ATIPPA STATUTORY REVIEW COMMITTEE 2020

Transcript	Volume 4

Committee Chair: Honourable David B. Orsborn

Thursday	21 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.

This morning's session is a continuation of the presentation of Memorial University. Time constraints meant that we could not finish the presentation on Tuesday past. One area not covered was the university's submission on the effect of a Commissioner's recommendation to reconsider a decision or to conduct a further search. This latter issue raises a question of what follows from a Commissioner's finding of a breach of the duty to assist an applicant. Another unrelated issue not canvassed in the previous session was the university's submission on the rules of court relating to the hearings of appeals under the act. There may be other issues that the university did not cover, but those are the primary ones.

I invite the university representatives, again, Morgan Cooper, general counsel, in person; Stephen Greene, the chief information officer of the university; and Rosemary Thorne, the university access and privacy advisor.

Thank you for coming back. I invite you to continue your presentation.

Thank you.

MS. THORNE: Thank you, Chair Orsborn.

Good morning. Thank you for inviting us back. We're very happy to continue the discussion. I think you wanted to first address our discussion in the submission about the section 47 recommendations.

CHAIR ORSBORN: Yes, I gather you wanted to talk about what you call soft recommendations. I take it, by soft you mean a recommendation to reconsider or conduct a new search. Is that essentially –?

MS. THORNE: Right. Under section 47, there are four paragraphs: (a), (b), (c), (d). And (a), (b), (c), the recommendations that he would make under those sections, are hard recommendations. These are recommendations that can be the subject of a declaration, an order and an appeal. Any recommendations the Commissioner makes under 47(d) are what we characterized in our submission as soft recommendations. That was some wording that the Information and Privacy Commissioner, in fact, had used in a meeting a year or so ago.

So the soft recommendations could include an additional search for records, or any other type of recommendation that the Commissioner might make. For example, it could be improvements in how they manage ATIPP requests or any other type of improvement that the public body might take to improve access, to improve their processes.

So, yes, under (d) of section 47 any recommendation, I think, in connection with the duty to assist would fall under section (d). The duty to assist is interpreted to include searches for records.

We have looked at this very closely and because the wording of the act is pretty clear about what can be the subject of a declaration or an order or an appeal to court following a recommendation report from the Commissioner is very precise. Therefore, it does not, to us, appear at all that the framework contemplates an additional search for records or a failure of the duty to assist and so on can in fact be appealed.

CHAIR ORSBORN: All right, let's step back a little bit from an interpretation of the act. Assume, for the sake of argument, that the Commissioner recommends – and we'll leave aside reconsider for a moment – that the public body conduct a new search.

MS. THORNE: Right.

CHAIR ORSBORN: All right. A couple of things can flow from that. The public body can say no, or the public body can say yes and then come back and say we have done a new search and there either is or is not any other records.

If the public body says no, we've searched to our heart's content and we're not going to go back and do any more, what happens after that?

MS. THORNE: I don't know, because we haven't had that experience. So I would assume that the Commissioner – so let me back up. So

when an investigation is initially undertaken, so the OIPC receives a complaint pertaining to the university's decision in respect of an ATIPP request and part of the investigation, the first part is an informal resolution stage. So once we've provided our submission, we've detailed exactly how we conducted our search, who searched, how long it took them and so on. If the Commissioner raises a question and says, well, we see an email here that suggests some other documents should exist. Then during that informal stage we would go, oh, okay. We would go back and, hopefully and typically, by the time their investigation is done, if there are other records that have not been located, they've now been located. So it doesn't become a major issue.

We've never had an experience where the Commissioner recommended an additional search and we said no. As a matter of fact, we've only once had an experience where the Commissioner recommended an additional search and we undertook it and we accepted it.

CHAIR ORSBORN: Okay.

Based on your experience, then, in the area overall, sort of apart from the university as such, what mechanism is there or should there be or could there be for enforcing a recommendation to conduct a search?

MS. THORNE: For an additional search?

CHAIR ORSBORN: Yeah, just take the extreme case where a public body says no.

MS. THORNE: Well, you know, I thought a lot about it and again looking – I know there's the interpretation of the existing framework, right?

CHAIR ORSBORN: Leave that aside for a moment.

MS. THORNE: What you're looking at is what should it be.

CHAIR ORSBORN: Well, could, should.

MS. THORNE: Or could, right.

I think that, first of all, additional searches and getting down into the duty to assist probably should not go to the court process; it should rest with the Commissioner. I think the Commissioner should be able to make recommendations, any recommendations. They are the experts so they do have an obligation to work with the public body. We would be glad to, and we have; it's only twice that we've not followed a recommendation of the Commissioner. We would be glad to do it, but I think that the authority should rest with the OIPC.

The challenge that comes up is where does it go? We followed the Commissioner's recommendation to do an additional search. We find more records, let's say for argument sake, but we note that some of them contain material that needs to be redacted so we apply redactions, then these are released to the applicant who once again is either not satisfied with the redactions or the adequacy of the search. So where does it keep going? I guess, if, on the rare occasion when you've got an applicant and the scenario where it's not easily resolved – because let's face it, we are talking about outlier kind of situations here.

CHAIR ORSBORN: Sure.

MS. THORNE: I guess you just continue to work with the Commissioner. The problem is that once the Commissioner issues their report, for all intents and purposes it's done then. The report has been issued and now it all rests with the public body. If the public body follows a recommendation, does an additional search and applies redactions, does it go back to the Commissioner then?

CHAIR ORSBORN: Well, the question is that at some point – and I appreciate that it's not the usual situation – either the Commissioner or a court has to be able to say: Yes, there was a reasonable search done, thank you very much.

MS. THORNE: Yeah.

CHAIR ORSBORN: How do we get to that point?

MS. THORNE: I don't know. I think that the Commissioner can, certainly, and has. My experience has been that we provide them and they have come back to us multiple times: Can

you call so-and-so and ask them this and can you …? There's quite a bit of back and forth with the OIPC, a substantial amount of work often, in terms of them following down whether or not we've located all of the records.

CHAIR ORSBORN: A broader question but related to section 13 and a duty to assist. At some point, again, a body needs to be able to say that the public body did or did not comply with the duty to assist. I guess my question is: What adjudicative body or what body should that be and how do we get there?

Mr. Cooper.

MR. COOPER: Thank you, Mr. Chair.

CHAIR ORSBORN: Just pull your mic over just a little bit, please.

Thank you.

MR. COOPER: Thank you.

Just to expand on some of the things that Ms. Thorne has talked about. I understand what you said about not engaging in an interpretive issue with respect to the act, but the question was premised on should there be access to the courts, for example, or what body should make a determination in the event that the university is perceived to fall short of its duty to assist.

When I look at the current framework, just high level, clearly, the core of the legislation, in terms of Commissioner jurisdiction, in terms of matters that might be appealed, is rooted in complaints that are tied to access requests or requests to correct personal information. There are, as you've indicated, direct right of appeal with respect to either disregards or refusals to investigate separately from those matters that are dealt with under a complaint.

When I look at the act and I look at section 105, the Legislature has put its mind to the relationship between the Commissioner's powers and duty to assist. It's not like the current act is silent. It speaks to the Commissioner's ability to report annually to the House of Assembly and to document and report on "persistent failures of public bodies to fulfil the duty to assist applicants …."

I think the reference to "persistent failures" is important. As Ms. Thorne has indicated, there is a collaboration; there's a continuous back and forth between any public body and the commission with respect to a search, duty to assist and attempting to identify responsive records and the like. When I look at the powers here that are under section 105, they look a little bit and, I think, to a certain extent, they are similar to powers that you see with respect to the Citizens' Representative under the *Citizens' Representative Act*. You don't have, necessarily, that direct order-making power or power to make a recommendation that effectively becomes an order as you move forward.

As a large public body in the province, we interact, as in other public bodies, with the Office of the Citizens' Rep. Not as frequently, of course, as the ATIPP legislation, but we do interact annually and sometimes multiple cases in an additional year. I believe I can say frankly for the record that the investigations that have been undertaken and the recommendations that have been made, very high levels of compliance with those recommendations.

In the event that there's not compliance, as a large public body we're very sensitive to the fact that the Citizens' Rep can report to the House of Assembly and document the concern. The same right exists here, with respect to the duty to assist, which is a component of what the public body needs to do to meet its overall obligation in respect of access requests.

To the extent Ms. Thorne indicated that – and I recognize we're only one public body – the duty to assist has not been problematic, doesn't mean it hasn't been an issue that has been raised. But when there's been a direction from the Commissioner, as a public body, we, in good faith, do our best to meet our obligations under the act. I'd like to think that in the absence of some sort of widespread indication of tensions, problems around duty to assist, or at least some evidence that the Commissioner has used that power, resorted to it and it hasn't had the intended objectives, just a caution about broadening the subjects, that might be the matter of either a formal complaint and/or an application to the court.

CHAIR ORSBORN: All right, let me focus a little more then, counting back from the duty to assist and a recommendation to reconsider. It's a reconsideration of an earlier decision. How does or should the process work? We have the first decision, which generates, on its own, a right of appeal. If there is a recommendation to reconsider, and the public body does reconsider, should that right of appeal still be out there for the first decision, or should any appeal rights flow from the reconsidered decision, whatever it is. If the reconsidered decision works, there's still refuse to access. Would the appeal rights simply be with respect to that decision?

MS. THORNE: I'm guessing that you're referring to – because I think that when the OIPC presented on that first morning you did have a discussion about that. Commissioner Harvey or Mr. Murray, one of them, said that they have not used that power, they have not exercised it; in other words, issued a report in which they referred it back to the head of the public body for reconsideration. It was because they had concerns about court options for the applicant, should they use this.

CHAIR ORSBORN: I'm just trying to understand what –

MS. THORNE: I just want to make sure – you're referring to 47(b).

CHAIR ORSBORN: Section 47(b). Let's assume the public body has refused access, there's a complaint, an investigation and the Commissioner issues a recommendation under 47(b) for whatever reason –

MS. THORNE: To reconsider –

CHAIR ORSBORN: – to have the public body reconsider its decision. At what point then, and to what decision, is the appeal process directed to? Is there still an appeal available for the initial decision or should it be only have the reconsideration?

Mr. Cooper.

MR. COOPER: Thank you, Mr. Chair.

My view with respect to reconsiderations – and I believe there are any number of statutory frameworks that expressly refer to the ability of a party, before a particular administrative body, to request reconsideration. When I think about reconsideration and its purpose, a decision has been rendered – and in this case, it may be an applicant – to the complainant.

I just think of a request for reconsideration. Clearly, the head here has a recommendation to reconsider, but I'm thinking that a decision has been rendered; a concern has been expressed, either with respect to reasons, completeness. There's a request, and the Commissioner believes that it's important for the public body to reconsider. I'm just thinking about duplicative matters. The public body reconsiders, says yea or says nay. I feel that's the determination, assuming there's not too long a time frame in between –

CHAIR ORSBORN: That was my question. Because as it stands now, as I understand it, if the public body says nay, I'm assuming that there could be a direct right of appeal at that point.

MR. COOPER: I'd like to think that if the public body says we're not going to reconsider the recommendation, the recommendation gets treated as full force of law. The provisions with respect to declaration and enforcement all should apply.

If the public body reconsiders and renders an additional decision, to a certain extent it strikes me that the original decision may be moot and it's that second decision that – and there ought to be a right of access to the courts, with respect to a modified decision, certainly.

CHAIR ORSBORN: If I understand correctly, essentially what you're indicating is that the decision following a recommendation to reconsider is the operative decision for appeal purposes or whatever.

MR. COOPER: That would be my view.

CHAIR ORSBORN: Yes. Okay.

MS. THORNE: I just want to be clear that we're talking about the same thing. A reconsideration is the Commissioner is satisfied that the information in question is subject to a

discretionary exception to disclosure; the head of the public body has presumably exercised its discretion to say: Yes, this is subject to section 29 and we are going to protect it, taking into account any number of factors; and the Commissioner has looked at that and said: Yes, we agree. It's subject to section 29, but we would like for to you reconsider, so the recommendation is that you reconsider the exercise of discretion.

CHAIR ORSBORN: Yes.

MS. THORNE: Okay.

CHAIR ORSBORN: That would be the context normally of a reconsideration, I would think.

MS. THORNE: Okay, sorry.

So the question is: What goes to court, then? I guess the applicant should have a right of access to appeal.

CHAIR ORSBORN: How does one appeal a recommendation to reconsider?

MS. THORNE: Yes.

CHAIR ORSBORN: My question is that …

MS. THORNE: Because the court –

CHAIR ORSBORN: The appeal process is directed, as was said earlier, to decisions. And when there is a reconsideration, what decision are we talking about? The earlier one or the reconsidered one?

MS. THORNE: Right, yeah.

CHAIR ORSBORN: It would make sense, I would think, without prejudging it, that it would be the reconsidered one. Because there would be no point otherwise.

MR. COOPER: I share that view.

MS. THORNE: But there are two issues, right? One is the determination as to whether the discretionary exception applies, and the Commissioner or the court could make a determination that: Nope, section 29 does not apply here; you have incorrectly applied this exception and order access. But the exercise of discretion, if everybody agrees that it is, in fact, subject to section 29 –

CHAIR ORSBORN: The applicant may not agree.

MS. THORNE: The applicant may not agree, but the only thing that the applicant can appeal to court is whether or not section 29 applies, surely. If the head of the public body has exercised their discretion, I don't even know how that can be challenged in court.

Anyways, I don't know if I'm misunderstanding and I'm not an expert on – this is not even something that I've really turned my mind to in our submission in terms of the recommendation to send something back for reconsideration. So I'm, you know –

CHAIR ORSBORN: Well, if the decision goes back for reconsideration and exercise of discretion, or whatever, even though the Commissioner may have agreed that the exception applies, once the reconsidered decision is made by the public body the right of appeal would allow the applicant, I would have thought, to address both the substantive exception and the exercise of discretion.

MR. COOPER: I agree with that.

CHAIR ORSBORN: Yeah, okay.

Anyway, I probably interrupted you with my questions. I don't know where you were in your comments, Ms. Thorne. If I can summarize it, take it on the breach, if I need duty to assist – and leaving aside the reconsideration, which is more directed – I take it your view is that any breach of that that might be found by the Commissioner is not legally enforceable as such, but is subject to rebuke through publication through the Commissioner's reports to the House, or whatever. Is that fair?

MS. THORNE: The Commissioner has power under section 95 and under section 105 – yes – to deal with the duty to assist and to bring a failure of the duty to assist to the head of the public body and can raise it in the Legislature, so yes.

CHAIR ORSBORN: So you don't end up in court with evidence going both ways on whether the search was reasonable or not.

MS. THORNE: Yeah. By the time an issue gets to court, I think that all of these other issues should be dealt with through the Office of the Information and Privacy Commissioner, and that the court should, in fact, be dealing solely with the decision to grant or refuse access or a refusal to correct personal information.

I know that in Manitoba, which has a very interesting arrangement now, and I think they must have recently amended their legislation. So they have an ombudsperson who, in the first instance, investigates all access and privacy complaints and renders a report. It can deal with any issue. Then the ombudsman may choose to refer the matter to a person called the access and privacy adjudicator, who has order-making power. Then, should it end up in court, the only issues that can be dealt with at a court are the granting or the denial of access. That's it.

CHAIR ORSBORN: Yeah, it's a whole different structure, isn't it?

MS. THORNE: Yes.

I apologize, because I had not sort of systematically planned –

CHAIR ORSBORN: Okay.

MS. THORNE: – to continue, but there are some points that I would like to make. So if you want, I can just keep on –

CHAIR ORSBORN: You made a number of recommendations really about the rules of court. I don't know if you wanted to elaborate on that at all, in terms of what rules should be applicable or not applicable when a matter gets to court?

MS. THORNE: I'm clearly, as you've already established this morning, not the expert on all of this, but based on –

CHAIR ORSBORN: If you're comfortable relying on what you have written, that's fine.

MS. THORNE: We are – unless you have any specific questions, and I'm sure Morgan would be glad to jump in. I think that based on the experience that the university has had with a lot of ATIPP matters proceeding through to court, we have, as a result of all that experience, identified some issues.

I think the main point in our submission is simply that the ATIPPA provides for an expedient trial. We found it's been anything but. I think the overall weight of our submission is simply to make it clearer in the act, to be able to ensure an expedient resolution at court.

CHAIR ORSBORN: It may be that the matters going through the court raise different issues. What's your experience been with the value of, let's say, a case management process which really leaves – and any particular proceeding then can be tailored in terms of the way that matter should proceed through court. But it's subject to case management right from day one and –

MS. THORNE: Yes.

CHAIR ORSBORN: – proceeds to (inaudible).

MS. THORNE: I think that under the current framework, where there is that direct right of appeal – I feel that all access complaints should first go to the OIPC and let them deal with all those issues.

CHAIR ORSBORN: Well, that's another question I had. In terms of the direct right of appeal, leaving aside probably third parties and leaving aside the disregard question, is there any merit to taking that away –

MS. THORNE: Probably, yes.

CHAIR ORSBORN: – and making sure that all complaints have the opportunity for informal resolution before the Commissioner?

MS. THORNE: I think so. Absolutely. That's what the OIPC is there for. I know that in a number of other jurisdictions, there is no direct right of appeal.

CHAIR ORSBORN: I don't think this was canvassed in detail by Chief Justice Wells. If my

recollection serves me correctly, I think the right of direct appeal was in the legislation prior to the 2015 review.

MS. THORNE: I think so.

CHAIR ORSBORN: It was? Okay.

MS. THORNE: I think it should all go to the OIPC first and let that be required. A privacy complainant has to go to the OIPC under the current framework, but an access complainant under the current framework, does have the direct appeal option. It seems to make sense to me that all complaints should first go to the OIPC. Then, should it go to court, it should be restricted to those main issues of a denial of access and then a disregard decision or whatnot.

In case management, yes, absolutely. I think it could facilitate an expedited review and trial. It can handle all of the issues because ATIPPA – and I'm not saying this because this is what I work in and I've spent years and years and many years working in solely, but it is, it's a complex piece of legislation. I think it makes sense to have it case managed from the get-go.

I don't know. If the only matter that can go to court is, should this be redacted or not, then perhaps case management is not necessary. Typically, it's not a request for one record; it's a request for 500 pages or 1,500 pages and there are all sorts of issues where the applicant feels disadvantaged because they don't have access to the information. I think case management is definitely a worthwhile requirement.

CHAIR ORSBORN: Mr. Cooper.

MR. COOPER: Thank you, Mr. Chair.

Again, I agree with everything that Ms. Thorne has said. A couple of comments I would make – and I think it's consistent with a comment I made when I last appeared before the committee and the commission – are that with respect to those matters that are currently the core jurisdiction of the Commissioner under, I think it's 47(a) and 47(c), I believe very strongly, and advocate this opinion on behalf of Memorial University, that applicants ought not to have a direct right of appeal. There is a process established. The Commissioner is the body designated by statute as having core expertise in this area. Memorial University just fully respects that expertise and that process.

It strikes us that any matters that might be raised by the applicant directly to a court means that the matter is being adjudicated in that form without the advice, expertise, opinions and reasons of that specialized tribunal. If the appeal relates to 47(a) and (c), I can't think of issues that would be raised on direct appeal that wouldn't be the same as those that would be raised in a complaint.

I have a slightly different comment with respect to applications to disregard. It's more of an observation because I do think it's important. I think it's consistent with Ms. Thorne's view that as much of the issues that need to be resolved or determined by way of investigation and adjudication under the act be dealt with by the commission. When I look at applications to disregard, as a public body we're looking for approval from the commission to disregard. The act requires the commission's approval, yet it's effectively where the commission accepts, because I don't believe they issue reasons; I think it's effectively the public body's reasons.

That is one area where allowing a complaint directly to the commission with respect to the public body's decision, if it was permitted to make a decision not subject to approval, and have the public body's decision and reasons properly be the subject of a complaint before the Commissioner. Again, there's a right of appeal from decisions of the commission, so I don't think it's precluding an applicant or a complainant having an important issue dealt with by a superior court, should be that be necessary.

With respect to the commission's decisions not to investigate – so that's a circumstance where the complaint has been lodged. They've already seized jurisdiction under, presumably, 47(a) or (c). In those circumstances – and there is an obligation to give reasons – I think it is important that a complainant who wishes to appeal that determination to have a mechanism. I see that being a little bit different than the application to disregard.

On our formal submission where we speak to rules of the court – and I have obviously reviewed our submission in advance of it arriving here and subsequent to – I'll be very frank, I'm not a litigator. I don't spend a lot of time in Supreme Court and I have no hesitation. The reason I say that is we rely upon, sometimes – not sometimes, pretty well always – external counsel to represent us before the superior court.

When I look at the submission, the core things that I would want your committee, your commission, to hear from us is a reflection of a number of things; number one, our preferences to be before the commission and the Commissioner. If circumstances mean that you have to be in court, we understand that and we participate in those forums accordingly. It relates to what Ms. Thorne said about processes under the act with respect to the commission, intended to be more streamlined, more expeditious and timelines to deal with matters in a certain fashion.

What I can assert is that the large majority of cases don't end up before the courts, and are dealt with by the commission under the forum, but our experience in the court has been that there have been multiple concurrent cases that were linked to matters that arise directly under the act. The submissions are intended to say, to the extent possible, if there can be tweaks under the act that make it really clear that informal resolution is desirable, case management at the outset is desirable, increased reliance on affidavit evidence recognizing that the appeals provide for de novo hearings and the ability to hear additional evidence.

The submissions very much go to express some frustration, and that's not to assert with respect to either party because we just fully respect that the party have the right to use the established processes, but to the extent the processes can be streamlined to deal with matters quicker, more informally, it would be a desirable outcome for Memorial University.

CHAIR ORSBORN: Any other comments?

I have one related question back to one of your submissions earlier. One of your recommendations was that if there was evidence that an applicant already has information in his or her possession that, then, the public body should have the ability to disregard. Number one: What sort of evidence are you talking about? Number two: Would an applicant have the ability to challenge that? Number three: Would it go the whole of the request or just the part that the applicant already has?

Practically speaking, how would that work on the ground?

MS. THORNE: Again, this is something that has arisen for us on numerous occasions and has presented a problem. When we made our submission, we didn't talk about it being a disregard or a partial disregard because I think the disregard ship has sailed. By the time the public bodies, all of the offices of records, all of the offices that provide records to the ATIPP coordinator, the ATIPP coordinator has gone through them and determined that the applicant already has these records, the applicant authored most of these records or is a recipient on most of these records.

We simply want to be able to say to the applicant: We are not providing you with records that you already have in your possession. If you don't possess them then we would probably try and provide them. But we have found requesters who expressly ask for their own records. We know that they have them but, once again, they want their own records. It just feels like it's an abuse of public resources. It's an abuse of the process for someone who clearly has possession of the records to then also request them.

Now, we could seek a disregard at the outset. If the request is clear: I would like a copy of all emails that I sent to this other person. Well, then, hopefully, the OIPC would approve a disregard of that request as being frivolous. Typically, the request is all emails that mention me in any shape or form between this period of time and these numbers of people. So, although, I can't say for certain, I know that once those records come into my possession and I'm looking at them, a vast majority of them are going to involve the applicant. I would like to be able to say – and we often do, quite often we'll go back to applicants and say: Is it all right if we exclude records that you have authored or

received? They respond: Oh, yeah, by all means, I don't need them. And so it works, right?

But then there are certain applicants that are absolutely adamant that they must have records that they clearly already have in their possession. So I'm not saying that it necessarily should be a disregard, I'm just saying that the OIPC perhaps could be more amenable to us not providing a record when we have evidence in front of us that the person already has them.

CHAIR ORSBORN: Are you suggesting some kind of legislative change?

MS. THORNE: I suppose it could be added to section 21 or maybe even section 8, although I wouldn't want to mess around with section 8, but it could be added to section 21 with time frames and so on appropriately adjusted. But our experience with the OIPC has been that – and I've had many occasions when I've said to them: Why do I have to provide these emails when this applicant clearly has them? They've insisted and said: They're responsive and therefore you have to provide them.

CHAIR ORSBORN: I'm going back a bit now. How does the completeness of a search get judged by the OIPC?

MS. THORNE: Through a great deal of questions by them. In the first instance, once they receive notice of a complaint, they send a notice to the public body or to the ATIPP coordinator. I receive a notice in a letter, a copy of the complaint and a set of guidelines for how to respond and participate in the investigation. One of the things that they specify is to detail how the search was carried out, by whom, which locations were searched and so on. Then that information, combined with a close review of the records, ordinarily, would enable the OIPC to say this appears – obviously, in the context of the wording of the request, right, that's the starting point.

Usually the OIPC is quite able to then, with those things, be able say, yes, that search appears reasonable, or they will come back and forth, back and forth and say what about this? What about that one? What about this one? So we do quite a bit of following up. Typically, by the end of the investigation process, they are satisfied that the search was comprehensive and complete or, at prompting from them, we've gone out and done some further searches, located some additional records and provided them.

CHAIR ORSBORN: It has been suggested to me, more than once, that with an applicant being able to ask for information or records that the applicant may already have in their possession, that it provides some degree of check by the applicant as to whether or not the search was conducted reasonably. If it comes back without these documents in it, then you wonder about the reasonableness of the search.

MS. THORNE: I think my response to that would have to be that if you're using the ATIPP Act to audit a public body, then that's an inappropriate use of the act.

CHAIR ORSBORN: I think that covers my questions.

Do you have any concluding comments?

MS. THORNE: I wanted to talk a little bit about the word that we used in our submission: the gravitas of filing an ATIPP request. It should not be, but increasingly has become – I think it shouldn't be the first resort for a person who wants information from a public body. The ATIPP Act, as I've said before, is highly prescriptive. So any request requires considerable work, administratively, in order to process, retrieve the records, process the records and so on.

As I mentioned, we've spent, just in our office alone, 167, 172 hours processing an ATIPP request. It could be as few as five or seven hours. But it's a serious decision, in my view, for a member of the public or for anybody to file an ATIPP request, and it shouldn't be the first option. We get requests for information that's on our website. Now, of course, we can respond and say it's here or it's on the Stats Canada website, or it's available here.

We often get requests, too, where when we contact the office that has the records they're like: Oh, for goodness sakes, why didn't they just call us? I think that the other processes, before ATIPP came along, are still there for

people to get access to records. So that's one of the things that frustrates me a bit is that people are no longer considering those other means of getting access, and ATIPPA is their first option. Nothing we could do statutorily about that.

CHAIR ORSBORN: A little difficult to legislate call first, isn't it?

MS. THORNE: Yeah. It is difficult to legislate call first. I think that was one of the reasons why a nominal application fee is able to make the person pause and think maybe I'll just call the registrar's office tomorrow instead of filing this request. But no, I agree, you're right; you can't legislate call first. You can't legislate –

CHAIR ORSBORN: Do you have situations where you are faced with a request where you understand that there are other formal processes available to get the information, perhaps with payment of a fee? It's been mentioned on a number of occasions. For example, the constabulary mentioned it in terms of accident reports that are available through Motor Registration. One, not quite an analogous area, is where ATIPPA is being used, according to coordinators, via legal firms and individuals who are involved in litigation using it for discovery purposes, as opposed to using the rules of court for discovery.

Do you have any submissions or views on where ATIPPA is being used instead of other formal avenues?

MS. THORNE: I know that other public bodies do have – I think the first example that comes to my mind is the regional health authorities. I don't think (inaudible) becomes an issue for us here at Memorial.

CHAIR ORSBORN: No.

MS. THORNE: We don't have processes, I don't think, where you have to pay a fee in order to get access to something. So it doesn't arise as an issue for us.

CHAIR ORSBORN: I apologize for jumping around, another question jumped into my mind as you were talking about other institutions. A couple of education institutions here have mentioned the question of disclosure of personal information that you may hold regarding students with respect to bodies for counselling and whatever – and I may have asked you this before. Do you simply look to the consent of the student if it's necessary to disclose?

MS. THORNE: Yes.

CHAIR ORSBORN: Okay.

MS. THORNE: I think it would be useful to have a discussion about records in electronic format. I'm not sure which section gives a person the right to – I think it's in section 20, but a person can request records in specific formats and it's at the discretion of the public body if they're able to provide those records in the particular format requested.

Sometimes we'll get a request for records in an Excel spreadsheet. If we're able to accommodate it, then we would. But the challenge is you've got to use processing software in order to apply redactions. Plus, we get records coming from six, eight, 10 different offices. We have to assemble everything that we've received which comes in multiple formats: some paper, some emails, some Excel, Word format, everything. We need to then assemble all of that, arrange it all in chronological order, remove exact duplicates and then process the records.

We have to be able to then review everything, determine what must or may be withheld, what can be released. We have to conduct internal consultations and so on. What we ended up working with is a PDF, and then that is typically what is released to the applicant.

Let's say there's a request and there are 50 email threads that are responsive, three of them have redactions applied and 47 of them are being released. I suppose I could attach all 47 individual emails and send those out to the requester and then send the others in a PDF format because they have redactions applied, but I can tell you that the time and the extra resources that are required to do that and then the time – our process doesn't easily accommodate that, I guess, is what I'm saying.

So for us, in order to process a request, we must be able to take the records, put them into the software that is specialized for redaction and

then we end up with a PDF record. We're pretty busy, so we have a process to follow and the act supports us being able to do it that way.

Anyways, I just wanted to make that point about it, but Steve, I think, can add on the question.

MR. GREENE: Thank you.

I completely agree. If you look at any of the public bodies, collectively, we have hundreds of different services and systems. Even the definition of what is a native format can be challenging. For certain services it's easier. For example, excel would be easy, email would be easy, but as you get into more complicated systems, quite often we see in our environment, it requires an IT assessment for even determining what a native format is.

As Rosemary stated, when information flows into our ATIPP coordinators, regardless of the format – I'll use excel as a simple example. We may get a request about specific information. One of our employees may have a spreadsheet that contains information that's relevant to the request, but there may also be large amounts of information within that single file that's not relevant to their request.

So how do you actually provide that? It could be provided in native format to our ATIPP coordinator, but for the ATIPP coordinator to properly redact the information, they have to use additional software which transforms the outputs. Otherwise, you would be releasing information that's beyond the scope of what was asked.

On the native format, I don't think it's as simple as just providing it in that format. I think you definitely would need IT interpretation. I think it would put an additional burden on organizations to actually even determine: What is a native record and how do you actually get it to a requester?

In particular, if the requester comes from outside your organization. We have tools within our organization to process kind of native records, the records are born within your organization. But even excel, if you were to send an excel file to a requester natively, it's not guaranteed that they can open every different native file that exists in a public body. The scenarios are in the hundreds in that case.

So I always go back to the concept of what is reasonable in that case. In these examples where processing of an ATIPP request doesn't need IT involvement for interpretation of what is a native record and how do you actually get it to a user, and is it even possible to get it to a requester without providing additional information outside of the scope of a request.

CHAIR ORSBORN: Is there data lost in the processing?

MR. GREENE: That depends on what system you're actually trying to get information from. It's more realistic to – I guess, if somebody were to challenge native format. Certainly, it would be modified slightly or less information available if you put it through redaction software, which is necessary. I mean, that process, just by the nature of what it does, does –

CHAIR ORSBORN: Let's leave aside redaction, let's assume there's a request for one email and there's no need to redact anything on the email. As that email is sent to the requester, is there any loss in data from what is on the university's system, as opposed to what goes to the requester?

MR. GREENE: With email it's much simpler. It depends on how we receive it. So if an end user were to forward that email as an attachment, nothing should be lost with respect to that email. If you forward it not as an attachment, it would essentially be a new email. So when you forward it as an attachment, it would retain the original characteristics, including metadata. Once you go beyond email outside of – that's kind of the easier case. If you were to look at different systems, it's much more complicated.

CHAIR ORSBORN: Okay.

You both raise the issue of relevant material and not relevant material. I'm having a little difficulty getting my head around all this business of responsive and non-responsive. Assume that you have, as you indicate, a document and you have two lines in it that are

what was requested, and the rest of the document is not; what was requested would not be subject to an exception. What do you with that? Do you produce the whole document or do you line up the stuff that's irrelevant?

MS. THORNE: I think we handle it on a case-by-case basis. If it is clearly non-responsive –

CHAIR ORSBORN: (Inaudible) this issue has come up a whole lot –

MS. THORNE: Yes.

CHAIR ORSBORN: –with coordinators –

MS. THORNE: Yeah.

CHAIR ORSBORN: – in terms of how you deal with non-responsive (inaudible).

MS. THORNE: A very good example where that occurs is in a set of minutes produced by a committee. The request is pertaining to a certain matter which is number one on the agenda of 12 items and so then the minutes largely are non-responsive to the request. I'm quite comfortable blocking that off as non-responsive when we process it and send it back to the requester. We may add a note that says this deals with other matters and doesn't touch on your request at all.

The Commissioner frowns a bit on the use – and this is an issue across the country – of just coordinators marking stuff as non-responsive, non-responsive. Obviously, if it is non-responsive to the request, then, I think, if it's a chunk of material like the remainder of a set of minutes, I think, yes, mark it as non-responsive.

What I don't do and what we don't do in my office, though, is say this paragraph is responsive, this sentence isn't, this paragraph is, this sentence isn't. I think that's not fair perhaps to the applicant. In those kinds of cases, we process it and we just take the time that is needed to process the record. That means, though, instead of marking something off as non-responsive, now I have to determine is there anything here that can be released even though it has nothing to do with the request.

CHAIR ORSBORN: From a practical manner, and assuming that none of the information is subject to exception, why blot it out at all?

MS. THORNE: Well, exactly and we don't.

CHAIR ORSBORN: It takes time to do it.

MS. THORNE: Yes.

CHAIR ORSBORN: I suppose if you have a minute with 12 items in it, they ask for one, none of it is subject to exceptions, here's the –

MS. THORNE: That's the approach; that's exactly what we would do. If there was no harm in disclosure whatsoever, just let it go. Why bother redacting.

CHAIR ORSBORN: That was my question, but my understanding is that it is practice from some coordinators to sort of focus on simply what information has been asked for and everything else is irrelevant or –

MS. THORNE: Yes. The coordinator has a responsibility and it's a responsibility to do that line-by-line review of all of those records. The coordinator needs to be clear that there's no harm in disclosing this stuff.

CHAIR ORSBORN: I understand that. That's a basic responsibility to ensure that if anything needs to be redacted for any exception, it would be.

MS. THORNE: Yeah.

CHAIR ORSBORN: But absent claiming an exception, do I understand that there's no harm in disclosure? It might not be what's asked for.

MS. THORNE: That would be my view. Let's say, for example, the request is for all information concerning a policy that's to be adopted, and then there are drafts of it. I look at the drafts and I see that the final policy, which is on our website, doesn't vary. Just let it go. It's already out there anyways, and so I can make the determination.

CHAIR ORSBORN: You mentioned a website. Do you have a written policy on the material that will be proactively disclosed on the website?

MS. THORNE: On our website, we have a section, yes, that specifically deals with proactive disclosure. If you go to mun.ca/iap, you will see a Proactive Disclosure tab and you can see all of the material. One of the things that we do, for example, is we require the senior offices – the president, the vice-presidents and so on – to provide us with travel expense and other types of expense updates and stuff. That is all there.

I don't know if there was any further discussion that you wanted to have or any further questions about workplace investigations and personal opinions. I know that we covered it comprehensively.

CHAIR ORSBORN: We did cover it; I don't think we need to go back over it.

MS. THORNE: Okay.

CHAIR ORSBORN: I take it your position is, short of a workplace investigation, an opinion that someone expresses in terms of workplace conduct about another person that they're working with should be protected. Is that fair?

MS. THORNE: Yeah.

CHAIR ORSBORN: Even though they may be expressing an opinion about person B, that in the context of workplace conduct that should be protected?

MS. THORNE: It should be captured by the definition of personal information. If it's not captured by that definition in the first place, then nothing else applies and so the privacy interest is lost.

CHAIR ORSBORN: An opinion expressed in the context of a discussion about workplace conduct, essentially.

Mr. Cooper.

MR. COOPER: I am mindful of the fact that you weren't looking for specific responses this time around workplace investigation. If it would please the Chair, just to make a couple of very high-level comments about the importance of this particular section of the act to Memorial University. What I have to say is it reinforces the messages that Ms. Thorne has conveyed, both last day and just a moment ago.

I'd like to start with an observation having reviewed not all, but many of the submissions before the Commission, including the submission of the OIPC. What's obvious, I believe, from all of those submissions is the strong indication that there are challenges with respect to the application of the section, as it currently exists. I am struck – and the university is very supportive of all of the OIPC recommendations in regard to workplace investigations, to preclude access until the investigation is concluded, and the indication that a number of additional exemptions should apply as opposed to the absolute override that's there now.

I think all of those things are incremental. I believe all of those things are positive and I believe that's reflected in many of the submissions. What has struck me, though, is that when you look at this particular section and then a submission by even the OIPC, that certain exemptions have to apply. You shouldn't have that right to disclose to an applicant who's a party all the information referred in subsection (2) until the investigation is complete.

You start to get to the point where the qualifications really raise a question as to whether that special treatment under section 33(3) is required at all. I understand it's not required in the large majority of jurisdictions in Canada; in fact, we may be exceptional in our language around workplace investigations.

I would draw your attention to – and I know it's a different body with different purposes – a very short submission you have from the Office of the Citizens' Representative, a statutory body with very significant investigatory powers. When I look at their submission, they speak very much to the importance of preservation of the integrity of the process and the importance of confidentiality to the integrity of those processes. They refer to the importance of the interests of complainants, respondents and witnesses participating in those processes.

When I look at Memorial University as a public body and recognizing the complexity of our institution and our mandate investigations –

whether it's sexual harassment, sexual assault investigations made between students, and quite often between students and employees with significant power imbalances with respect to the individuals engaged in the processes; respectful workplace, again, academic misconduct – the institution shares that concern. All our processes are informed by language that stresses the importance of confidentiality with respect to those individuals that participate.

When I think about investigations in our context, they're not always single complainant, single respondent. Quite often, they're multiple complainant, single respondent. Quite often, timelines have to be extended to allow for a proper investigation. Quite often, investigators are speaking with witnesses. Then, based on others they speak to, they have to go back to either a witness, complainant, respondent. Certainly – and this is to support the OIPC recommendation – until the investigation is complete, very concerned about requests for disclosure of documents during an ongoing process, in terms of how it may compromise, have a chilling effect.

With respect to sexual harassment and sexual assault, Memorial University has very, very – obligations, of course, to all our employees, but very special obligations to students in a teaching and learning context. All Canadian universities in the last decade and, in some cases, legislatures, have mandated stand-alone sexual assault policies. In this area, universities are, I believe, universally committed to protecting the interests of individuals who engage in those processes and allege sexual harassment or sexual assault.

It is absolutely critical that those persons be able to walk into those offices and engage in conversations with individuals who advise them on pathways, and recognizing the importance of complainant choice with respect to pathways, which may include references to speak to legal authorities, whether it's RNC, RCMP and the like, and very nervous.

When I say that, in these processes, there's initial intake and initial discussion and it may give rise to a formal complaint, and (inaudible) in terms of a formal complaint that I understand. But when there's a formal complaint lodged, the respondent is provided with a copy and a full opportunity to respond. We miss that the dialogue between people that engaged these processes continues from the first consultation throughout an investigation process and perhaps even subsequent to an investigation process. I know we can't always ensure confidentially having regard to an individual's right to speak about their personal experience and how they have been impacted, but that's the individual's right.

When I look at the Office of the Citizens' Rep – and I understand their statutory context is different, core interest is so important. The worst thing that could happen for us is that this important piece of legislation around access to information and privacy be utilized in a manner that compromises the integrity of those processes. When you look at the myriad of requests that Ms. Thorne has attached to our submission, you'll see a significant number of requests that relate to a number of investigatory processes. So, for us, this is not a one-off. It's a regular part of what we do.

I simply wanted to add those comments on behalf of Memorial University to support our submission around workplace investigations.

The only other area I would like to touch on, with your permission, of course, is to just touch briefly on some of the conversations you've had in your forum about public interest, public override, unless you have a question for myself, Ms. Thorne or Mr. Greene with respect to my comments.

CHAIR ORSBORN: Just in terms of individuals coming in on a confidential basis to complain about workplace conduct.

Let's assume that perhaps you get three or four, for example, students come in to complain about an individual employee or professor, or whatever, then there's a discussion and the student goes off happily and no investigation follows, but those complaints against the employee are filed. Is it possible that in the later management of that employee, considering promotion or shift assignment or whatever, that those complaints could factor into the decision-making and the employee have no clue of what influenced the decision?

MR. COOPER: That would be highly unusual. Investigations are just that.

CHAIR ORSBORN: Outside the context of an investigation, you have a student come in and make a complaint about an employee for whatever reason, it's dealt with and the employee never even finds out about it. The student goes off happy and thank you (inaudible.) That happens two or three times and you've got an accumulation of information about an employee being complained about – no investigation. Everybody is happy, but is it possible that that information could affect a later promotion or assignment decision by the university and the employee would have no clue as to what influenced the decision because they couldn't get at it because under that definition of personal information?

MR. COOPER: I will ask Ms. Thorne to speak to this, but what I would like to say is our processes – and I don't think they're unique in that regard. Of course, in the university our promotion and tenure process for academics are highly prescriptive, just overlaid with, I believe, very important due process.

CHAIR ORSBORN: This could be somebody operating a snowplow for the university. It doesn't have to be professor.

MR. COOPER: Okay, that's a fair example because I know some of the issues that Ms. Thorne has raised earlier about some of these requests engaging privacy interests with respect to other individuals who have expressed that opinion, not protected by the current definition.

I think the interplay is a little different outside of a workplace investigation context but it doesn't mean that the interest is not important. I do recognize the tension you've identified and maybe the potential for mischief, but to me what's so important when you see these competing interests is the ability to gauge in some kind of balancing. I'm not sure that option is there under the current framework.

I'll segue to Ms. Thorne because if I've missed a nuance there, I'd really appreciate (inaudible.)

MS. THORNE: I appreciate the question a great deal because wearing my privacy hat, this is something that I say all the time when I'm in discussions and meetings and whatnot; I reiterate that people have a right of access to personal information about themselves.

In the context, however, that you've described, the snowplow operator or the professor or the student, there may be an email or handwritten notes of a discussion that's been retained. It may be retained in the scenario by an employee down the hall, a supervisor or whomever. But if there's a decision that's made that no action is being taken, so in other words, the student goes away happy, the record will probably just sit there, if that unit – or it may sit there or it may be deleted right away, maybe shredded, it may never go anywhere. But it's certainly not going to go to the person's personal file. It's not going to go anywhere else. It's not going to go to any decision-makers, because that would be a violation of the confidentiality, the confidential discussion with the student.

If the student wants to take a complaint further, or anybody wants to take it further, then there's a process. But what you'd have is an orphaned record, probably, sitting somewhere doing nothing. I mean, it raises privacy issues because there ought to be a records retention and disposal schedule that's being applied in which the record may be kept for a period of time and then it's securely disposed of and so on.

CHAIR ORSBORN: Yeah, the issue may be perhaps moot in the university, maybe less so in a smaller public body where the coordinator and the decision-maker and whatnot is the same person.

MS. THORNE: So perhaps then there needs to be more policy and process put in place to handle those sorts of situations so that employees understand. I think that the principle of providing a safe environment for employees to be able to discuss workplace concerns is absolutely –

CHAIR ORSBORN: Well, that goes to Mr. Cooper's point about the balance.

MS. THORNE: Yeah. Those sorts of records would never find their way in someone's personal file, and if they were going to be acted on or used in any way, then my position would

be that the other subject – so there are two privacy interests, the one expressing the concern and the one that the concern is about – would have a right of access, if there are decisions being made about her or him based on that.

CHAIR ORSBORN: I understand.

Did you want to talk about the public interest, Mr. Cooper?

MR. COOPER: Yes, that would be great, thank you very much.

I have just a couple of comments or thoughts that I'd like to share. I haven't had the opportunity to review all of the video submissions, but the fact that you've archived some of them and made them available, it's been very helpful as a participant in the process to be able to go online, where possible, and listen to some of the conversations. I did have an opportunity to view some of the conversation and dialogue in this forum with the OIPC around public interest. I found it very interesting and I believe it's important.

A couple of comments I would like to make with respect to section 60(2) – and I was mindful, Mr. Chair, of your reference to a previous decision of Justice Murphy who spent some time making commentary on the public interest in the context of the ATIPP legislation. I think it was the Mastropietro v. Newfoundland and Labrador (Education) case back in 2016.

As I read the decision and I reflected on the language and the conversation that has occurred, I support many of the findings, conclusions of Justice Murphy in that. There are references in that decision to the Ontario legislation; I think the only other jurisdiction that has something that looks like the construction of our 60(2). It appears, as I look at the language, I would submit, for the university, that it's not clear as to where the onus lies under that particular clause in terms of clearly demonstrating that public interest outweighs.

What I do notice in the judicial commentary was an indication or a conclusion from the court in that decision that the language doesn't put the burden or the onus on the public body in this respect.

CHAIR ORSBORN: It's on the applicant.

MR. COOPER: It does raise the question and if it doesn't, should it? Where should it lie? How should it be dealt with? At the end of the day, I saw considerable merit in the submission that when it comes to public interest, typically, there's an assertion of a public interest and raises the question who's best positioned to raise the question, put the issue into play.

I do believe a public body, by the nature of its work and its knowledge of a record – and I understand that the applicant to the extent of requesting a record that's been denied, they haven't seen the contents. So what I really like about the decision is it underscored some of the difficulties in trying to work public interest into the application of those discretionary exemptions.

There are a couple of things there that we support. Number one, in many cases, the applicant is best positioned, to the extent that is possible, to raise those issues with respect to the application of the override. We suggest the notion that the onus of burden can't be absolute and perhaps need to be relaxed because of some of the limitations in the knowledge that an applicant may have. We don't have language or wording, but we strongly believe that some clarification in this area has value.

I found it interesting, again – and I know the context is different, but it was in the *Citizens' Representative Act*. Under that act, there was a certain power to refuse to investigate. What was interesting, the language was "in the opinion of the Citizens' Representative" that there was a public interest in not proceeding with the application. I found it interesting in where that sort of onus lied in that legislation with respect to raising a public interest aspect for consideration.

Even when I read the judicial decision on the one in Ontario where the judiciary also recognized that the onus was silent, it appears that the courts went on to make the determination on the basis of either judicial notice of something or a document that may relate to the interests that had arisen, or the characterization as the request having related to a private interest case of Mastropietro to

advance litigation in another form. There may be some things here that help us – and when I say, help us: public bodies, the Commissioner, courts. I believe there's a common interest in ensuring that public interest is paramount, because even in terms of the purposes of the act's transparency and accountability, at the core I think those things go to the public interest in public bodies and how they work and function.

CHAIR ORSBORN: If you're sitting as a judge and public interest is an issue, what do you do? Who goes first?

MR. COOPER: I'll be frank, I don't have a – I'm thinking as I speak to you here today, but that is an important question. Oddly, sometimes I think of it in the notion of shifting onus. I think human rights and non-discrimination – someone has to establish a prima facie case of non-discrimination and then, all of a sudden, the burden shifts to prove bona fide occupational requirement, for example. Or in job competitions, I establish that I'm qualified and the onus shifts to show that you weren't qualified.

There's a whole range of decisions that have to be made where it's not just about one of the parties having a role in presenting the evidence and the considerations for consideration by the court. Maybe that's true whether or not; sometimes it's not as important who leads as to what's heard at the end of the day and what's significant.

CHAIR ORSBORN: Yeah and public interest, by definition, is something of interest to all participants, not just one participant.

MR. COOPER: Absolutely, I agree.

CHAIR ORSBORN: I recall one from the Wells committee report. Chief Justice Wells said speaking to public interest is a decision that has to be made at the highest level of the public body.

I had a question there –

MS. THORNE: I've heard lots of discussion about the public interest override and who decides and so on this week, but one of the things that I've not heard – not to say that it hasn't been talked about – is the relationship between that and an estimate and waiver of costs. Under section 26(3): "The head of a public body may, on receipt of an application from the applicant, waive the payment of all or part of the costs payable … where the head is satisfied that (a) payment would impose an unreasonable financial hardship on the applicant; or (b) it would be in the public interest to disclose the record."

Of course, we've not had, I don't believe, any judicial consideration of this, not least because there's hardly ever a fee estimate issued.

CHAIR ORSBORN: The thing is that I've seen – I think, probably, the university collected most of it. You're running around $600 across the whole public body.

MS. THORNE: Yeah, we've not issued one since 2019. I think we issued four in 2019 or 2018 and that was the most.

CHAIR ORSBORN: It probably cost you more to do it than they're worth.

MS. THORNE: Yeah, in terms of the time and stuff.

Anyways, the reason I raise it is because it is there and the onus here, under the estimate and waiver of costs, is on the head. So the head can waive the costs, if it would be in the public interest to disclose the record.

Based on my experience or reading and whatnot of events in access and privacy across the country, as I say, we don't have a lot of experience here in this province with it, but this similar provision regarding costs exists in all of the access and privacy acts. I think fees are more judiciously applied – I don't know about judiciously applied, but more regularly applied in other places. Quite often, journalists will apply to have the fees waived because the subject matter of the request is in the public interest.

There would be decisions out there about what constitutes, possibly, in terms of decisions to permit. So, for example, if a head of a public body denies a fee waiver request and the person complains to the Commissioner, then the

Commissioner will investigate. I don't know if there is anything to be learned from reading those sorts of decisions about public interest in the context of fee waivers, is all I'm saying, right.

Anyways, in our act, it's up to the head of the public body to make a decision to waive on the basis of the public interest in disclosure.

CHAIR ORSBORN: Okay, thank you.

I'll give you a final question and I'm not sure who wants to answer it.

In talking about the public interest and the override, is there a difference between the public interest in the context of the override provision and the public interest in the context of a discretionary exception? Because, as I understand it, in the discretionary exception, the head of the public body determines that the exception applies, but then goes on to decide whether or not the discretion should be exercised to release the information in any event. Now, is that process any different than applying the section 9 override?

MS. THORNE: My experience is that the exercise of discretion almost inevitably would take public interest into account.

CHAIR ORSBORN: Yeah, that's my understanding when –

MS. THORNE: And that's my experience.

CHAIR ORSBORN: – the Supreme Court said that. Yeah.

MS. THORNE: Yeah.

CHAIR ORSBORN: Does the override provision add anything?

MS. THORNE: Probably not.

CHAIR ORSBORN: At least where the exceptions are discretionary.

MS. THORNE: My office identifies, for example, that this qualifies for protection under section 29 and then we have a discussion with the relevant parties. My discussion with them is: Okay, but can we not release it anyway? It's been in the news last week, or there's no harm, or it's already been decided and announced in senate, why can we not release it? So we go through that exercise.

CHAIR ORSBORN: Okay.

MS. THORNE: Right, yeah.

MR. COOPER: Mr. Chair, I think it's a very good question as to whether the override is necessary at all. When I respond in that way, I just think about the differences, even under section 9 with respect to section 9(3), where not in the exercise of a discretionary exception, the head of a public body shall, without delay, disclose where there's a risk of significant harm to the environment. Those are areas where clearly there's an obligation to apply that public interest consideration. I look at the section, clearly with the public body, in terms of, I think, both obligation and reasons.

So an example I think of most clearly – and, at the time, I'm not saying I thought about it or it was even involved in the context of this clause, but a number of years back the university had a circumstance, I believe, where a water main, either on or adjoining to the university testing, revealed the presence of lead. The university immediately, as did I believe other stakeholders, whether it was the city or otherwise, but immediately looked at public interest in the context of the information that it had available, and there was disclosure to affected parties, public. I look at that kind of disclosure as being extremely important and being consistent with that type of obligation.

That's a little more complex when you have a discretionary exemption where there's already a public policy basis for the exemption. So I believe the question you raised is very important.

CHAIR ORSBORN: Thank you all very much. I found the discussion very helpful. I appreciate you taking the time to come back and finish the submissions.

We'll adjourn now until 2 o'clock, and, weather permitting, we'll hear from the Chief Electoral Officer.

Thank you.

(Due to impending weather, the afternoon session is cancelled and the committee will resume on Tuesday, January 26, 2021, at 9:30 a.m.)