wrong and it was part of the 2020 year so they hadn't been vetted yet.

As part of that, we ended up having to do a rush vet of it to get the information out. The same can happen with reports that are in progress, things like that, or have been completed but not fully reviewed by say, management or executive office.

Section 29(1)(b) of the act currently puts in there some room for incomplete information –

CHAIR ORSBORN: Yes, that's more, sort of, research reports than something else.

MR. GREENING: Right. But I think it might be helpful if a similar provision could be put in there for information that's not deemed accurate at the time of the request. It's very important to say we're not saying refuse the information but to, perhaps, allow the time to adjust to release the accurate information.

CHAIR ORSBORN: Again, is that the sort of thing that – I assume it doesn't happen very often – can be worked out with an applicant and say: We're waiting on incomplete information?

MR. GREENING: In some cases, I would imagine, yes, it would. I haven't come across a situation where it's been disputed but, again, it's a situational thing.

CHAIR ORSBORN: All right.

You mentioned the OIPC investigative process on communication throughout. I understand that once a complaint is filed, there is an informal resolution process, which, I assume, would keep both sides relatively informed to what's going on.

MR. GREENING: Usually, yes, the informal process is fairly – there's a lot of back and forth with questions and obtaining information through the OIPC anyways. In particular, though, there is one situation that's been outstanding since 2017.

CHAIR ORSBORN: Yes, I was going to ask you about that. That's mentioned in your report. I had thought the legislation provides for a 65-day time limit for completion of an investigation.

MR. GREENING: Correct. I don't know if Ms. Harding or Dale would like to speak to that, as that was before I was involved.

CHAIR ORSBORN: Okay. So you're saying if it goes beyond 65 days, there's not much you can do about it. Is that …?

MS. HARDING: Currently, we have a case before the court, so it's paused until the court proceeding basically goes ahead.

CHAIR ORSBORN: Right. Is that the 2017 one you're talking about?

MS. HARDING: That's correct.

CHAIR ORSBORN: Okay. There is ability for the Commissioner to get an extension from the Trial Division if time is needed to extend the investigation, I believe, is it?

MS. HARDING: We believe, yes.

CHAIR ORSBORN: Yeah, okay. That's a peculiar situation, then, where the court has become involved in the matter.

MS. HARDING: Correct.

CHAIR ORSBORN: Okay.

In terms of files where you say there may well be a suspicion of guilt but without an identified person, is that the same as a file where an investigation has not concluded because – I think 5(1)(k) takes out investigations that are still open. Is that the kind of file you're talking about?

MR. GREENING: No, not necessarily. Sometimes we may have files where – home invasion, break and enter – the investigation is completed; all sources have returned negative results. We will conclude the file pending further information. The file is technically concluded, unless other information comes forward.

When that file is concluded, say if the homeowner were to request the file, they would be entitled to that information even though there's no suspect identified. There is a risk there. I don't think it's a big risk, but there's a definitely a risk there.

CHAIR ORSBORN: A risk of what?

MR. GREENING: Well, depending on what the applicant does with that information. We have no control where that information goes once we release it.

CHAIR ORSBORN: So prejudicing the investigation if it were to be reopened, is that what …?

MR. GREENING: Right, exactly. So then there would be information that's crucial to the investigation and a proceeding that's already out in public that could jeopardize that.

CHAIR ORSBORN: So would that cover pretty well every file, whether it has been concluded without a charge?

MR. GREENING: No, not every file, but there would be a significant number I would think.

CHAIR ORSBORN: Mmm.

MR. GREENING: Yeah.

CHAIR ORSBORN: Okay.

MS. HARDING: Just to add to that. Traditionally, before ATIPP, when a person requested a copy of the file, the only thing that was released was a copy of his or her own statement. Then over the years through ATIPP we've seen an increase where the complainant wanted the entire file. That's where it has become a little bit problematic because we have to review the entire file and then redact certain information so that it's not harmful to the law enforcement investigation, yet giving enough information to the complainant so to fulfill their requirement. So oftentimes the entire investigation may be disclosed. That's where it could become problematic.

CHAIR ORSBORN: Okay.

I was interested in your comments on section 36, (inaudible) still some level of expectation, but you want to take out the word reasonable?

MR. GREENING: Section 37?

CHAIR ORSBORN: Thirty-seven, I'm sorry.

MR. GREENING: Okay.

CHAIR ORSBORN: Yeah, 37, I'm sorry.

MR. GREENING: Yes, again, I think this makes us a unique public body over some of the

other ones, a lot of our information is very sensitive. As I previously mentioned: assaults, sexual assaults, threats, homicides, things like that, and because we have no control of the release of the information, we don't know what's going to be done with it. We have had requests where estranged couples are just trying to get information on each other and things like that. It becomes concerning because we don't know what those people may intend to do with that information or how it may be used or disclosed after we release it.

CHAIR ORSBORN: So what level of risk are you saying should be present before you refuse disclosure?

MR. GREENING: So, right now, the process that we take is we will withhold anything that specifically says within the document about any physical or mental harm. That particular line-by-line redaction, we'll redact that, but in our case, as a whole, generally, will explain that nature of, I guess, the nature of the file itself, it's just post-traumatic stress, things like that. We don't know if the individual is trying to harm that other individual, things like that. It's a judgment call and I think every situation is going to be unique.

We are fortunate enough that we can generally tell, by the nature of the file, where it could or could not go.

CHAIR ORSBORN: What I'm trying to understand is –

MR. GREENING: But proving that is our difficulty.

CHAIR ORSBORN: I understand but I'm just thinking out loud, I'm wondering if the standard could be expected as a probably even higher one than could reasonably be expected.

MR. GREENING: Right. So you're suggesting possibly could be expected.

CHAIR ORSBORN: Well, I'm saying your suggestion is to take out the word: reasonably.

MR. GREENING: Right.

CHAIR ORSBORN: I'm wondering if that would leave you at an even higher level than the reasonableness assessment.

MR. GREENING: I think that goes back to interpretation.

CHAIR ORSBORN: Is this a major issue for you in terms of the level of assessment that you give to – if I say it's a judgment call, I assume that the judgment will be exercised reasonably.

MR. GREENING: Yeah, we would use our reasonable, professional judgment each time, but I think, again, our concern is the burden of proof when we can't always prove that.

CHAIR ORSBORN: Has it been challenged?

MR. GREENING: We've been fortunate enough, at least in my time as ATIPP coordinator, that it hasn't been. I don't know if there's been previous challenges but –

CHAIR ORSBORN: Do you collect any fees presently?

MR. GREENING: We have not. I don't know if we have before.

CHAIR ORSBORN: It's interesting, because you're the first in a public body – I think I'm correct – that has offered as a reason for a fee, the economics of it. Most of the public bodies want a fee to discourage frivolous – what they figure are frivolous requests. Yours, I take it, is an economic issue for you, is that fair?

MR. GREENING: I would say no, it's probably not that big economic issue. The thing that we realize though is that a lot of our resources go into these multiple requests so we're not necessarily saying it as a way to lower the number of our requests, but I think it would at least make the requests more reasonable sometimes.

CHAIR ORSBORN: Okay.

From the figures I've seen on the fees right across the province, I think the total fees that were collected last year were around $600 for over 400 public bodies.

MR. GREENING: Yes.

CHAIR ORSBORN: You mentioned about the wording in the personal information being unclear. I appreciate that you have to read it four or five times to figure out what it says. My understanding is that: my opinion, so my information; unless my opinion is about you, in which case it becomes your information.

MR. GREENING: Right, which would kind of contradict a lot of our information that we have in our police files for investigations.

CHAIR ORSBORN: Yes. Intuitively, it's a little difficult. You've talked about the clarity in the wording, but if one looks at the wording it seems to be pretty clear. It's interesting because I can sit, and I may have opinion about you and you can't force that out of me, but once I put that down on paper, then it's yours.

MR. GREENING: Exactly. Again, the definition would kind of counteract anything that we would typically do on our normal process with police investigations.

CHAIR ORSBORN: Just explain that to me.

MR. GREENING: It's our practice that we won't release any statements or anything to anyone else that puts in a request. We only provide, as Kim mentioned, their own statements, things like that. We won't provide anything else. So that definition, in that instance, doesn't agree with our practice.

CHAIR ORSBORN: That's where the statement would have an opinion about somebody else?

MR. GREENING: In many cases, yes.

CHAIR ORSBORN: I see.

Has it been an issue for you?

MR. GREENING: No, it hasn't because our standard practice has always been to only release the person's own statements.

CHAIR ORSBORN: Yeah.

MR. GREENING: We've been fortunate, it hasn't been contested.

CHAIR ORSBORN: Okay.

All right, those are my questions. If either Ms. Evans or Ms. Harding want to add anything.

MS. HARDING: I'll just add one comment about the fees.

Back a number of years ago when I was the ATIPP coordinator, we did have the responsibility for collecting fees from every applicant. As the ATIPP coordinator, when we were collecting these fees, it became onerous, basically, even trying to collect the application fee and to try to identify what type of fee to put on the request. I think that was one of the reasons why it was removed over the years because it is work. Even though it's easy to say to collect the fees, it does put more work on the ATIPP coordinator, just to keep that in mind as well.

CHAIR ORSBORN: Yeah. Given what's being collected now, I would expect the cost to keeping track of the time would far outweigh what you get out of it.

Anything, Ms. Evans?

MS. EVANS: With respect to the fees, we often see applicants apply with the RNC for requests for information so that they don't have to pay a fee from another government body.

CHAIR ORSBORN: Like Motor Registration or something.

MS. EVANS: For instance, Motor Registration or the Chief Medical Examiner's office. They use us as a first point of application so that there is no fee charged.

CHAIR ORSBORN: Thank you all very much.

MR. GREENING: Thank you for your time and consideration.

CHAIR ORSBORN: Dr. Oleynik, I don't know if want to stay there or if you want to –

DR. OLEYNIK: Well, it depends on you. I'm comfortable here.

CHAIR ORSBORN: You're comfortable there? If you wanted to move up, we'd take a break and sanitize the desk up here. If you're comfortable there –

DR. OLEYNIK: No, no, it's fine, unless you want me to move up. I'm fine here.

CHAIR ORSBORN: No, I'm fine. Just give the RNC people a chance to leave.

Thank you.

DR. OLEYNIK: Thank you, Sir.

First, I would like to make some preliminary comments about the procedure of public hearings. I know it's not quite appropriate but let me ask: How many private citizens made submissions to the commission?

CHAIR ORSBORN: That's on the website, Sir.

DR. OLEYNIK: Yes because by my count it's just one, not counting myself. I would like first to elaborate on that because I got an impression that concerns stated must be by public bodies. They dominate the discussion. Naturally, public bodies, their interest is to restrict access to information, not to extend access to information.

I have some practical proposals in this respect that I would like to cite because I find it odd that an act whose aim is, I quote, to facilitate citizens' participation in governments – "The purpose of this act," at section 3, "is to facilitate democracy through … ensuring that citizens have the information required to participate" and so forth. Again, I find it a bit odd that the discussion is dominated by public bodies, not by citizens, with very little input from citizens.

The next natural question in this context: why there are so few who contribute. Obviously, it's open; it means there are no restrictions. Everyone is welcome. I can just witness, based on my own experience, that there are no barriers or restrictions, or at least there are no explicit barriers.

Perhaps the committee could cast a wider net, because in my case I heard about the process by instance – it was not even in the media – when I was searching something on the Internet. Then, I came across the website and I realized that there was a process ongoing. It means there was no PR campaign or there was no information diffused by widely read mass media that would attract attention to the process. Again, it's very important what is discussed here, what is at stake here. I will try to use some examples of the importance a bit later on.

How it can be done: It may be done through some kind of online form because, again, one of the barriers – not explicit – is the fact that it is acknowledged on the website that all information is subject to ATIPPA requests. It means what you said and who said it may be disclosed under certain conditions. Not all people are comfortable with that, I assume. Again, it's my speculation because I didn't do any specific research on that.

First, the person has to be very motivated to spend time and resources, to make a contribution. Second, a person has to be given some kind of – especially if the person is not outspoken. Not all people are outspoken. Some people prefer just to keep their comments or input confidential. In the present conditions, it's rather difficult because even confidentially made comments are published and they're subject to ATIPPA requests, as acknowledged on the website.

Going back to the idea of a wider net or a wider call, a survey may be the solution. As it stands, it's very difficult to assess how many people actually in this province use this mechanism and for what reasons – personal, to access information about government operation and so forth – to get a picture that is not based only on the accounts that are provided by public voice, that are fragmented, that are very difficult to aggregate and to create the whole picture.

I remember I watched several online hearings. Some public bodies provide you with statistics saying: Okay, we have N number of requests; some of them were disregarded and so forth. Some other public bodies don't provide that information. They prefer to focus on something else. So there is no general picture where we are

in terms of how people use that instrument and for what purposes.

Even more troubling, there were some known cases of people who, in the past, were fighting for access to information in this province and some of them were forced to move out; for example, some people who were behind that much-publicized later sunshine list disclosure. Journalists who were promoting and pushing very hard for that change succeeded, but at the end of the day they are not here, they are working elsewhere because it's very difficult in this province to fight for information.

Yesterday, for example, there was a discussion of some educational bodies. They mentioned we have some pending legal cases or ongoing legal cases. That's a precedent that one of the public bodies referred to yesterday. The precedent has quite the important impact on the situation with access to information because that private citizen won, actually, even in the Court of Appeal.

What struck me during the previous statutory review process was that case was not even mentioned in the final document. There was just a mention of some interlocutory results of that legal proceeding but not a final result, which was very important and, again, it is public. There was a second case in 2020 when the same individual was brought to the Court of Appeal, but the Court of Appeal upheld, actually, the right of that individual.

All I am saying is that there are two reasons, concluding that preliminary comment about the procedure – probably reasons for rather limited input from private citizens. I see them twofold. First, one has to be very motivated and outspoken to make a contribution, which is not the case for many people. Second, as strange as it may sound, it's dangerous in the Province of Newfoundland to deal with the issues of access to information. It's dangerous. Not physically, obviously.

It's not like in countries like China or Russia where people may physically be suffering as a result; I'm talking about consequences for their employment situation. I'm talking about consequences if they go to the court – which is promoted by several public bodies. They are told, okay, if you disagree, just go to the court. But that increases, enormously, the costs of fighting for the information – enormously. Obviously, when a case is brought before the court, a public body has much more resources to deal with it, regardless of the merits of the case.

CHAIR ORSBORN: You have about 45 minutes, Sir, so you might want to talk about your recommendations for the legislation.

DR. OLEYNIK: Yes, so I'm closing the introductory comments. Now I would like to focus on overarching issues. In addition to what – or not in addition, just on what I said in my written submissions because I realize that you had a chance to look at them. I will focus on six such recommendations or issues. Let me first numerate them and then I will comment on each of them one by one.

First, is duty to document and it's something related to section 3, the foundational section of the act; second, access to the records, section 8; a duty to assist, section 13; legal advice, section 30; conducting an investigation, section 44; and prosecution of offences under the ATIPPA is section 115. So six matters that I would like to discuss in more detail.

Duty to document: The Commissioner explicitly stated that it would be a very good idea to include the duty to document, but the Commissioner wants to include it in his portfolio. That means he sees that by including the duty to document it would just extend the scope of the mandate of the Office of the Information and Privacy Commissioner. I have very serious concerns on this respect.

I am in full support that the act should include clear reference to the *Management of Information Act*, because that was the stated intention of the Legislature five years ago. If you read the report that was produced five years ago, it clearly states that access to information doesn't work without parallel duty to manage and to produce information, the duty to document, but it was not done. It means there is a separate act and the separate act is essentially that it means it's not enforced. For your information, since you were a chief judge of the Supreme Court, there is not a single case in this province in which the *Management of*

Information Act is even cited by your court. Not to speak about it being enforced, even cited.

Clearly, this act is just an act that is not working and something has to be done to make it workable. One way to make it workable is to add – for example, when discussing the purpose of access to information legislation, section 3, the purpose is to be achieved and then a new paragraph or a new section is added, (g) creating records that document the key business decisions of public bodies. That's the purpose of the duty to document.

Then, there is a reference to the *Management of Information Act* as a separate act. But seeing there is no reference currently in the Access to Information act to the *Management of Information Act*, that's why applicants are unaware and public body are headed to be unaware of *Management of Information Act*. The *Management of Information Act* is a very good act. It sets very high requirements, how to deal with records, in contrast to the Access to Information act.

To conclude my comments on the first substantial issue, the duty to document, an explicit reference to the *Management of Information Act* would help. It can be done by adding a sentence to section 3, more specifically section 3(2). Again, the purpose of the act is to be achieved and – then containing means by which it can be achieved creating records that document the key business decisions of the public body as stated or as required by the *Management of Information Act*.

The next set of comments is about access to records, section 8. I would like to say that the act was introduced, as we all know, 15 years ago. It's a pretty long period of time. At that time, most documents were created not necessarily electronically; some documents were created electronically and some documents were still produced in paper form. Now, it's difficult to judge – because a server would help – how many documents are currently produced in digital form and how many documents are produced in paper. My impression now is it's more than 90 per cent of all documents are produced electronically and that's created a problem. That's created a problem because in the current form, the act is open to various interpretations as how to deal with digital records or electronic records. They may be as simple as emails and, again, based on my impression from online panels, in many submissions emails were mentioned. This is electronic record by excellence.

The point is if someone seeks access to such records – email or, I don't know, for example, some Excel spreadsheets, statistics that exist in electronic form only – usually how it's done, a PDF copy is provided, but a PDF copy doesn't allow the person who seeks access to make full use of that information. Excel allows you to manipulate all these numbers, analyze them. People looking for access to that information are not just to see them on PDF just on the screen; they would like to work with them.

Again, five years ago, in 2014, it was clearly stated that information should be provided in the format that allows reuses, but that was not done. Reuses – I mean something useful can be done with that information; information can be analyzed. Furthermore, that discussion of the format has implications also on the integrity of records. For example, speaking about emails, if emails are just printed out, you cannot assess whether it's a real document or, for example, it can be altered.

It's very easy to alter an email. Adding a line or removing a line or so forth is very easy. It's one of the legal cases that are currently ongoing, so I'm not going into detail. I would like to say that when it's printed out, then there is absolutely no means to check whether that's an authentic document or it's something that was altered, exposed.

There is an offence under ATIPPA saying that a public body should not alter records. Currently, that offence doesn't work. It means there is no single case of prosecution. Why? Because it's impossible. It's impossible to demonstrate anything. For example, here, that's an example of email printout. It's impossible to assess whether it's an authentic email. It's just an example. Of course, it's authentic email, but I'm saying that emails contain metadata when produced in electronic form. If someone requests records in native format, I don't see any problem unless, again, some public bodies can clearly demonstrate. Because they are created as

electronic documents. It means they exist as electronic documents. If a requester asks for these records in native format – and, again, there is a very long line of legislation in this respect, even in this province.

CHAIR ORSBORN: Native format is the format in which it was produced in the first place?

DR. OLEYNIK: Yes.

CHAIR ORSBORN: Okay.

DR. OLEYNIK: And, again, you don't need to change anything.

CHAIR ORSBORN: If I have an email on my screen and I forward you that email, do you then get that email in native format?

DR. OLEYNIK: Well, as an attachment, MSG attachment. There is an option when you forward, as you say. It means forward – click on the forward button. But when you forward as an attachment, it may be attachment MSG, or EML attachment or PST attachment, whatever: how it was created.

CHAIR ORSBORN: And you would then get it in –

DR. OLEYNIK: Yes, that's it. Again, it's not necessarily directly to me, of course. It can be first forwarded to an ATIPP coordinator who will review and if no information is exempt, then it should be provided in native format. If information is exempt, it's a different story. It means then that information shall be exempt. It means some plan applied and so forth. In many cases nothing is exempt, but still a public body consistently refuses to provide information in native format.

Again, in this province there is a very nice *Management of Information Act*. That act states clearly that electronic documents shall be retained in the format in which they were made, received or sent. It's an excellent act, but unfortunately it is not working.

Now, the duty to assist, section 13. Yesterday I noted that Memorial University's submissions in this respect caught your attention since you expected additional submissions from the university. The university essentially focused on the duty to assist. It means the impact of duty to assist, whether it's reviewable by the court or what is the scope of judicial review and so forth.

CHAIR ORSBORN: Yeah, just help me out with that whole process.

Let's assume the Commissioner recommends that a public body do a better search or another search. What do you say should happen from there, if the public body then goes and conducts a further search and they say: We've searched and that's all we got? Let's assume that applicant disagrees with the public body. They don't think that they've done the search. How should that issue get looked at or adjudicated?

DR. OLEYNIK: Well, it can be bypassed or resolved even in the current form. It means as I keep a stance right now. Let me explain my view on that. Currently, what is reviewable, you can start an appeal in the court if the public body decides to refuse access.

CHAIR ORSBORN: Yeah.

DR. OLEYNIK: Then the court can say: No, you have no right to refuse; you need to provide access.

CHAIR ORSBORN: Right.

DR. OLEYNIK: But let's think a bit differently about that. If a public body failed to conduct a reasonable search, it means that, in fact, the public body refused access. It means the public body can refuse access in a great many ways, as a matter of fact. First, a public body may refuse to a record by simply not searching for that record or refusing to conduct a reasonable search. Second, they may locate it but then not release it. Third, they may locate it and then put on hold, as has happened in several cases, and then, only if the court action started, they start to release these documents. There are a great many ways in which a public body can refuse access.

CHAIR ORSBORN: I understand. How does the question of whether or not they searched properly get decided?

DR. OLEYNIK: Well, what I'm saying is that the current wording means that it's not that important, contrary to submissions made, for example, yesterday, just to make it clear, that duty to assist is not a ground for commencing an appeal, because any refusal of access to a record is reviewable. Any decision to refuse access to a record is reviewable. Otherwise, again, there is no power of judicial oversight over the process. So any decision to provide access to disclose personal information or to refuse access should be reviewable.

Again, if we start playing with words, as some public bodies suggest, okay, let's exclude the duty to assist. But the duty to assist is based, as it stands, as you know, Sir, on a three-part test developed by the Commissioner. This three-part test includes three components. First, it means the public body shall communicate openly with the applicant; second, a public body must conduct a reasonable search; and, third, a public body must assist at the early stages, if necessary, in providing the information. Again, it's not even a case law because it was not a decision of the court. It's not a legal test, properly speaking. What I am saying is that wording has to be taken very carefully or changed very carefully because a public body can refuse access in a great many ways. By saying that a refusal based on a failure of the public body to meet its duty to assist is not reviewable, then that will simply reduce the scope of judicial oversight over the process.

Those are essentially the comments I wanted to make about section 13.

CHAIR ORSBORN: Thank you.

DR. OLEYNIK: Now, comments about legal advice. Again, Memorial made quite elaborated comments on that.

What is at stake, as I understand it, is whether the Commissioner has the right to review records. Many public bodies, they argue and they push very hard forward the idea that the Commissioner shouldn't be able to review records and if a requester wants to get these records reviewed, the requester must go to the court. That's the logic, as I can see it.

Memorial refers – and not only Memorial, it's easy to find references to several cases in Alberta, because in Alberta there is a long line of case laws exactly about that. It means whether the Commissioner can review or not review legal advice or information that was served as legal advice or not. I would like to direct your attention, with respect, to a recent case – last year case – that is usually overlooked. It's cited in my written submissions. It's University of Calgary versus Alberta Information and Privacy Commissioner, 2019 ABQB 950. That's exactly what we may see happening here in this province if the proposal will be implemented.

In that case, essentially what was at stake is falsely claimed legal privilege. The Commissioner was not able to demonstrate anything because the Commissioner was – well, the request of the Commissioner to produce these records was rejected by the public body. The Commissioner said: Okay, since the information that you produced is not enough to make any determination, let's leave it to the court to decide.

The court refused to do so. The court returned the matter to the Commissioner saying if there are grounded doubts about falsely claimed exemptions, especially legally privileged exemptions, it's up to the Commissioner to do so. So it's Catch-22, it means a lot of resources were spent in that matter and just to arrive to the point of departure. It means the matter is before the Commissioner. It's very easy, seeing nothing can be reviewed if the proposal is accepted; if nothing can be reviewed by the Commissioner then it's very easy for public bodies to claim exemptions, legal-advice exemptions in a blank manner. I can give you an example.

In the case of Memorial, even people who are not legal advisors, legal counsel, they claimed it. For example, according to the case law, only people who have the status of internal or external legal counsel, or what external or internal legal counsel conveyed, only that may be exempted. What we see, given an ATIPP coordinator can claim that, it means persons without legal education or some officials, they also claimed it. That's what will happen, even to a great extent, if the Commissioner has no power of review.

Now, let me turn to the next section, which is conduct of an investigation. From my point of

view, it's one of the weakest, and not only one of the weakest links in the ATIPPA currently but also a link that is very difficult to fix. Why? Because on the surface everything is fine. What is the source of the problem? Let me explain as I see the source of the problem.

Section 44 says that investigations may – may – be conducted in private. This is a standard close. You can find that close in many other access to information acts in other jurisdictions, but may interpreted here by the Commissioner as should or shall, it mean as mandatory. It means the procedure for investigation, as it is set right now, means that nothing is shared between the parties. Parties make separate submissions to the Commissioner, they don't see submissions of each other. They cannot comment on submissions of the other and, as a result, they are just relying on the very short summary provided by the Office of the Information and Privacy Commissioner. No documentary evidence is shared in these circumstances.

Of course, it increases the burden on the legal system in the circumstance because the only alternative of how to bypass that is to go to the court, but here is the next catch. The next catch is that if one goes to the court, then all that information is still exempt. Why? Because the Office of the Information and Privacy Commissioner then start – let me refer to a specific clause –

CHAIR ORSBORN: Is this the informal resolution process that you're talking about, Sir, or …?

DR. OLEYNIK: No, it's all.

CHAIR ORSBORN: Okay.

DR. OLEYNIK: It's formal investigation as well. I agree that for informal resolution it's quite appropriate, but even formal investigation works exactly in the same way.

What I would like to say is, for example in Alberta – let's return to Alberta – they also have a clause in their access to information act saying that the Commissioner may conduct investigations – inquiries in their language, investigations are inquiries – inquires in private, but in their case it's may, it means it's an exception. Parties need to apply to the Commissioner for leave to make submissions in private. The second part is you may comment on that application.

So it may be a really serious case or serious reason for letting a party make submissions in camera. As a result, there are fewer cases that are brought before courts regarding access to information in Alberta than here, because here – again, it's difficult without having access to a real scope of the problem, but my impression is that any problems that were not properly dealt with at the level of investigation, they're brought before the court, but then the court faces the same problem, because even if the court orders the production of a record, a record is confidential and that's it. It means it's a Catch-22.

Something has to be done, but I realize that it's very difficult to change that because the Commissioner, as master of his procedure, can set that procedure, then some wording has to be changed. Let me be more specific. In section 41, that is the section usually relied upon by the Office of the Information and Privacy Commissioner and by public bodies if anything is brought before the court. It is disclosure of House of Assembly Service and statutory office records, because all materials that were submitted during investigation in private, they are exempt, citing statutory office records exemption. The court won't overturn that because it's a mandatory exemption. It's very difficult to argue with that.

So what I would like to say is an exemption has to be added to section 41. It means that once a proceeding is commenced at the Supreme Court, then all materials that were collected during the investigation should be a part of the court's record; otherwise, it doesn't work. It cannot work, regardless of what you do.

One more point about section 44 and one more argument against the extension of the scope of exclusive jurisdiction of the Commissioner: If the exclusive jurisdiction of the Commissioner is extended to the *Management of Information Act*, as proposed, then it will be even worse. It means everything related to the *Management of Information Act* will be just excluded and made

inaccessible as long as it's a part of an investigation.

Either something is changed at the level of how investigations are conducted, or, again, there should be a clear statement that once the matter reaches the Supreme Court, then the Commissioner and the public bodies have the duty to file a record, or public bodies have – actually, it's a stated duty, it means it's currently in the act. The problem is that duty cannot be met properly in the circumstances because most records are exempt under section 44.

A minor point against the proposal to extend the scope of jurisdiction is that as it stands, the Office of the Information and Privacy Commissioner doesn't have IT experience or IT staff on that. In contrast to ATIPPA, the *Management of Information Act* is much more suitable for dealing with digital records. Again, there is a risk that if the Office of the Information and Privacy Commissioner is not changed by including, for example, IT experts in that office, it will be simply excluded from any work, any reach of citizens, everything that is produced in digital format.

The last point is on section 115. That section has been in the act since the very beginning, for 15 years, but, Sir, you won't find any example of actual application of that section. Perhaps it's not public but I searched in several databases and there is not a single case when section 115 was applied. It doesn't mean that everything is fine. If you look at the number of cases in the courts, the public bodies complained that there are too many cases. It means that something is wrong, but at the same time, the root cause of these problems cannot be addressed because that clause cannot be enforced.

CHAIR ORSBORN: Yes, it's an interesting question because a wilful breach of privacy is an offence under section 115. If that happens in a public body, it's really up, then, to somebody in the public body to let the police know that we have a problem here with an offence under the act and then the *Provincial Offences Act* takes over.

DR. OLEYNIK: Absolutely. Here I –

CHAIR ORSBORN: It depends very much on the people within the public body because it's not a public kind of offence.

DR. OLEYNIK: Well, it's white-collar crime that is always difficult to prosecute, to start with. It's not rape, it's not murder, and it is not burglary or whatever. It means it's always more difficult to prosecute white-collar crimes. In this case, I completely agree with you, Sir, and also with the Commissioner on this account because the Commissioner says that some protection has to be offered to whistle-blowers. Only whistle-blowers can be a trigger of anything but, as it stands, whistle-blowers are punished and they're punished very severely.

I would like to say there are ways to organize clauses or articles: one, in ATIPPA, section 115; and, second, in section 8 of *Management of Information Act*. If you take this section seriously, they would help change the (inaudible) for the better. Unfortunately, it's impossible to enforce them. Many of them have never been used, ever. One reason – and you brought it up – it means it's an insider job or it has to be done from inside. If it has to be done from inside, then some protection has to be offered and some guarantees.

Again, let me return, as a footnote. You know that, for example, Memorial University is exempt from the scope of the Whistleblower Protection Act. There is a clause in the Whistleblower Protection Act excluding Memorial. It means that no whistle-blower will ever come up from that body.

Well, that's essentially it, Sir, unless you have questions that I will be more than glad to answer.

CHAIR ORSBORN: I'm curious about the last comment. Are there other public bodies that are exempt from –?

DR. OLEYNIK: No, I was quite surprised. If you wish, I'm online right now, I can direct you right now to the specific clause.

Yes, it's section 2. The exact title of the act is *Public Interest Disclosure and Whistleblower Protection Act*. It's SNL2014 CHAPTER P-37.2. It's section 2, subsection (h), public body

means, and there is a list of various public bodies, but it does not include Memorial University of Newfoundland.

CHAIR ORSBORN: Other than that, does the listing of public bodies there match what's in the ATIPP Act?

DR. OLEYNIK: No.

CHAIR ORSBORN: No, okay.

DR. OLEYNIK: Not like in the ATIPP Act, it's just a list or generic types, like: "a corporation, the ownership of which or a majority of the shares of which is vested in the Crown …." So it's the only exception.

CHAIR ORSBORN: All right. If I can just ask you one final question.

It's my own understanding that the issue about native format, from your experience, would that pose any difficultly for public bodies technically in trying to respond to requests?

DR. OLEYNIK: Sir, let me give the following answer: Since the records were created beforehand, it means that there is technology. Because if the public body claims that they don't have the technology to deal with that, they wouldn't create these.

CHAIR ORSBORN: Okay.

DR. OLEYNIK: For example, think about emails. If an email is created it means that the public body has the technology. It's Outlook. It's very common. It means even students have the technology right now. The only thing that is required is just to process records in native format, which doesn't require anything else. It means it can be forwarded as an attachment, which is –

CHAIR ORSBORN: If it's in that format, firstly, it's no trouble to reproduce it in that format?

DR. OLEYNIK: No, no, no. Unless you would like to change it, and that's the tricky thing.

CHAIR ORSBORN: I understand that, yeah.

DR. OLEYNIK: Because that's where IT experience is required. I can change – and I can say that in public – email can be changed even with a person with no advanced IT skills. I can show it right now how email can be changed, exposed, if you wish, because it wouldn't take very long. It would take five, 10 minutes. But to make it invisible or difficult to detect, IT experience is required.

CHAIR ORSBORN: I take it that the phrase "native format" has no meaning outside the electronic context. It has nothing to do with paper records or anything like that. It would simply be the –

DR. OLEYNIK: A generic term. If a record was created as a paper record, then the native format of that record is paper record.

CHAIR ORSBORN: Native format is paper. Okay.

DR. OLEYNIK: Again, it's not my invention. It's not even Sedona principles, because when I rely on Sedona principles, you know that Sedona principles, it's mostly about complex litigations. Sedona Conference of Canada, they developed a number of principles.

We don't need to go that far because we have the *Management of Information Act* in this province that clearly formulates that records have to be retained in the format in which they were created beforehand. So we don't need even to rely on Sedona principles and to waste resources fighting about these Sedona principles. Whether they are applicable to ATIPPA context or not applicable, we don't need that. We have the *Management of Information Act*, which is very good, but unfortunately that, as it stands; it's very good calibre.

CHAIR ORSBORN: Thank you, Sir, very much.

You're well within your time, Sir. I appreciate that and thank you for your submissions and for your explanation to the layman about what native format is.

DR. OLEYNIK: Thank you, Sir.

CHAIR ORSBORN: We will reconvene at 11:15.

Thank you.

Recess

CHAIR ORSBORN: Welcome to this public consultation session of the 2020 review of the Access to Information and Protection of Privacy Act. We have two presenters in the present session. I can advise the presenters that I have read their submissions and need only a summary of their main points. That should leave enough time for any questions that I may have.

I do note that both presenters are scheduled, at least presently, to attend the section 39 round table, which is scheduled for next Thursday. If you still plan to attend that, you may want to defer any comments on that section, but I'll leave that to you.

The first presentation is from Mr. Edward Hollett. Go ahead, Sir, please.

MR. HOLLETT: Thank you, Commissioner.

I don't intend to refer at all to the issue of third party information; I'll save that for the 28th.

Thank you for this opportunity. I won't spend very much time dealing with my submission. You've read it. I will make a couple of additional comments that are related to it now that I've read some other submissions.

I'll begin by establishing why I'm here. I have a personal interest in the act. I've been a long-time user of it. Also, I've had the experience of having administered, on the other side of it, access requests under the old *Freedom of Information Act* many years ago. I have experience with it, as well, in the federal public service. In my current and other private sector positions, I've dealt with disclosure of information privacy issues and the *Personal Health Information Act* and so on, so it's an area that I deal with pretty well every day. In both my profession and avocation, I'm a researcher, so access to government information is of extreme concern to me.

I made a presentation in 2014 to the review commission because I was increasingly concerned about the prior restrictions at the time. I made an extensive presentation there. What I decided to do in this instance, based on that background, is actually bring to your attention what appeared to be initially a relatively small matter, but I think it was indicative of how a small error can grow to the point where we actually start seeing less access to information.

That in and of itself isn't monumental. We're not talking about hiding a $15 billion contract; we're talking about relatively trivial information. But for a researcher today or in the future, it's the kind of thing that is important piecing together how a decision was made. What I'm talking about is the practice of handling orders by the Executive Council, formal decisions by the Executive Council, in things that are called orders-in-council or minutes of council.

As I indicated in my submission, prior to 2012 these were – in their form as they currently are released as well – entirely public. I requested one in 2006 by sending a letter to the clerk of the Council and asking for a copy of the order that commissioned Chief Justice Green at the time to look at the House of Assembly. Twenty-four hours later, I received the fully unredacted copy of not just what I was looking for but something else besides. That's the premise and that's the principle of the practice that I was familiar with prior to 2012 anywhere in government.

After 2012, as I demonstrated in several examples, we had a situation which officials were required to withhold documents that were identified as Cabinet documents that contained orders of the council. It doesn't matter whether you call it council or Cabinet under the act, they're interchangeable. Which left the officials of Executive Council in the conundrum of having, on the one hand to not disclose it, but on the other hand to disclose it. Orders-in-council are typically public documents, both here and in every other jurisdiction in Canada that I'm familiar with and in the UK. The examples I gave in my paper are from the UK. The definitions and so on are from the UK.

We've seen a mixed bag of that, in some cases, in which the actual body of the order, the decision itself, was censored. We are now in a situation, after some evolution, in which the council still withholds two tiny pieces of information, but doesn't indicate that they're withholding them from the document. Unless you know it's missing, you don't know what you're going to get. I gave an example to you of how that actually would have, if it occurred today, misinformed or affected a discussion of a contentious public issue.

Less access, as I concluded, is not more. The remedy for it is actually quite simple: It's either an amendment to the act, or the clerk of the Council could exercise powers granted under the ATIPPA, 2015 to disclose the information in the public interest. What we're talking about here is actually the distribution list – that is, the people within government and outside who get a Cabinet order – and the number of supporting paper, which is what's currently deleted.

CHAIR ORSBORN: Have you seen any response from (inaudible)?

MR. HOLLETT: Yes, I have.

CHAIR ORSBORN: I gathered, certainly with respect to the distribution lists, it seemed to me if they weren't specifically asked for you wouldn't get them; if you asked for them, you'd get them. Is that a fair reading of the response?

MR. HOLLETT: That's an absolutely fair reading of the response. It's exactly what the clerk said in his reply.

As I noted in my submission, Commissioner, they're not marked. In a typical access request, when a deletion is made the section that's deleted is blacked out and there's an indication of the authority for the deletion. In this particular case, they simply don't disclose it at all; it's whited out. You don't even know it's there, that it was supposed to be there, unless you're like me and you're one of those people who know what an order-in-council is supposed to look like.

CHAIR ORSBORN: It's not an attached document that just doesn't get produced, it's something that's printed right on the order-in-council?

MR. HOLLETT: It's actually printed on the form. The fact that's it deleted is not obvious to anyone. If you look at the examples I've given you, that, I think, is quite plain and that is actually the point I made.

The clerk's submission actually doesn't deal with, to my mind, the crux of my matter, which is that this doesn't need to be deleted at all; it, in fact, goes to the length of trying to justify what they do. I think, to my point – and I'll reiterate it so that it's absolutely clear – I don't doubt for a moment that the officials of the Executive Council are behaving with integrity and honour in trying to wrestle with a conundrum in the legislation. It's just that they will go to the length of actually writing a four-page letter to try to explain what they're currently doing when the simple answer is to simply stop doing it.

CHAIR ORSBORN: Well, my understanding, to be fair, from what I read from the clerk's letter, was that the distribution list is not considered to be part of the substantive document itself. That's why it's not included.

MR. HOLLETT: That's a more recent interpretation of it. Again, if you look at the practice that I think I've demonstrated over time, historically, it has been considered to be a part of the document and it's only been deleted very, very recently. Prior to 2012, which I think is a crucial turning point, the information that I presented to you – and I have other examples of it as well – the distribution list and a number of the supporting Cabinet paperwork was considered to be an integral of the order-in-council.

CHAIR ORSBORN: So you're concerned that the practice might vary as people change over time?

MR. HOLLETT: The practice has changed. What is now a current practice wasn't practised 10 years, with turnover in the office.

I made the other point, as well: Oftentimes, decisions in government are justified on the basis of a jurisdictional scan. They ask what everybody else is doing and they usually try to

aim for the middle of it: Don't be the most extreme; don't be the least extreme. That leads into a difficulty because our practice may vary and our practice may vary here locally for a very good reason.

Ontario may have always decided that the order-in-council didn't contain that information, but that wasn't our practice. Why should we suddenly conform to Ontario's practice and, in the process, give people less information than they had? A relatively trivial type of information, but in the case that I gave you it was actually quite important in a public discussion. It demonstrated that some of the people involved were lying publicly about what they knew. I think that's really the crux of it. It's actually a relatively small point, and rather than justifying it, there's a simple way to deal with it. But the point is less is more.

Mr. Norris's submission to you, I think, is fine insofar as it goes. I don't have any contention with it, except to point out that I think, fundamentally, he didn't really rebut the point I made about the long historical practice.

That's as much as I have to say about what I submitted. If you will, I would like to just go on and expand upon it because I think Mr. Norris's justification of the current practice actually ties into the other submissions that you received. It's an attempt to justify or an attempt to deal with matters that could actually be dealt with internally and administratively. As I said, the simplest answer to this question is if Mr. Norris, as the clerk currently, felt that I was right, he could take an administrative decision and fix the problem very easily rather than – that's a simple example.

But if you look at many of the things that were brought to your attention by the other submissions from departments, many of them are, in fact, administrative in nature. In terms of the complaints from officials about the number of requests they receive, that's actually justification for saying that the act works perfectly and should be kept the way it is, but that the departments need to put more resources into it.

If you look at another instance, the Executive Council submission wants to know what holidays they should use to define – this is the level that you're getting. Your submission from the Executive Council wanted to know what holidays they should use to judge –

CHAIR ORSBORN: Well, in fairness, that was a common complaint from pretty well every coordinator that I spoke to in a group. I did mention, right at the outset of these hearings, in a public statement that I held a number of anonymous group sessions with coordinators, either on Skype or in person. There was just some difficultly, practically speaking, in dealing with the relatively short timelines in the act. Some public bodies have different holidays than others and there was no real consistency of calculation across the public service.

MR. HOLLETT: Absolutely. It's a legitimate point and it exposes another problem. I could suggest, very simply, that for all of government, their benchmark would be whatever date they're closed on. It actually exposes another problem, which is that there are several different definitions of what constitutes public holidays. There's one in the *Labour Standards Act*. There's another one in the *Shops' Closing Act* and then we have the practice of the government, which is the one that actually changed for most of us 20-odd years ago.

CHAIR ORSBORN: It might vary as to where you are in the province.

MR. HOLLETT: And it varies to where you are in the province. My point being, though, actually the answer to that question is internal to government and administrative, and not really something about the substance of the act.

I appreciate the point that's coming to you, but it could be handled in another way.

CHAIR ORSBORN: If I can go back, you mentioned that the issue with the orders-in-council could be remedied by an amendment to the act. Do you have a specific amendment that you're suggesting?

MR. HOLLETT: Simply deleting the word "order." There's a fairly simply change in wording we could probably submit. I didn't give you one and I could certainly follow up and give you one.

Simply deleting that particular part of the back end of the sentence where it says "and anything that reveals an order of the council," it captures the documents for the purposes that the definition was originally drafted to mean, and that's all you would really have to take out.

CHAIR ORSBORN: You're referring to an order of the Executive Council as opposed to an order of Cabinet or both?

MR. HOLLETT: Under the act, as I understand it, there is no difference between Cabinet and the Executive Council, or have I missed a fine point? I may have missed a fine point, but section 2(c) of the act defines Cabinet as the Executive Council.

CHAIR ORSBORN: Ye. I understood the response from the clerk to be that an order-in-council is not considered to be a Cabinet record. A Cabinet record is one that's exempt. An order-in-council is not, as such, considered to be exempt, but it will be redacted insofar as it includes information that would come within the definition of Cabinet record.

MR. HOLLETT: I don't have it right in front of me, but as I recall the definition of what was exempt, it was an order of –

CHAIR ORSBORN: Cabinet records talks about, in this context, "an agenda, minute or other record of Cabinet recording deliberations or decisions of the Cabinet …."

MR. HOLLETT: And under 2(c), Cabinet is the Executive Council. I didn't quite follow his distinction between Cabinet and Executive Council. It seemed to me that the act uses a common distinction, which is that the two things are the same. I didn't quite follow that part of his argument, to be honest, and I don't understand the distinction. If there's a fine point, I'm missing it.

But again, to go back to my point, prior to 2012 this was never an issue.

CHAIR ORSBORN: For something that's considered to be an order-in-council.

MR. HOLLETT: For something that's considered to be an order-in-council. Minutes in council, which are intended to be internal administrative decisions, tend to be handled differently and we could consider that differently. But for an order-in-council – that is, the exercise by the Cabinet/the Executive Council of either a statutory or prerogative power – that's typically been in public. I'll use that distinction of what an order-in-council is, which may not be a strict legal definition, but I think it's a fairly commonly accepted idea.

CHAIR ORSBORN: So I'm clear: You're using it in both contexts, something that can be an order of Cabinet or an order of the Executive Council?

MR. HOLLETT: I'll make the distinction this way, Commissioner: Cabinet and the Executive Council are the same body. In common parlance, they're the same thing.

CHAIR ORSBORN: Yes, okay.

MR. HOLLETT: We don't tend to distinguish between the two. An order in Cabinet and an order-in-council are the same thing.

CHAIR ORSBORN: For your purposes, it doesn't matter if it has to be signed off by the Lieutenant-Governor or not?

MR. HOLLETT: Right.

CHAIR ORSBORN: Okay.

MR. HOLLETT: The distinction I would make is between a minute of council, an MC, and an order-in-council. An order-in-council is the document signed by the Lieutenant-Governor. It's an exercise of either statutory or prerogative power. A minute of council is typically, in my understanding, essentially an internal administrative direction.

CHAIR ORSBORN: Like the difference between reasons for judgment and the order itself.

MR. HOLLETT: Conceivably, yes.

CHAIR ORSBORN: Yes, okay.

MR. HOLLETT: I think that's really the substantive distinction that you could make.

Again, we could clarify it by changing the wording to make that distinction, but I don't really think that's even necessary, because for the most part people don't ask for minutes of council, and it's unlikely to. Yes, you could certainly make that as a very simple definition of the distinction. I haven't written one, but I could easily draft one and suggest it to you.

Just to carry on very briefly, just to touch on some other issues that come up out of this, the last thing I'll finish off with is a couple of references to some other items in the Executive Council submission to you, other than the holidays matter, that I had some experience with as a user over the years.

The Executive Council raises a question of the Auditor General's working papers, which is an issue, the definition is an issue. In my experience with that, the Auditor General has in the past sometimes tended to interpret that very broadly. I understand working papers of the Auditor General to mean the research conducted and the calculations made in the completion of a report, an actual report. I submitted a request for administrative documents related to the operation of the office and was told I was not allowed to have it because they were considered to be working papers of the Auditor General.

The only comment I would make is that I would support anything you could do to clarify what is exempt and what isn't exempt for the Auditor General. Because, again, in keeping with the general premise of the ATIPPA, that the public ought to have information except for specific exemptions, that's an area where I think we could do with some clarity; otherwise, everything in the Auditor General's shop will be forever secret, whereas I think there are a great many things about the administration of the office that are of public interest.

CHAIR ORSBORN: Am I to understand correctly that the AG, as a body, is not included within ATIPPA right now?

MR. HOLLETT: I'm sorry, I don't know whether it is specifically or not. I know that under the act right now, as I believe was previously, the working papers were not subject to disclosure.

CHAIR ORSBORN: Okay. But your point is that as a public body, whether it's included in the current definition or not, the administrative aspect of that body should be open.

MR. HOLLETT: Yes. I think there's a legitimate argument to be made to exclude the supporting documents –

CHAIR ORSBORN: That's different from working papers.

MR. HOLLETT: Yes, very different. Working papers means the material collected during the conduct of an investigation, in terms of the functioning of the office. But if I were to request, for example, annual budget allocations, staffing sizes, that sort of thing, that shouldn't be – if they have an annual internal working plan and timetables, that sort of stuff shouldn't be necessarily subject to secrecy.

There was an interesting question I noticed about other procedures for disclosure, which was raised by the Executive Council and they wanted some clarity about that; Executive Council asked about some clarity about that. There was a reference in the current ATIPPA – if I remember correctly – that the submission referred to a statement that the ATIPPA does not substitute for other sources of disclosure.

This has actually been a common administrative practice over a very long period of time that I've observed and I've experienced, in that officials in departments will often drive people towards ATIPPA as a means of providing information, as opposed to simply responding to an inquiry. In other words, the letter that I sent to the clerk of the Executive Council in 2006, as the administrative head of the Executive Council, to get a copy of the order, would have been turned into an ATIPPA. An inquiry like that would've been turned into an ATIPP request.

I had an experience of having been shown a document by a government official who was in a position to disclose it to me. I asked if I could have the document. He said: Well, you'll have to submit an ATIPP request for that. There is this tendency, and it uses the ATIPPA for something it wasn't created for.

CHAIR ORSBORN: I'm just surmising: Does that provide some protection to a public servant who discloses a document because that disclosure is required by the act, rather than something done voluntarily?

MR. HOLLETT: Well, I'll just give you an example. If I were to ask about how a particular practice works – and I've had this experience of asking public servants how do I go about doing something or why is a certain practice happening that I wanted to know something about. I wanted to know about how doctors get paid at one point, so I called up the person in the Medical Care Commission, who's responsibility for paying doctors. She quite happily answered the phone but was surprised because the practice had been to refer the general inquiries through some other process. I should be clear, the official I was talking about at the time was actually a Cabinet minister who was in a position to give me the document. The minister said: I'm not sure I can do that, I'll have to go back. His officials advised me to submit an ATIPP request, which I did, which they then denied under a certain section of the act.

But I've noticed this in other terms, and if you look, Mr. Commissioner, at the body of released access, the completed requests, you'll often see routine pieces of information, things that could've been answered in other ways, could've been disclosed on the website. One of them that stands out in my mind is a submission to the Justice Department wondering why it is that in court judges and lawyers wear robes. This is a relatively trivial piece of information that could easily have been posted as a backgrounder on the court website, for example. That sort of stuff. Because there's no other mechanism for people to get that information, they tend to go to ATIPPA or get driven to ATIPPA.

CHAIR ORSBORN: Interesting discussion that's been raised many times on the flip side by public bodies and others, where there is a set or legislative or regulatory process for obtaining information that requires, in many cases, the payment of a fee, I'm told that it's quite common practice for applicants to make an ATIPP request rather than utilize the fee-based request that is available. For example, the RNC told me this morning they get numerous requests for accident reports that are available through a process at Motor Registration Division for a fee. Or somebody needs some information about Crown lands, which is available in a Crown Lands search with a fee, but rather than pay the fee – well, maybe not rather than pay the fee, but they choose to go through ATIPPA.

From your experience and from your view, do you have any issue with ATIPPA being used in such a manner?

MR. HOLLETT: I think it's indicative of a broader problem, which actually was another point I was going to make in conclusion, but it is part of this business, information that government could be disclosing by other means that it doesn't use. So people wind up going to ATIPPA for it.

In the Crown Lands information –

CHAIR ORSBORN: (Inaudible) proactive disclosure kind of (inaudible).

MR. HOLLETT: Proactive disclosure or just simply updating administrative practices. I'm not sure about accident reports.

CHAIR ORSBORN: That's just an example I used.

MR. HOLLETT: Well, I'll make the distinction. I think accident reports could be separated out into a different category because of the legal implications of disclosing that. I wouldn't want to get access to an accident report on something that happened to you.

CHAIR ORSBORN: No, no, I'm assuming that, in the circumstance, you're entitled to it.

MR. HOLLETT: (Inaudible.)

CHAIR ORSBORN: But you can go to Motor Registration, pay your fee and get it.

MR. HOLLETT: I should be able to get it, maybe without a fee. In the case of Motor Registration, maybe not, but in the case of information from Crown Lands or assays that are done in the minerals divisions, natural resources department.

Another example that I've had: Municipalities are required to submit their financial information to the department of municipal affairs every year – complete audited financial statements. I made a request to the department because the information isn't readily available. The first response I got in the ATIPPA was that they don't have that information, which actually wasn't true. I subsequently got a complete disclosure from the minister.

My point being, though, it's actually the kind of information that could be readily available on the government website.

CHAIR ORSBORN: Certainly, for those municipalities under the Municipalities Act, I think it's 215, requires them to make available a raft of information to residents of the municipality.

MR. HOLLETT: You could actually save everybody a lot of problems by making that information available publicly through the provincial government. The provincial government in 2013 did start a program – I think Mr. Kent was the minister at the time – called Open Government, following a very common practice at the time. The idea was to make disclosure more readily available. Digital information would be disclosed routinely. Unfortunately, it disappeared and nothing happened to it. There was some initial work and it didn't happen. This is a chronic issue. There's a great deal of information like that.

The Registry of Deeds, Registry of Lobbyists are all currently in an antiquated system that requires the payment of fees, which affects home sales; it affect lawyers; it affects realtors. It affects a number of people, increases their costs and forces them to use these other means of trying to find it at low cost. I think government actually needs to take action, administratively, to lower down those burdens. Today, the problem may be more than it was, say, 10 years, when government was driving people to ATIPPA. I think government needs to look generally at its disclosure practices, to look at all the information it could be disclosing regularly and routinely without any cost.

CHAIR ORSBORN: All right, let me come back to my question and try and focus a little more.

An individual is entitled to an accident report. They have the option of going to ATIPPA or going to Motor Registration and paying a fee and getting the same report. In that circumstance, is it appropriate to use ATIPPA, given the public interest objectives of the act, as the first recourse?

MR. HOLLETT: My question would be for the department of transportation and works or Service NL, wherever motor vehicle currently reports, as to why am I required to pay a fee. It would have been justifiable 10 or 15 years ago, or 20 years ago or even five years ago, if I had to do a manual search to compile the information. That would largely be a reason for a fee; for example, doing a title search on a property. If a clerk has to manually extract the information and type up the information and print it out, there's a justification for a fee in that. But if the information could be made available electronically without any labour being expended on it beyond the initial data entry, why do I have to pay a fee for it?

CHAIR ORSBORN: So your answer is, I take it, that in situations like that, I shouldn't have to pay a fee anyway so I'll use ATIPPA?

MR. HOLLETT: Precisely.

I think the logic of where government needs to look at is what are we keeping back and what are we holding back and why are we charging fees on some things?

CHAIR ORSBORN: I'm trying to get a sense of your view of the parameters of ATIPPA. I'll give you another example. It came up quite frequently in the context of an ongoing legal proceeding and lawyers or their clients using ATIPPA for discovery purposes as opposed to going through the rules of court and what have you.

MR. HOLLETT: It's not one I'm particularly familiar with. I don't have a personal experience with it. I would suggest to you that would be inappropriate, in the same way that I would consider it to be inappropriate for me to be able

to generally access accident reports. There are protections for, for example, investigation reports of the RNC and there always have been protections for that from ATIPPA, but I think that would be an inappropriate means.

It may point me though to another problem, which is why would a lawyer feel the need to apply through ATIPPA to get information which will be subject to redaction and censorship, as opposed to a discovery process, which seems to me would be more open? I mean, I'm not a lawyer so I don't know. In your previous experience, you might be able to help me with that. I would think you would get more information through discovery then you would the other way.

CHAIR ORSBORN: All I can tell you is I hear a lot of reports about counsel using ATIPPA for discovery purposes.

MR. HOLLETT: As you're speaking of it, it did give me another example that came to mind of the same sort of thing. It's gone out of my head but I will think of it. Trying to get through one door what you can't get through the other. Anyway, sorry, if it comes to me.

I don't really have a view of that one. I don't really have a perspective on it. I can see how in those instances, yes, it would be inappropriate and there may be some doors that need to be closed there. In an awful lot of other instances that I am familiar with, government could actually be far more forthcoming with information publicly.

The one that I was thinking about was actually – one of the chronic things I hear complaints about from ATIPP coordinators is the number of requests that they get from politicians who routinely ask – political offices routinely ask every month for briefing notes from ministers. They've been using the ATIPPA system for most of the last 20 years, instead of using questions on the Order Paper in the House of Assembly. This actually goes back to my point about how ATIPPA is used inappropriately.

As you may be aware, legislators have a right to access government information by request and not have it censored. There's a principle established most recently by, I believe, Speaker Milliken in the federal Parliament about the duty of government to respond fully to questions on the Order Paper. The Newfoundland House of Assembly follows the same practice as the House of Commons and has followed the same practice as the UK Parliament since 1855. An ordinary Member of the House of Assembly has the right to ask for all sorts of information in their capacity as a Member of the House and receive it.

Except, in the late 1990s, the politicians, amongst themselves, as part of an agreement on how to reorganize House arrangements, managed to get the Opposition at the time to agree to stop submitting questions on the Order Paper, so they don't anymore. It was an administrated deal. Instead, they agreed to submit ATIPP requests and they get censored ATIPP requests as a result. They actually get less information. They have impaired their own ability to get information and to hold the government to account. It's that sort of thing: using ATIPPA for what it wasn't intended to do.

In the case of those things like briefing notes, the government could very easily take the practice of, at the end of every month, simply posting them online. They're generally public documents anyway and they're going to wind up censoring them, they know, so save time and do it that way.

CHAIR ORSBORN: I think it was Minister Collins who said in 2014 or '15, was it – I think it's quoted in the Wells report – who cares what's in a minister's briefing notes? He made a comment to that effect. I think that's what he said.

MR. HOLLETT: Minister Collins said something to that effect. He said a number of things that were quite funny.

CHAIR ORSBORN: It's in the Wells report.

MR. HOLLETT: But it's true. And an awful lot of briefing notes, if you've read them, if you ever have a chance to read them – it's not something to keep you up at night – they tend to be very frequently mundane. There might only be one or two paragraphs. From an administrative standpoint, it should be easy enough to structure them such that any

potentially redacted information is contained in one or two paragraphs in a certain section of the document. Administratively you can produce these things quite quickly and the parts that you need to delete are going to be clearly marked as deletable.

This is a standard practice in the federal public service. It's a standard practice in other public services in which information in documents is classified by certain categories. The paragraph itself in some documents will be marked U-class one, class two or whatever the system is, and the "U" means anybody can have it. When you're going through the practice, you simply know that you will delete all paragraphs numbered three, because that's a classification three and it's never going to get disclosed anyway.

To my understanding – this actually takes us into another thing. When I worked in government a very long time ago, I was also at the same time a part-time reservist with the Canadian Army and was struck by the difference between the two systems. In the federal public service, there's an information classification system that applies to every department, not just through National Defence. I also had a Level III, Top Secret clearance at one point.

In the Newfoundland government there is no such classification system. The administrative practices in handling secret information or private information or confidential information tend to be still idiosyncratic. That actually is a missing piece of this puzzle and it may be where you're looking. I hadn't intended to talk about it, but it is actually another piece of the puzzle.

A standard information classification system that everybody can learn and know, that then makes it easier to know what information can be readily made available to the public and you don't have to worry about it. Again, that's an administrative practice that would save time and ease some of the –

CHAIR ORSBORN: Presumably, it would be an aspect of the *Management of Information Act*, I would assume.

MR. HOLLETT: It should be, but as a practice, to my understanding, the Executive Council doesn't do it and it isn't a practice of government to do that. You'll see documents marked confidential or letters come in confidential and so on, but what does that actually mean? It stands in contrast to the tiered system you'll see, say, in the federal public service.

That really completes – oh, the last one, sorry, one last piece. There's a mention in the Executive Council submission (inaudible) about non-responsive requests. This is a most persistent and, from a public disclosure standpoint I find, one of the most offensive efforts to undermine the spirit of the act. I'm surprised that it still exists, after having been beaten down a couple of times before.

A non-responsive request or a non-responsive portion of a request is one – if I asked, for example, a letter about subject X and the letter that I received included information about another subject that wasn't covered by an existing mandatory or discretionary exemption, officials will delete the paragraph and claim that it's non-responsive. It's actually an illegal deletion, because the act is very clear: Information is public unless it's subject to one of the specific exemptions listed here. If it's not there, you can't delete it; yet it gets deleted anyway.

I went through the exercise after 2012, in fact, at one point doing a small test of requesting other people's deleted bits. In any submission that I saw online where there was a non-responsive deletion or a non-responsive deletion had been made, I said: Could you send me the parts that are deemed non-responsive? In most cases I got what I was looking for, completely unredacted. In some cases I got chunks of it, but other parts were actually taken out with a specific exemption.

So what was happening here I think was –

CHAIR ORSBORN: Why would you do that?

MR. HOLLETT: Why would I do it? Because it's the same reason that I'm here, Mr. Commissioner. This is an issue of interest to me and when you see certain behaviour, you want to know what you're not getting.

CHAIR ORSBORN: Okay. As a matter of principle, then, you ask for something on subject X and the letter also contains something about subject Y.

MR. HOLLETT: Yes.

CHAIR ORSBORN: Why should you get the subject Y when you didn't ask for it?

MR. HOLLETT: The principle of the act is that the information of government is public, except for the –

CHAIR ORSBORN: I understand that.

MR. HOLLETT: On that basis, I would suggest why shouldn't I get it?

CHAIR ORSBORN: Because you didn't ask for it.

MR. HOLLETT: Maybe it's something that's actually relevant to what I'm talking about. Oftentimes it is. There seldom are situations in which a government letter is written about two completely different subjects.

CHAIR ORSBORN: But intuitively, it would seem to me that – let's say you have a 10-page document and one paragraph of the document relates to what you asked about. The rest of it's irrelevant to your request, isn't it?

MR. HOLLETT: More typically, in my experience what you would see with that is that it's a case of – for example, in maybe a long report. You've only asked about one particular part of a confidential report, something that normally wouldn't be disclosed. On the print version, it starts in the middle of a page and the top part of the page would be blacked out. It's actually relatively trivial information more often than not.

It may be relevant information; it may be nothing at all, but if it's not subject to one of the existing exemptions, I have difficulty making an argument to say that I shouldn't have that information. After all, if you accept the principle of the act, it's the principle of the act. Once you start shifting away from it, then you go the other way and you start withholding information. The difficulty I have as a requester is I don't know why that was withheld. It could be for any reason. We have had experience in the past in which government has withheld information, sometimes for mundane reasons – somebody is overworked and just doesn't want to do the work, which happens – but in other cases, they've withheld information for less-than-pristine reasons.

CHAIR ORSBORN: Right, so you can get a bunch of redactions on a page and you don't know if the proposed redactions are pursuant to an exemption –

MR. HOLLETT: Or not.

CHAIR ORSBORN: – or pursuant to nonresponsive.

MR. HOLLETT: It will become, as it was in the past, a blanket excuse just not to apply the act properly, so people black things out. I've had requests for information in which even the pagination was – ordinarily you will get a fairly coherent pile of sheets back, that you can see letters, you can see the structure and you can see the related information. The contextual information is sometimes important, to go to your other point, a more substantive argument, not just I have a right to it.

Sometimes the contextual information is important in determining what's going on. There may be a matter that was referred to that I didn't realize, when I first went looking for this information, is actually relevant; but in helping me to understand what's going on, I see the context in which this whole paper was written. While I only asked about X, I suddenly discovered a whole bunch of other things besides. I wind up being better informed in the process. I learn more and it improves my ability to understand what's going on.

I think that's really a more substantive argument and I think that's the point I'd make to you. Oftentimes, what can get deleted gives me a better context. Sometimes it's trivial; sometimes it's actually important. Nonresponsive requests are a chronic issue. There are numerous – as the last point on this – references to it by the Information and Privacy Commissioner. It's been condemned, there have been all sorts of

encouragements to stop using it and yet it persists.

We either have an Access to Information act that's open and allows people to find information and receive it or we don't. My tendency is always, as a personal rule, to seek more disclosure rather than less. With that –

CHAIR ORSBORN: You're talking about what's considered to be nonresponsive simply in the context of a document, a portion of which you're going to get anyway. Is that fair? You're not talking about separate documents. Once a document is found to come within the ambit of your request, then your position is you should get the whole document, subject to proper exceptions.

MR. HOLLETT: Subject to proper exceptions.

CHAIR ORSBORN: Okay.

MR. HOLLETT: To make the point completely – you've expressed it clearly but just to make it absolutely clear – I'm not suggesting that if I request a document of carrot production in the Codroy Valley, that there's a separate report that I have no knowledge of, that there's no reference that I should get. If I'm seeing this carrot report in the context of something else in a larger report, then, sure – about vegetable production, sure, it makes sense. As opposed to deleting all the parts about cabbages, which I didn't ask about, but which I might find interesting and useful and to help me understand the broader context of what government is doing. It's a facetious example but there it is.

CHAIR ORSBORN: Can we go back on one issue that was raised, I think, in the clerk's response to you. It's something I don't know about: The numbering of, say, the orders.

MR. HOLLETT: Yes.

CHAIR ORSBORN: The clerk indicates that the numbering is information that should be except of the acts.

MR. HOLLETT: Yes.

CHAIR ORSBORN: Do you take any issue with that?

MR. HOLLETT: Yes, I do.

CHAIR ORSBORN: Why?

MR. HOLLETT: Because a number doesn't tell me anything. The numbering system that's deleted, the most that I can glean from it outside the system is I may be able to tell what department or what committee of Cabinet it came from. In and of itself that does not disclose – and at that point in my interpretation, I fall back on the 1981 act's definition, the substance of the deliberations of Cabinet, which is a definition that survived into the 2002 act, which I think is more indicative of the intent of the legislators at the time as to what ought to be kept secret.

What I think we could find quite quickly as a general agreement is what ought to be secret, the substance of the deliberations of Cabinet: what ministers talked about, what they discussed, the options they considered; and the papers and recommendations that were recommended to them. But the fact that an issue came from a particular department or processed through a particular committee, seems to me to be trivial and doesn't disclose the substance of the deliberations.

I read that part and I saw it essentially as a rationalization or an explanation of the existing system, but I still couldn't figure out what made it such sensitive information. After all, to go back to my point about that – and the distribution list, which is essentially the same thing. If it was such a monumentally secret issue why is it that every clerk of the Council, prior to – well, actually prior to probably 2015 didn't have the same problem. You will see in the examples I gave you in which other information is blacked out, but those numbers were left in. If they were so sensitive, why were they always public before? They didn't suddenly become secret last week.

I think that's the last point I'll leave.

CHAIR ORSBORN: Thank you, Mr. Hollett, very much.

Our next presentation, I think, will be somewhat of a shift in gears. We'll hear from the Heavy Civil Association of Newfoundland and

Labrador, represented by its executive director, Jim Organ.

Thank you, Mr. Organ.

MR. ORGAN: Thank you very much.

First of all, I would like to say, as well as Mr. Hollett said, thank you for the opportunity to come forward and present our feedback and opinions on what we think would be positive changes to the act.

I should review. The Heavy Civil Association of Newfoundland and Labrador represents road builders, water and sewer contractors and bridge builders, what we refer to as the horizontal construction industry and their suppliers. Those are the folks that are represented by my association, so just for the record there. Our industry has no issue in particular with the *Freedom of Information Act* as it was intended to be, and that is for the open and transparent actions of government in their dealings in everything they do.

We are going to focus – or we have focused, we will focus – on a niche piece of the act specific to section 39. The association's submissions relate primarily to what it feels is a current lack of protection for sensitive commercial information contained in bids, quotes and proposals to public bodies. Specifically, the association feels the current protections afforded by the third party notification threshold at section 19 of the act and the exception at section 39 are not proportional to the potential harm caused by the disclosure of the information to the public, and thereby other industry members.

We feel that this really is not in accordance with the spirit and intent of the legislation, which is to provide open, transparent dealings from government; not to provide sensitive commercial information to folks that would like to have it.

Currently, the position of the Office of the Information and Privacy Commissioner in relation to bid information is prices contained in bids, proposals and contracts are not exempt from disclosure pursuant to section 39. This includes the aggregate contract price, as well as unit prices and copies of full bids. Although the association agrees the aggregate contract price should be disclosed – and why shouldn't it be, for government openness – it does believe that unit prices, bid breakdowns and subcontractor invoicing should be protected by the act.

Our submissions, therefore, relate to the following terms of reference of this committee here today: first, "An examination of exceptions to access as set out by Part II, Division 2 of the Act;" secondary, "Whether there are any categories or types of information (personal information or otherwise) that require greater protection" – from the act –"than the *ATIPPA, 2015* currently provides;" and, lastly, "An examination of the complaints process to the Office of the Information and Privacy Commissioner."

Just starting off there, exception for third party information, the test as it's currently stated in section 39 and interpreted by the OIPC creates a burden that is nearly impossible for our industry members to meet. We feel that several parts of the section 39 test are unreasonable. An example there under item one, supplied in confidence: The OIPC takes the position that due to section 8(2) of the *Public Procurement Regulations*, third parties are required to specifically identify the contents of their bids that are exempt from disclosure under section 39.

While this seems like a small item, this does create a huge practical issue for our industry. If a bidder alters their bid in any way, including by (a) making a note on the unit price form that each unit price is subject to section 39 of the act, or (b) by adding an additional piece of paper outlining such exemptions, the bidder faces the risk of the public body deeming that its bid contains a qualification and is therefore non-compliant and disqualified. The Public Tender Act states that there are no additions, no deletions and no exceptions when contractors bid on these tenders

CHAIR ORSBORN: Have you had the experience or any of your members had the experience of a bid being disqualified because of a reference to the *Public Procurement Regulations*?

MR. ORGAN: To the best of my knowledge, I've been told by contractors that when that topic has come up they have been told that any

qualification that you put in with your tender could disqualify you because qualifications are not allowed under the tendering process. I can't give you a concrete example of that, other than that is certainly the assumption that contractors would be under.

CHAIR ORSBORN: So, in this sense, a qualification would be putting it onto the bid document rather than including a typed sentence that the *Public Procurement Regulations* apply and such-and-such-and-such-and-such should be confidential.

MR. ORGAN: Right now, underneath the OIPC, they have stated that unit prices will be given out. So if a contractor were to come forward and put within his bid that the unit prices are confidential and are not to be given out, then – and I may be corrected – the general understanding is that could open them up for bid disqualification.

CHAIR ORSBORN: Okay.

MR. ORGAN: The public bidding process is extremely tight. The price goes in and the lowest bidder, in our industry, if it's for a kilometre of pavement on the Trans-Canada Highway, the lowest bidder is awarded that contract. Unless –

CHAIR ORSBORN: Are your concerns related to disclosure of the bids, as opposed to final contracts? For example, an unsuccessful bid.

MR. ORGAN: Our concern is with – and you've read through my submission, which was more general in outlining our concerns. When we felt we had the opportunity to come and give an oral presentation, we thought we should delve into some of the more specific items that would relate to those general items.

Again, I'll go through it, but our concern is that we feel, for many reasons as I'll outline going through, that the publication of the unit pricing and subcontractor invoicing – really, the only people who would be looking for that information would be other contractors looking for competitive information. At the end of the day, there's truly no reason that any of our members in our multiple, multiple discussions could come up with any reason why a member of the general public would ever want to delve into the detail of how a mile of pavement is produced, constructed or designed.

The price of the crushed stone, the price of the guardrails, the price of the labour and a hundred other items that would go into that mile of pavement, we can only envision that other contractors looking for competitively sensitive information would request that information and not anybody in the general public. Giving out that information really has no reflection on an open and transparent government. Giving out the bid pricing – absolutely – but that detail is not required.

One of the reasons we know that is we've had many contractors come forward and tell us that, listen, I know that others are looking for my information so I'm now looking for their information. So we would suggest – and we don't know, because you're not allowed to know who's requesting this information – that intuitively the vast majority of requests for this type of information, chewing up a lot of time and costing the general public a lot of money because there are a lot of salaries being paid through all of these ATIPPA folks within the departments within government are spending a lot of their time doing things that are unnecessary, unrealistic and were never the intent of the act.

CHAIR ORSBORN: I'm going to sound a bit like the Commissioner now, but can you –

MR. ORGAN: No problem.

CHAIR ORSBORN: – give me some example or examples of the practical effects on your industry of disclosure of this nature?

MR. ORGAN: Some of the practical effects are that many of our paving contractors would spend a lot of time, a lot of money, have engineers on staff, use different sorts of programs and whatnot. The development of unit pricing for a paving contractor is not sitting down and within half an hour just throwing together some pricing. It's a complicated scientific initiative that over years of experience, hiring engineers with years of experience, they would develop unit pricing that would allow them to be competitive and do work. A lot of those numbers would be dependent upon the particular bid, upon the area

where the work is being requested, whether or not pits are available. There are a whole pile of things that go into the development of a bid, multi-million dollar bid for a paving contractor or a water and sewer contractor.

So any other contractor just getting into the business or a competitive contractor who's not been able to do their homework, not been able to pull this information together, the could request the unit pricing from a contractor who bid the work and was successful a year ago, two years ago, whatever it might be. And rather than put the effort into developing the unit pricing that would go towards what they would hope to be a successful bid, they could just download somebody else's unit pricing and take their chances on that bid.

CHAIR ORSBORN: Have you seen that happen?

MR. ORGAN: That's where it becomes extremely difficult, and that's the subjectivity that creeps in to having to prove harm. I sort of did –

CHAIR ORSBORN: That's the point of my question.

MR. ORGAN: – a little bit of a Catch-22 paragraph –

CHAIR ORSBORN: Yeah.

MR. ORGAN: – in my submission talking about you have to subjectively prove an objective harm that may take place sometime in the future. Again, that's extremely difficult to do or we would consider it extremely difficult to do.

A lot of what we focus on, or a lot of what we bring forward here today, is intuitive. Why would anybody in the general public – and I've not been able to get an answer yet – want to have that unit pricing? Intuitively, they wouldn't. Other contractors would want that general pricing.

Intuitively, if another contractor is taking the time and effort – and we know they are – to get unit pricing, that in itself would lead you to believe that it has some relevance, that there is some competitively sensitive information they're looking for. It's that competitively sensitive information that really the act is supposed to protect.

CHAIR ORSBORN: What would your suggestion be, Sir? That there be some legislative – speaking specifically of unit pricing – amendments to cover that or a different approach to the assessment of harm or what?

MR. ORGAN: We feel that the information on competitive bids, the total numbers should be given out, but the unit pricing and subcontractor invoicing should not be given out. There's no reason for it to be given out.

I would struggle to try to find any reason or rationale why somebody from the general public would want to have that information. Again, I can't tell you that contractor A benefited to the order of $500,000 of profit because he utilized the unit pricing from contractor B underneath this legislation, but I think if you look at all of the aspects of it intuitively, it truly is people seeking competitive information that should be protected and is not being protected by the act.

It goes against the intent of the act. Under my own understanding of the act, it was put in place to provide open and transparency in government dealings to the general public most importantly, and so it should. But just how much information should be given out under the guidelines of that?

CHAIR ORSBORN: I assume the bids themselves require unit prices.

MR. ORGAN: Within the government, the bidding process requires unit prices, yes. Without going off track, there's another component of these bids which talks about a balanced bid versus an unbalanced bid. Contractors are not able to go in and bid, put in a dollar for a metre of blasted stone, if that's required. They have to put in factual, realistic numbers associated with the unit pricing. They're not allowed to unbalance their bid; they're not allowed to hide the cost of one item by loading it on the cost of another item.

CHAIR ORSBORN: If, as you say, the public interest is only in the total amount of the contract, why are unit prices asked for in bids?

MR. ORGAN: The main reason that the unit prices are asked for is what I just said: so that the contractors come in with a balanced bid and they don't use an unbalanced bid. Many contracts, such as water and sewer contracts, paving contracts, bridge contracts, there will be unknowns. The owners would want to see: Okay, if we've just come across 50 square metres of rock –

CHAIR ORSBORN: For extra –

MR. ORGAN: – what is the additional cost of that? Rather than the contractor being able to come back and say, okay, that's $10 million now to remove that rock, that's covered under the unit pricing for the removal of rock, be it blasting or crushing or whatever they may need to do. That's just one small example.

CHAIR ORSBORN: Yes.

MR. ORGAN: But the unit pricing is an important component for the owner to have those units.

CHAIR ORSBORN: Okay.

MR. ORGAN: I'll carry on with the – again, this is a little detailed but we felt it was the only way to really bring it through. The OIPC has stated that it is not enough to show that a competitor may take the pricing information it learns from disclosure and apply to it to the next bid again to gain an advantage. That in itself just levels the playing field and does not show detailed and convincing evidence of harm.

I've just covered a little bit of this, but if that argument does not succeed, it is practically near impossible for a third party to prove disclosure of unit prices causing it harm, even though, in fact, our members are confident that it does. We know that contractors request this information for that competitive information, for that proprietary information. It's very difficult for a third party to provide any real-time evidence regarding losses it expects to incur in the future, which it won't actually incur until a similar project is bid.

Without knowing the identity of the requester, a third party is denied the opportunity to put forth an argument showing that the requester later won a bid at the expense of the party whose information was disclosed. Without knowing the company obtaining the information, a third party can't begin to try to put together a pattern showing the loss of future bids to that company.

The OIPC's rationale on this point is often that heightened competition ensures that public bodies are making the best use of public resources; i.e. if bid information is disclosed it may ultimately lead to lower bids and savings for public bodies. We feel that in itself acknowledges the loss incurred by the bidder whose information caused lower bids in the future. It also isn't necessarily true that the lowest bid is providing the best value to the province.

It is the opinion of the association that publicizing individual unit prices and subcontractor invoicing would reveal proprietary trade secrets that have taken years of experience, education and software knowledge to obtain. Unit pricing in this industry is not the same as a pen or a sheet of paper; contractors make large financial investments in software, specific equipment, experienced personnel and accounting advice in the development of proprietary unit pricing. This significant investment leads to the establishment of business models which are effective, efficient and which in turn results in lower prices for the contractor and clients, including government and hence taxpayers.

Our members' pricing formulas, their expected costs and anticipated profits to complete a project and the methods for compiling the same are essential to the function of the business and are not something they would ever willingly share with a competitor. We did look at more recent, other jurisdictions across the country. I do have some examples where in other jurisdictions and other legal proceedings that the court agreed that this information was proprietary, competitively sensitive and should not be given out. Is it appropriate for me to leave you with my speaking notes, which highlights those particular cases?

CHAIR ORSBORN: Yes.

MR. ORGAN: I'll leave those there.

One is an order PO-3764, 2017, Ontario and I'll just highlight: "A number of decisions have considered the application of" their section 17 "to unit pricing information, and have concluded that disclosure of such information could reasonably be expected to prejudice the competitive position of an affected party."

CHAIR ORSBORN: Perhaps you can just put it on the record the names of whatever decisions you're going to give me – the names and references. Is it just the one there or are there others?

MR. ORGAN: There are others as well and they're included here.

CHAIR ORSBORN: Perhaps you could just read out, for the record, so I have (inaudible) the names.

MR. ORGAN: Yeah. This one was order PO-3764, Appeal PA16-136, 2017, Ontario.

The next one I have here is Carmont et al. versus Province of New Brunswick et al., 2018 CarswellNB 120 (New Brunswick). In this instance, the court accepted that the information described – in the evidence I'll mention below – was exempt or should be exempt from disclosure as confidential information that posed a competitive disadvantage to the third party. This one had to do with per diem rates and the components of the per diem rates, such as salaries, benefits, food supplies and operating costs, which would be no different than unit pricing.

The court's ruling there: "Having access to the successful per diem amount in previous RFPs or service agreements would provide a competitive advantage, reveal trade secrets as competitors could ascertain Shannex's pricing formula and harm Shannex's ability to successfully be awarded future … bids."

The next one I have there is Medavie v. PNB (Department of Health) 2018 NBQB 121 (New Brunswick). In this instance, for this example, the court accepted that the information described in the evidence provided by Medavie was exempt from disclosure as confidential information that posed a competitive disadvantage to the third party. It had to do with – I'm just trying to get to the summary: "A competitor, having access to" Medavie's "Key Financial Information could reverse engineer" their "components to determine its pricing formula." Which is the same example I had given with regard to unit pricing for contractors coming into the business. The court ruled that "As a result these components are … connected with the Key Financial Information and together form the building blocks of the financial matrix which then becomes the Baseline Budget" and competitors should not have access to this proprietary information.

Moving on to notification threshold. Currently, public bodies fail to provide notice to industry members when their bid information is subject to an access to information request. The OIPC's interpretation of ATIPPA creates a high threshold for notification: "A Section 19 notification ONLY comes into play when there is an intention to release and the Public Body is uncertain regarding the application of section 39 …." If the bid fails to mark specific information with the section 39 expectation, the notification does not come into play.

That goes back to the earlier discussion we had with regard to a contractor's inability or supposed inability to indicate that the unit pricing is proprietary and should not be released under section 39. That is a question that remains open, but it is a stipulation of bids that they not be altered in any way or that there not be any qualifications submitted with the bid.

CHAIR ORSBORN: Does that mean your experience in practice, and experience of your members, that they don't get the opportunity to talk to the public bodies while they're in the decision-making process, so to speak?

MR. ORGAN: We have had multiple discussions with folks within municipal affairs, from the minister on down, and folks within the Department of Transportation, from the minister on down, related to the disclosure of what we feel to be proprietary information. Really, the response has been: Listen, we understand. We have our own issues with ATIPPA and section 39, but right now it seems that the act is being interpreted in such a way that the unit pricing

will be provided, and we really have no control over that.

CHAIR ORSBORN: Yeah. That's a little different issue. I'm thinking about the notice aspect and you having an opportunity to talk to the public body while they're in the process of making their decision whether it should be released or not. I know section 19 says that when they intend to release, then you get notice, but is it your experience that that is the way that has been working in practice, or in practice are you being able to talk to them ahead of that?

MR. ORGAN: I would suggest that when the act first came into play, 2015, so 2015 to '16, we had multiple discussions with the Office of the Privacy Commissioner and the Commissioner himself at the time. We indicated our thoughts on our information being proprietary.

For the first year, year and a half, somewhere in that range, the third party was being given notification that his unit pricing was being – or her unit pricing – the company's unit pricing was being requested under the freedom of information act, and they did have an opportunity to go back and suggest why the information should not be given out. At the end of the day the Privacy Commissioner and the Office of the Privacy Commissioner ruled that: No, we do not accept your argument. Without the three subsections of section 39 being proven objectively, then you're not able to prove harm, and if you're not able to prove harm, then the information will be given out.

It reached a point where after multiple opportunities for third parties to say why they felt the information was proprietary and should not be given out, it was interpreted in a different fashion. It reached the point where they just stopped giving that information. They reached the point where: No, we're just going to give out the unit pricing.

We do have examples where not just the unit pricing, but a subcontractor – so I'm just going to give an example of a small item – providing a quote on a guardrail for the highway job to the pavement contractor. That is very sensitive for that subcontractor because he might quote a price, for whatever reason, to one contractor and not another. That might be that he has, at that particular time, additional inventory in his yard. It might be that contractor gives him $10 million worth of business a year.

But his concern there is that if the next contractor comes along, if he's looking for $1 a foot, and I quote him $1.25, through the ATIPP process he has access to my sensitive information and he's going to come back to me and say: My God, you quoted John $1 a foot; you're giving me $1.25. He has now to explain that and there's a good chance he's going to lose that business because that contractor has access to specific competitive information. It puts the subcontractor in a real tough situation. We have examples of subcontractor invoicing being giving out to the penny.

That's going to move me into another area here, which was already brought up – you touched on it earlier today.

Our association has doubts of whether the ATIPP coordinators at the relevant public bodies, through no fault of their own, have the required industry experience to understand what constitutes a trade secret or confidential commercial information, yet these are the individuals who determine whether a contractor would be notified of the potential disclosure. That comes into play as well.

We deal a lot with municipal affairs and Transportation. That's where most of our bids come from, bids that are related to public funding. I think each of those departments has one or two folks that are full-time, responding to ATIPP requests. From what we've seen, they're great people; they're good people, but they wouldn't have the industry knowledge to be able to sort through what should or shouldn't be given out under that ATIPP request.

We have seen a trend more and more recently that – and you mentioned it earlier as well – instead of giving the specific information that's being requested, it's a lot easier to just give the full tender, give whatever information you have. It's a lot quicker, a lot simpler and it doesn't put you in a position of having to determine what should or should not be given out.

We have seen a trend in that direction, which is a concern, but we still go back to feeling that

unit pricing and subcontractor invoicing is proprietary, confidential information, and really does not affect open and transparent government. The open and transparent piece is the tender price for the product or service being provided underneath that tender.

CHAIR ORSBORN: Just to come back to the example that you used, and sort of anticipating the argument on the other side, subcontractor bills the guardrail at $1.25 a foot or whatever it is and you mentioned somebody else could do it for $1. If they find out they're doing it for $1.25, is it not in the public interest that it be done for $1?

MR. ORGAN: Well, I'm going to suggest what's going to happen here is that a subcontractor providing the material piece is just one small component to the paving contractor. The next paving contractor, if he knows that someone else received that guardrail for $1, he's going to go to that subcontractor supplier and say I want this for $1.

CHAIR ORSBORN: Keep his total price the same.

MR. ORGAN: Keep his total price the same. He's going to say I want this for $1, but because of the quantities he buys or for other reasons, the fact that that subcontractor is going to come back and say, no, I'm sorry, I can't give it to you for $1. That's going to push that paving contractor to go somewhere else. Whether it's legitimate or not or whether he can get a better price somewhere else or not, in his mind, he's not getting the same price as somebody else had received. This subcontractor is going to be in a position of losing business thorough no fault of his own, only because what he would consider to be his competitive unit pricing invoicing information was given out to the general public.

Again, based on what you've just said there, that just reinforces the competitive importance of that information. If it's going to be a matter of other contractors using that information to squeeze a price out of a subcontractor, that just reinforces the competitive importance and the proprietary importance of that information. That's not the general public looking to see what government is spending their money on or what government paid for that mile or kilometre of pavement or that thousand yards of pipe in the ground.

CHAIR ORSBORN: You mentioned a moment ago, tenders versus perhaps only a portion of what's in a tender is being asked for. Is it your experience that sometimes people only ask for a portion of the information and end up getting the whole tender because the coordinator can't be bothered extracting it or – I would have thought that –

MR. ORGAN: Or the coordinator is not quite sure of what to give.

We have a specific example just a little while ago, a bridge that was being built down in Renews and it was an ATIPP request for some specific information, which we thought would have been proprietary. Everything, every file on the construction of that bridge was given out and that file included the on-site engineer, his daily logs, his name, his address, the address of other people, everything, conversations that took place, supplier invoicing to the contractor who was doing the work. Just a raft of information, much of which, or the vast majority of which, was not requested. It's just a broad sweep: Here it is. Here's everything associated with that file.

Again, I think it goes back to what I just mentioned, that a lot of these folks really are not – okay, you're going to be the ATIPP coordinator and you'll react to a request coming in, give information based on the freedom of information act. Just how prepared are they to do that and how much background knowledge do they have associated with the industry and with the information that they're giving out whether it should or shouldn't be given out?

CHAIR ORSBORN: I assume that would be a situation where once the coordinator says I intend to disclose this, there would be notice then to the third party?

MR. ORGAN: No, in this case there was not. This was only picked up because one of the subcontractors was looking at information that had been ATIPPed and going through it to see what might be there, and stumbled upon his own invoice being there and just was highly concerned.

CHAIR ORSBORN: It was the information of the contractor that was disclosed and no notice to the contractor. Is that your understanding?

MR. ORGAN: I'm not sure if there was notice to the contractor, but there was no notice to this subcontractor pertaining to his proprietary information within that bid.

CHAIR ORSBORN: I see.

MR. ORGAN: The association certainly understands the necessity for transparency and openness in how government funds are spent and government resources are procured, but we do feel that in accordance with section 3 of the act, that purpose should be balanced with the exceptions to the right of access, including protecting "from harm the confidential proprietary and other rights of third parties …." We feel the current use of the act is not properly balancing these rights.

Practically, the vast majority – and I say practically and we can't understand why; I know I'm repeating myself. Someone in the general public would want some of this information. We would suggest that, practically, the vast majority of requests for bid information are coming from industry members who are seeking an advantage against their competitors. These requesters are not motivated by the proper purpose of the act, and granting them access to the information is doing nothing to further those purposes. Those purposes being the act should be providing public overall transparency, which we don't feel that does.

The average citizen or even the media, in our opinion, have no reason to be interested in unit prices and bid breakdowns. Industry members are the only people motivated to gain access from this information. We would argue that the current interpretation of the act in the long run will inhibit the continuous improvement of the industry. Industry members have less motivation to improve and make efficient their processes and resources when they can simply look at what their lowest competitor is doing and be assured a reasonable chance of success.

One last item there had to do with timelines and complaints. We do feel that even in situations where a party is notified, the 15 days to file a complaint with the OIPC or an appeal with the Trial Division often is not enough time, given the requirements of the complaint.

Again, just to summarize, we feel all contractor total prices need to be released to ensure openness and transparency. Our industries and other members truly cannot envision a circumstance within the general public realm where the unit pricing would be of particular interest to anyone.

Who would be requesting industry-specific unit price information? If it is being requested by other industry companies, then this just reinforces the concept that this information has value and should be protected. Again, intuitively, disclosure would be harmful to businesses, business interests of a third party and should fall under the section within the act, which are there to protect proprietary information.

Thank you, Sir.

CHAIR ORSBORN: Thank you, Mr. Organ, very much. I appreciate the presentation.

We'll adjourn the sessions now until 2 o'clock. You can give your material there to Mr. McGee; he'll let us have it.

MR. ORGAN: Thank you very much for the opportunity once again. I hope you folks have a great day.

CHAIR ORSBORN: Did you say those are your speaking notes there?

MR. ORGAN: Yeah, but that's okay that you have those.

CHAIR ORSBORN: Do you have any issue with those going on to our website as part of your presentation?

MR. ORGAN: No.

CHAIR ORSBORN: It's all being recorded anyway.

MR. ORGAN: No, they're speaking notes so just the points that we're trying to make. That's fine.

CHAIR ORSBORN: Thank you very much, Sir.

MR. ORGAN: Thank you.

Recess

CHAIR ORSBORN: And you didn't hear any of that, did you, Mr. Lane?

MR. LANE: I was getting worried for a moment.

CHAIR ORSBORN: Yeah.

Anyway, welcome to this session, after I have turned my microphone on and I've indicated that I've read the submissions put to the committee and really need only a summary of the main points. That will leave enough time for any questions I may have.

I do note, Mr. Lane, that the association is presently scheduled, at least, to participate in the round table on section 39, so if you wish to defer your comments on that section until then, that's fine. If you decide that you would rather make them today and not come to the round table, that's fine too, that's your call.

The first presentation will be from the Newfoundland and Labrador Aquaculture Industry Association represented by Mark Lane, who is on video. He is the executive director of the association.

Over to you, Mr. Lane, thank you.

MR. LANE: Thank you, Mr. Chair, for that kind introduction, and thank you for the opportunity to make the following oral presentation to you and your Statutory Review Committee.

As you know, NAIA is a – or for those who may not know – NAIA is a membership-based association that represents the interests of more than 135 seafood farmers and their suppliers throughout the Province of Newfoundland and Labrador. As an industry association, like many others, we passionately advocate on behalf of our members to facilitate and to promote the responsible development of the aquaculture industry in this province.

Just to put things in context of why this is important is that as the global population continues to grow and the demand for nutritious and safe seafood surpasses that of the capacity of what the ocean, in terms of wild fishery, can present, we need to fill the gap; therefore, aquaculture is the fastest growing food production sector on planet earth. Currently, as we sit here today, the majority of seafood that is consumed by humans worldwide is now farmed.

Just to put it in context, in 2018, the Government of Newfoundland and Labrador engaged the global consulting firm McKinsey & Company to make recommendations on economic growth. They identified in their report that by 2030, this province has the capability to produce more than five times our current volume, exceeding that of 100,000 metric tons; that we would grow the industry to contribute upwards of $1 billion in GDP; create 7,000 additional jobs, most of which would be located in rural coastal communities. It's also noteworthy, Mr. Chair, that 62 per cent of Newfoundlanders and Labradorians support the seafood farming industry; inversely, only a mere 10 per cent oppose. That support is growing.

Why are we here today, of course? Well, the participants in the industry that I have the privilege to represent here today routinely and often share information with public bodies, such as the provincial government, as a matter of licensing and statutory compliance. Seafood farmers are also subject to regulatory auditing and inspection by both government and independent third party certification bodies. It's generally accepted by NAIA's members that such reporting and collection of information is paramount to the regulatory responsibility and oversight by the province, and industry, and it's important to transparency.

The *Aquaculture Act* – the provincial *Aquaculture Act*, because there isn't one that exists federally, in federal legislation, the provincial act directs licensees – so farmers – to share information with government. We accept that. It's a part of the licensing process. It's a part of the regulatory framework, but I'll give you a few examples, Mr. Chair, if I may.

In the submission we referred to subsection 4(6)(d) of the *Aquaculture Act*, and this relates

to licensing, it provides the Minister of Fisheries, Forestry and Agriculture that he or she may require at their discretion "records to be kept and information and documents to be provided that the minister considers advisable …"

In the same act, the *Aquaculture Act*, subsection 6(4), which relates to inspection, it provides that: "A person responsible for aquaculture gear, an aquaculture facility" – or some other prescribed place related to aquaculture – "shall provide," and I'm quoting, "the information, documents and samples and carry out the tests and examinations that an aquaculture inspector" reasonably requires. That would be one specific instance of where we are required, as seafood farmers, to present information that is relevant to our operations to the provincial government.

As well, on top of those two requirements as outlined in the *Aquaculture Act*, there is also the 2019 *Aquaculture Policy and Procedures Manual* that was issued under that same *Aquaculture Act* and, like the act, it does include requirements that involve the reporting and collection of business information of licensees and farmers.

So a couple of examples – I won't spend too much time on this Mr. Chair – but aquaculture policy 2 is the Application Requirements and that requires farmers to provide financial information, fish health management plans, integrated pest management plans, biosecurity plans, production plans and other such relevant business information to government. There's also the Annual Reporting policy that's required, which is AP 7; aquaculture policy 11, which is the Inspection Program; and, of course, aquaculture policy 17 on Public Reporting.

That specific policy requires reporting to be made to the government and, in some instances, to the public on circumstances of escape, quarantine, depopulation and other incident events that may occur, or potentially occur, on a licensed site.

As a result of these requirements, through the act and through the supplementary aquaculture policies and procedures, the Government of Newfoundland and Labrador has in its possession, in its custody and under its control, an ever-growing collection of business information, and commercially sensitive information, in some cases, relating to aquaculture licensees and their competitive commercial activity. And let it be known – go ahead, Mr. Chair.

CHAIR ORSBORN: If I may interrupt you for a moment.

The information that you set out there from the policy, I presume that's set out under the authority of 4(6) of the act, is it? Information considered advisable and that finds its way into the detail of the policy. Is that right?

MR. LANE: Correct, Sir. That's exactly it.

CHAIR ORSBORN: So what you're being asked to provide under the policy then is being, essentially, required by the legislation?

MR. LANE: Being required by legislation and I guess – well, I'll get into the problem areas in a moment. There is no protection of competitive or commercially sensitive materials.

If you look at the industry in Newfoundland and Labrador, there are two main species that are produced, which are Atlantic salmon and blue mussels. When the act was originally developed there were many operators, but through consolidation, we now have three companies producing Atlantic salmon and four or five companies producing shellfish. So the competitive nature, the information that's being released, can be detrimental to competitiveness between companies within our own industry. That's where things can become problematic.

As I said, with the province having so much information, through the act, through that which is required or desired or prescribed through policies and procedures and the act, from our perspective, that information is being released that's critical to our operations and can be detrimental to competitiveness between companies.

CHAIR ORSBORN: You say information being released. Are you talking about released to the government under the legislation or released publicly?

MR. LANE: Publicly, Sir.

CHAIR ORSBORN: Can you give me just an example, please?

MR. LANE: For example, in recent months we've had to report stocking densities, the number of cages on sites. It was related to Atlantic salmon farming. Stocking densities, the number of fish on site, that's competitive because not all farmers farm the same way, and that could lead to some type of disadvantage for a company that's trying something new or just the way they've done things in the past. That would be one most recent example, Mr. Chair.

CHAIR ORSBORN: Okay. Thank you.

MR. LANE: I guess the issue with the act, as it is, the ATIPPA, 2015, is that it applies to all records in the custody and under the control of the government; therefore, the government, as we noted, pursuant to aquaculture licence conditions and the requirements of the act and the policies, ATIPPA, 2015 applies to all our information. Within the ATIPP Act, there's a presumption of a public right of access to information subject only to specific exceptions that are set out in the act. One of those areas is subsection 39, which you had mentioned in the prelude, but if I may, Mr. Chair, just to touch on it for a moment, without going into too much detail.

CHAIR ORSBORN: Sure.

MR. LANE: When public bodies as the government are preparing these responses to requests for information made under the ATIPP Act, the primary statutory exemption or exception that we're looking for or looking to for protection of proprietary information, which is subsection 39 – it relates to the disclosure that could be harmful to businesses interests of third parties – because of the three-part test of that – which is "… that would reveal trade secrets of a third party, or … commercial, financial, labour relations," et cetera that would be "supplied, implicitly or explicitly, in confidence," and the third part of the test: "… the disclosure of which could reasonably be expected to … harm significantly the competitive position" – we find, specific to our industry, that it's challenging to substantiate as a result.

We often find, ourselves, we don't meet all three parts of that test of that legislation under the ATIPP Act, subsection 39. The difficulty lies, I guess, in the second part of the test, which I mentioned requires information be supplied, implicitly or explicitly and in confidence. While some third party business information may be supplied in confidence, others in our industry, such as contracts, they're deemed to be negotiated and not supplied; therefore, because of that, we fail that second requirement of the test.

In the third portion of that test, we find that it's equally problematic in that it's routinely accorded an unduly high threshold and we find it challenging to substantiate. So more often than not, information that we would, internally in industry and many others, consider to be proprietary and confidential is, in actual fact, released through ATIPP requests.

I guess our number-one recommendation, Mr. Chair, would be that we recommend a review of section 39 of the ATIPP Act, 2015 in its current language and to determine whether amending it would coincide with the provision's underlying policy justification. That would be our number-one recommendation.

CHAIR ORSBORN: You mentioned contracts. Are contracts among the information that you are required to supply under the legislation?

MR. LANE: In some instances, it is my understanding yes, Sir. I can clarify that for certain, but my understanding is that contracts with government and contracts with some suppliers have to be provided to government as part of their operations plan or their business management plan. Basically, for us to get a licence in aquaculture, we have to provide every aspect of our business to the government, to the regulatory body, which is understandable in most cases, but to have that in turn subject to the ATIPPA, 2015 under a request for releasing of information by a member of the public is what we feel would be unfair.

CHAIR ORSBORN: Thank you.

MR. LANE: The second area that we find problematic would be actually part of the *Aquaculture Act* itself, and I'll explain

momentarily how that would be related then to the ATIPP Act of 2015. Respecting information that's shared with the government that is deposited with the registrar of aquaculture, the Legislature in the past has signalled by subsection 9(4) of the *Aquaculture Act* that the industry should have an expectation of confidentiality in relation to certain types of information that it produces.

I won't read the entire section, Mr. Chair. I'm sure you're more than familiar with it, but in terms of that section 9, the registrar, is that they "shall keep copies and records of aquaculture licenses, leases … environmental preview reports and environmental impact statements," et cetera. But the issue is that in subsection (4) it says "Notwithstanding subsection (3), information prescribed as confidential shall not be available to the public." As we know, though, the ATIPP Act supersedes all other acts, unless then dictated or listed in, I think – oh, not appendix …

CHAIR ORSBORN: Schedule A.

MR. LANE: Yes, number four.

What happens then is that the confidential information that we provide, the registrar shall regard that as confidential and refuse access to the members of the public to information, which describes unique trade practices or technology used by a licensee or describes information concerning the financial backing. However, in the ATIPP Act, in section 7, there is an expressed provision respecting conflicts between ATIPPA, 2015 and other statutes. Through that, then, as I mentioned, the ATIPP Act supersedes all other legislation and regulations that fall within that realm.

The issues that we find in Schedule A, unlike most other – not most, unlike many other industries, we're not listed. Therefore, the provisions provided to us under the ATIPP Act, 7(2), 7(1), whereby we could be potentially protected from the provision of proprietary information to the public, we are not eligible. We cannot qualify for that because of the 7(2) of the ATIPP Act. So our second request is that we should be listed in Schedule A also and afforded the same priority of the provisions of the ATIPP Act as, for example, oil and gas or some other sector.

CHAIR ORSBORN: A couple of questions about that. What is currently protected by regulation under that section seems to be relatively narrow, somewhat narrower than what you would be required to produce under the policy, where the act talks about trade practices or technology and any information about financial backing, obligations or performance. That's pretty broad. It's a narrower scope of information than is otherwise covered under the legislation. That's one question.

The second question – and I don't know if you had a chance to look at the 2014 review conducted by Chief Justice Wells, but he was somewhat concerned where legislation provided that confidential information could be as specified by regulation as opposed to statute, which is the House of Assembly as opposed to Executive Council. Do you have any views on that?

MR. LANE: Well, I guess that's where the problem lies therein, Mr. Chair, is that because we are such a highly regulated sector, we have to provide enormous amounts of information, which is understandable. However, what we found is that through the ATIPP requests and our inability to meet the three-part tests, as well as the exclusion from Schedule A from the act, that basically all the companies of which I have the privilege to represent, their books, their proposals, their business plans are open to the general public, unlike most other sectors.

So it would be completely unfair – I would agree I think, if I hear correctly what Chief Justice Wells referred to, is that it's not just necessarily subject to that which is created through statute, but it's also that which is created through regulation which is where, I guess, we find ourselves in a bit of a conundrum and predicament that our business operations, beyond the scope of what would be in the interest for the public good, is being requested by those who either don't support or, I would call, as anti-activists and they try to take our own business information and release it unfairly in a competitive nature.

Here we have an industry that's been identified as the most sustainable form of farming on planet Earth, that we have an opportunity to grow the industry in the province. Yet because of the amount of information that's being released to the general public, beyond the scope of its original intention of providing the public good and keeping the public informed, which is very few, there's a hesitancy. It diminishes investor confidence. It's an unfair practice from our perspective that other sectors could either, (a), not have to provide the same amount of information, or at least have some level of protection under Schedule A of the ATIPP Act.

CHAIR ORSBORN: Without necessarily naming names, are you able to give me an example of how disclosure has hurt one or more of your members?

MR. LANE: Specifically, I need to be careful because I don't want to breach what I'm preaching. For example, there are well-known groups that are anti-aquaculture activists who want us to not grow seafood for a growing population. Those individuals request basically, on a consistent basis, all information related to our standing operating procedures, which could be competitive in nature, for example, between companies' internal communications. There have been requests for financial information related to specific companies. So, at the end of the day, that proprietary information ends up in the mainstream media, which has been disclosed by the person who had requested the information and it's typically the same one or two individuals or organizations.

We find ourselves unfairly being targeted through this. Proprietary information, confidential information that has no relevance to the public good: knowing the finances of a company. Things related to the environment, related to our practices where people would have an interest – sure, that's fine. But having our business plans subject to ATIPP requests, not so much. It's an unfair – and I don't think, to my knowledge, Mr. Chair, that it's a practice anywhere else in any other jurisdiction in Canada, that I can tell, from where we actually farm. So places like Norway, Scotland or Iceland.

CHAIR ORSBORN: Let me put myself in the shoes of the Commissioner for a moment. I appreciate what you're saying about an industry, or one or more of your members being unfairly targeted by interest groups and information ended up in the media.

What has that meant for your members on the ground in their operation from day to day?

MR. LANE: Well, it sways the opinion of key decision-makers. We're in the middle of an election now and the people of the province will select the next government, and because information is taken out of context or proprietary information is twisted, turned and then reported upon due to interest groups or activists, it influences key decision-makers. I've seen it.

I've been in this role for five or six years and we've seen ebbs and flows of support and openness from key decision-makers, depending on sometimes the flavour of the day of *Open Line*. That's unfair. My members invest hundreds of millions – not millions, hundreds of millions – of dollars in this province and I think that we can get more investment in this province. The issue is that companies who come into this province to operate are subject to, without any protection of their business plan or their proprietary or confidential information.

I think it's safe to say we are already the most transparent form of protein farming – or any sort of farming, certainly – in Newfoundland and probably globally. We are also, I would think, probably one of the most transparent sectors in the province of any industry. But I think to go above and beyond and not have any protection about any information that we are required by law, as a matter of licensing procedure, is unfair and it's unfounded.

To go back to your original question, Mr. Chair: How does it affect our farmers? We employ upwards of a thousand people directly on farms, and each one of those jobs creates three to four spinoffs, year-round jobs in towns like Harbour Breton, St. Alban's, Hermitage and Triton. When we see the level of activism against the industry by a very small portion of the population – as I mentioned, only 10 per cent of the population does not support our industry – we find ourselves in a defensive, trying to

explain proprietary information that we shouldn't have because other industries are afforded privileges that we are not. That's unfair to my members.

CHAIR ORSBORN: Forgive me for being devil's advocate for a moment, but you talk about the information being made available and then activists, as you refer to them, using that information to sway the opinion of key decision-makers. Would that activity come within participation in democratic governance, which is one of the objectives of the act?

MR. LANE: In some ways, yes. The issue is that information that should remain private, of a competitive nature in a very small industry but very large output, with only three major players, as I said, in salmon and four in shellfish, to have our proprietary information not presented as found – so a request would go in; then it would be relayed to the public as something different than what was requested so it seems malicious in intent – from our perspective is unfair.

We should be afforded the same privileges as oil and gas or mining, or some other sector that is listed under Schedule A. We should be there also. Those who come to the province to invest in our province and invest in our people should have some level of protection about their investment. Those things, as outlined, that are for the public good – sure, that's part of doing business, but the nitty-gritty aspects of our business plans and our finances to be subject to public scrutiny when they are competitive in nature, it's unfair, it's a deterrent to future investment and we see room for change.

The second recommendation, as I said, is for us to be included as other industry in Schedule A so that we're afforded some type of protection. Right now, we have none because we're not listed in the ATIPP Act and it supersedes all that of which is in the *Aquaculture Act* and its associated regs.

CHAIR ORSBORN: All right, thank you, Sir.

I believe I've exhausted my questions. I don't know if you had any other comments you wanted to make?

MR. LANE: I'll end on this, Sir: We really appreciate the opportunity and we will certainly participate in the round table. On behalf of the 135 members I represent, thank you so much.

I'll end on this: While the responsible regulatory oversight of the industry dictates government – and we embrace that – in collecting commercially sensitive information on a routine basis, such information should be afford confidentiality protections that are balanced with that necessity.

I'll end there, I think, Mr. Chair.

CHAIR ORSBORN: Yeah, let me ask you this – it's a little bit off topic – in your assessment, does the government collect more information than is reasonably required for its regulatory responsibility?

MR. LANE: I'd have to ask each of my individual members on that. I think that some would say, yes, and some would say, no. I think because different companies are subject to different amounts of information, depending on what type of species they are farming – so whether it be salmon, mussels, oysters or trout or seaweed – I would think that if you had asked a majority of people in my membership they would say –

CHAIR ORSBORN: They'd say, yes.

MR. LANE: – that confidentiality protections aren't balanced with necessity. I think that all safely, Sir, would agree that we need to be treated equally and fair as other industries, and we need to be afforded the same level of protection of proprietary and confidential information that other sectors are.

CHAIR ORSBORN: All right, thank you, Sir, very much.

We'll be talking to you again on Thursday, is it, I think, at the round table.

MR. LANE: I think so, yes.

CHAIR ORSBORN: All right, thank you, Mr. Lane.

MR. LANE: Thank you so much. Have a great day.

CHAIR ORSBORN: Thank you.

The second presentation this afternoon is from the Newfoundland and Labrador Veterinary Medical Association. Present in person we have Dr. Nicole O'Brien and Dr. Julia Bulfon.

Doctors, at your convenience, please.

DR. BULFON: Thank you.

We would like to thank you for the opportunity to present today at these hearings.

Today, the Newfoundland and Labrador Veterinary Medical Association has two main speaking points that we would like to address: point one, that the public has a right to factual information, which has been interpreted by an expert; point two, that a layperson cannot interpret raw veterinary data and release of this data without proper interpretation can lead to misinformation.

The Newfoundland and Labrador Veterinary Medical Association values that the public has a right to access public records. Transparency and accountability are vital to ensure public confidence and awareness of food security, food safety and animal health and welfare in the province.

We feel it is paramount that the public be able to access information related to regulatory programs and those that impact public health and animal health. This information is readily available through a number of governing bodies, which report information that provides needed context for understanding complex issues. Our concern is that access to veterinary medical records without additional context will lead to public misinformation. It is irresponsible to release these records without additional context provided by experts. This does not lead to an increase in public knowledge or public trust, but a propagation of misinformation.

The ATIPPA states that the purpose of the act is to achieve public education. We feel that information without proper context is misleading which contravenes this objective. The Veterinary Medical Act and bylaws state that veterinary medical records are to remain confidential; therefore, veterinarians who are required to release these records face a moral and ethical dilemma. We, therefore, request that our concerns are taken into consideration with respect to access to raw veterinary medical records.

We thank you for your time.

CHAIR ORSBORN: Sorry, just stop from what you said. The veterinary act?

DR. BULFON: Yes, so the Clinic Standards bylaw 2.1(8); "Unless required for the purposes of a clinic inspection, or other legitimate action of the College, a medical record is considered to be a confidential record that is accessible only to the owner of the animal (or representative) and the attending veterinary clinic."

CHAIR ORSBORN: Just so I'm clear – I haven't seen that – is that legislation or is that part of the internal bylaws of the college?

DR. BULFON: I'll let Dr. O'Brien speak to that.

CHAIR ORSBORN: Okay.

DR. O'BRIEN: Yes, that's in the Clinic Standards bylaws.

CHAIR ORSBORN: Okay, as opposed to legislation or …?

DR. O'BRIEN: That's correct.

CHAIR ORSBORN: All right.

DR. O'BRIEN: Within the act, the college has the ability to make those bylaws.

CHAIR ORSBORN: Okay.

A couple of questions. Number one: I think there was a fairly full discussion at the 2014-15 inquiry and that committee did not seek your views. Has anything changed over the last four or five years?

DR. BULFON: Yes, I believe so. As Dr. O'Brien was at those hearings, I'll let her speak to that. Thank you.

DR. O'BRIEN: Yes, I think a lot has changed in regard to confidentiality of veterinary medical records. I think that at the time of the evaluation in 2014-2015, the focus was on – as opposed to the release of the veterinary medical records, our argument here today is in relation to having them released raw without context, having misunderstanding of the records.

CHAIR ORSBORN: All right. I need a little bit of context for my own understanding.

I assume you're talking about veterinarians who are in the employ of the government, not talking about veterinarians in private practice. That's fair. Can you give me an example of the type of information you're talking about that could be released and subject to misinterpretation?

DR. BULFON: I can give two examples of that.

From a small-animal point of view, if I have blood work from a young puppy, which is showing elevated ALP, GGT, low albumin and creatinine, et cetera, if this information was given to an owner with no context, they would likely assume their puppy is very ill; however, if this information was given to another veterinarian, they would have the expertise to know that this is, in fact, normal blood work for a young dog. In fact, it would be irresponsible to give this information to owners without context.

From a large-animal perspective, if we had release of individual somatic cell counts for dairy cows with mastitis, if we took a sample of milk from a cow that was sick with mastitis, the public could read that report and misinterpret that the milk is – and as we've seen – full of pus and that we just pump them full of antibiotics. In reality, when a cow is diagnosed with mastitis, her milk is discarded and a sample of her milk is usually sent for culture and sensitivity. She receives intermammary antibiotics based on the outcome of these cultures and sensitivity.

Every single antibiotic that's given to dairy cows has meat and milk withdrawal times, and every bulk tank pickup on dairy farms has a sample taken and these samples are tested before being uploaded at a plant. If a farm tests positive for residues, they would be responsible to pay for the entire milk tanker of unusable milk. If only that raw data is given to the public, they could misinterpret the fuller picture.

CHAIR ORSBORN: Okay. So I can summarize that, then, your concern is that clinical records of government veterinarians being released without explanation of what those records mean. Is that fair?

DR. BULFON: Precisely, yes.

CHAIR ORSBORN: Okay. Have you experienced much of that?

DR. BULFON: So NaLVMA is aware of a few cases where this has been an issue. Unfortunately, we are not able to speak too much about it.

Dr. O'Brien may or may not be able to.

DR. O'BRIEN: In regard to some examples, I can't give any specific details at this time. We can certainly get that for you.

CHAIR ORSBORN: Yeah. Because one thing that I have to consider, I believe, when I'm asked to consider protecting certain classes of information, is to look at the harm, potentially, that could be caused by that release, and so I need to put some meat on the bones.

DR. O'BRIEN: Certainly, and we can get that for you.

CHAIR ORSBORN: If you will.

Just to follow the point, though. Let's assume one of your blood work reports is released and somebody in the public misinterprets it. In layman's terms, so what. What can happen?

DR. BULFON: In those scenarios we can have, potentially, a break down of trust between the producer and the veterinarian because their understanding would have been that those records are protected. At the same time, when we have misconceptions like, oh, there's a lot pus in the milk, or things like that, that could potentially lead to harm for the producer. We want to make sure that there's context given so

that the public isn't jumping to and making their own conclusions and, in fact, that that raw data, in turn, becomes misinformation because there's not the context behind it.

CHAIR ORSBORN: If for example – and I don't know if you're a government veterinarian or not, but assume for a moment that you were – you were asked for one of these reports and you were concerned about the context. Practically speaking, could you provide that context with the provision of the document?

DR. BULFON: I am actually not a government veterinarian, and I don't want to speak on behalf of them at this point.

Dr. O'Brien may be able to comment on this.

DR. O'BRIEN: I can't really speak specifically to what the government veterinarians would be given as direction in regard to something like that. But, again, releasing the raw data without interpretation leads to mistrust, and not only on the part of the client, but in the public environment as well.

The other concern that you have is the moral ethical dilemma faced by that veterinarian who has gone to school, received an education, takes that trust very seriously, and it's understood by the client that they have that trust and they have many years of that trust, building it together, and then they're put into this moral ethical dilemma where they have to release these records.

So from a veterinary perspective – being somebody who has to release records – it is difficult for us as veterinarians in general, regardless of whether we're small animal or we're government or large animal, whatever the case may be, it's a difficult moral dilemma when it's drilled into us from the very beginning that we have this trust and we have this confidentiality of records.

CHAIR ORSBORN: And the dilemma is not helped, even though it may be required by law, the production of a document?

DR. O'BRIEN: That would be a difficult – it's understood by us as veterinarians that we have that relationship, so if we want to give an example that is not specifically government-related, for instance, if you came in with your puppy and you said my puppy is lame and he's limping and don't know what's wrong; he never fell down, he never hurt himself. A dialogue would be struck between you and I and the history behind your puppy. How did we end up here? What are you feeding? There are a lot of details and all that information is written down about your puppy, and it's the information that are on the fringes that may not seem as apparently important to you as a puppy owner, but may trigger us to think about different things and ask additional questions. We write all of that down because it's part of our decision-making process; it's part of making a decision and going through we have a very set process in which we work through a case.

Then the next day, it might be that a colleague of mine walks into the examination room, we have some diagnostic tests that have been sent off based upon our discussion and our physical exam findings, and the results come in and it happens to me day off. My colleague needs to be able to pick up that piece of paper and figure out where my thought process was, evaluate that history that we had in regards to that case and be able to pick up from there and carry on with the case and go forward with helping you, as an owner, with your puppy. Then coming up with a solution at the end of the day, whether it be some kind of mitigation strategy, treatment, whatever the case may be.

Having that free flow of information is extremely important in that thought process and getting to our end diagnoses. So if that trust is broken you're not going to get the same kind of free flow of information between the veterinarian and the client and that's important in coming up with the final diagnosis. Potentially, you could miss something simply because you don't have that level of trust.

CHAIR ORSBORN: Okay.

Does that – to your knowledge, that situation, where you have the owner of an animal seeking clinical care for that animal, a private person if you will, from a government-employed veterinarian?

DR. O'BRIEN: My understanding of what veterinarians do employed by the government,

it's outlined in our submission. I'll just summarize that submission.

Essentially, they wear several different hats. They play a regulatory role. That's an important role and in a lot of ways it's somewhat separate than the primary clinical role that a veterinarian would play. We have veterinary clinics who provide samples with information about pets to government-owned laboratories. As veterinarians in a small, rural community, we've availed of sending animals for necropsy to the provincial laboratory as well.

Again, those records are contained within a government-licensed veterinary lab, which is employing government employees. They also will go out and do farm calls, from what I understand. They'll go out and do farm calls and go out and visit farms. There has been a history before in the past and I can't speak to what currently occurs.

CHAIR ORSBORN: What is a farm call? Somebody can go into the farm to treat an animal or …?

DR. O'BRIEN: Yes.

CHAIR ORSBORN: Not part of an overall regulatory regime or anything?

DR. O'BRIEN: No. That's right.

CHAIR ORSBORN: A farm call is, let's assume, a private farm, so you have a government veterinarian going to look after an animal owned by a farmer?

DR. O'BRIEN: That's correct.

CHAIR ORSBORN: Any charge for that?

DR. O'BRIEN: From what I understand there is a fee for service. As far as the details of that, that would be something that would be better answered by someone who works in that particular area.

CHAIR ORSBORN: Okay.

Would that be primarily because there is no availability of a private veterinarian?

DR. O'BRIEN: Yes.

CHAIR ORSBORN: Okay.

Are your concerns primarily in the area of these sort of private interactions with animal owners or are they broader than that?

DR. BULFON: Our main concern at this time is going to be with regard to access to these government records, which just have the raw data. Our biggest concern is just that context is needed in order to fully understand the picture.

CHAIR ORSBORN: You have no idea, I take it – if a record in the possession of government is subject to ATIPPA, you don't know if the veterinarian who produced the record is consulted or not, do you, before that record is released?

DR. BULFON: That's correct.

CHAIR ORSBORN: You don't know. Okay.

That's a learning experience for me. Anything further?

DR. BULFON: Not at this time but thank you for your time.

CHAIR ORSBORN: Thank you very much.

We'll adjourn now until 9:30 tomorrow morning.

Thank you both.