ATIPPA STATUTORY REVIEW COMMITTEE 2020

Transcript Volume 6

Committee Chair: Honourable David B. Orsborn

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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 will follow a little different format from previous sessions.

Section 33 of the act, the section dealing with access to information related to a workplace investigation, has generated a lot of comment and a number of suggestions for change. Unlike the case with most other provisions in the act, there seems to be a general consensus that the operation of section 33 has given rise, on occasion, to unintended and unfortunate consequences and that some amendment is required.

I felt it would help me better appreciate the issues and concerns if the committee held a session devoted only to section 33 in a format that might allow a little freer discussion and exchange of views. A number of those who have made written submissions have agreed to participate this morning.

This morning we have on video, on behalf of the Centre for Law and Democracy, Mr. Toby Mendel and Mr. J. Y. Hoh; on behalf of the Newfoundland and Labrador English School District, solicitor, Bernadette Cole Gendron – I think experiencing some technical difficulties right now; in person from the Office of the Information and Privacy Commissioner, Michael Harvey, the Commissioner himself, and with him, Mr. Sean Murray; from the College of the North Atlantic, Heidi Staeben-Simmons and Donna Eldridge; from the City of Mount Pearl, Darren Wall; Dr. Anton Oleynik, on his own behalf; and from the City of St. John's, Katie Philpott and Kenessa Cutler. Welcome to you all.

May I suggest that each party first give a short comment on your views and suggestions, and in the course of your discussions, I would be grateful if you give me your thoughts on the various interests that may be involved in a workplace investigation, and how those interests should be considered in the access to information context? I will likely have some questions, perhaps to one participant, perhaps to all, but I'll manage the format as we proceed and see how we get on.

As I've said before, this committee is not an adjudicative or dispute resolution forum. I consider it appropriate that I adopt a collaborative approach. Accordingly, there will not be any particular order of presentation, but because of other commitments that two parties have, I will call on them first.

In order to keep the website audio as clear as possible, may I ask that if you are appearing remotely that you mute your sound if you are not talking, and if present in person, please only turn on your microphone when you are talking. When you are talking into the microphone, please make sure that the microphone is directed to your mouth rather than off to the side somewhere.

With that introduction, I'll ask Mr. Mendel or Mr. Hoh of the Centre for Law and Democracy to make their comments, please.

MR. HOH: Good morning to the Chair. Thank you very much for inviting us again.

Just before I start, can I just check whether or not my video and audio is being uninterrupted. Just to see whether everything is okay and (inaudible).

CHAIR ORSBORN: I'm sorry; I'm having some trouble with the sound in trying to pick out what you're saying.

MR. HOH: Okay, I'm going to adjust the audio and the video. Just give me one second.

MR. MENDEL: I'm not sure if you heard that. J. Y. is going to lead our presentation. He is having a little bit of trouble with his audio and video and he's making some technical adjustments. Hopefully that will be very quick and he will come back soon. Maybe now.

CHAIR ORSBORN: All right.

MR. HOH: (Inaudible.)

Are you able to hear me?

CHAIR ORSBORN: Anybody understand that?

MR. HOH: Testing. Is the room able to hear me?

CHAIR ORSBORN: Would you like us to proceed with another presentation while you get things straightened up?

MR. MENDEL: Mr. Orsborn, you can't hear J. Y. Is that correct?

CHAIR ORSBORN: No and it's a little bit on the garbled side. I'm having trouble understanding anybody.

MR. MENDEL: But you can hear me clearly enough, or I'm also garbled?

CHAIR ORSBORN: I can hear you clearly enough. Yes, thank you.

MR. HOH: Can you hear me now, Mr. Orsborn?

CHAIR ORSBORN: I'm sorry?

MR. MENDEL: He asked if you could hear him. I can hear him quite clearly.

I think the best would be to go ahead with another presentation and we will try to fix it up and come back.

CHAIR ORSBORN: All right. Thank you very much.

MR. HOH: Thank you.

CHAIR ORSBORN: I take it we don't have Ms. Gendron yet, do we?

No. All right. This is a workplace, is it?

Perhaps, if you don't mind, I'll call on the College of the North Atlantic. I'm not going in any particular order. Turn your mic on, please, and turn it towards yourself.

Thank you.

MS. ELDRIDGE: Thank you, Justice Orsborn, for the opportunity to participate in this round table.

CHAIR ORSBORN: Just pull your mic in a little bit closer to you, please. Can you pull the whole thing a bit closer to you?

MS. ELDRIDGE: Better?

CHAIR ORSBORN: Yes. It was a little bit faint.

MS. ELDRIDGE: Okay.

CNA recognizes that the spirit and the intent of section 33 are consistent with the principle of natural justice. We also feel that it complements our own policies and procedures concerning the potential for misconduct in the workplace. We do, however, feel that revisions are necessary to ensure that section 33 does not become a deterrent to people who need to come forward, make a complaint regarding workplace misconduct or bear witness to it.

We respectfully submit the following: The complainants and witnesses related to a workplace investigation should remain anonymous in the disclosure made under ATIPPA. A respondent to a workplace investigation must address the alleged misconduct or harassment, and the identity of the complainant and the witnesses is not always necessary. We submit that the decision as to whether or not the identity of the complainant or the witnesses is necessary should be made by the overseers of the workplace investigation and revealed only as necessary in that process.

Consideration must also be given to protecting the identity of those people involved in a workplace investigation and the potential for harm. Disclosure made in accordance with section 33 could result in anxiety, emotional distress and possibly physical harm for complainants and witnesses in a workplace investigation. For example, threats and intimidation experienced by individuals within the community, or on social media, after their involvement in a workplace investigation is made public. This harm is exactly what is anticipated by section 37 of the ATIPPA. Unfortunately, because section 33 is a

mandatory disclosure provision, section 37 cannot be considered.

We respectfully ask that some change be implemented to allow for this consideration in regard to the risk to the individual's safety caused by the disclosure of statements or other related records to a workplace investigation. This serious implication of section 33 disclosure in people's lives will deter many from coming forward to make complaints and to give evidence in support of one. Other exceptions to disclosure should also be considered when releasing information under section 33; section 40, disclosure harmful to personal privacy; and section 30, legal advice, in particular.

Solicitor-client privilege still exists within the context of a workplace investigation. Public bodies must seek appropriate counsel in these matters, and records related to the giving and the receiving of this counsel attract the same privilege as any other record of legal advice. It is also our experience that third party personal information often occurs incidentally in witness statements and the release of this information is an unreasonable invasion of personal privacy. For example, individuals may be listed as being present at a certain event or incident, but are not actually called as a witness.

We believe our suggestions are consistent with those of many others who are presenting here to you today and we look forward to this discussion.

Thank you.

CHAIR ORSBORN: Thank you, Ms. Eldridge.

All right, let's stay in that row.

Dr. Oleynik, are you ready?

DR. OLEYNIK: Yes, I am ready.

CHAIR ORSBORN: Thank you.

DR. OLEYNIK: Let me first make a comment about, mostly, if I'm not wrong, people around –

CHAIR ORSBORN: Can you just turn your mic in towards you just a little bit?

DR. OLEYNIK: Better?

CHAIR ORSBORN: Yeah.

DR. OLEYNIK: Thank you.

CHAIR ORSBORN: Thank you.

DR. OLEYNIK: What I'm saying, that based on just a cursory observation, it's safe to assume that it's mostly public bodies that are making submissions with respect to section 33.

Section 33 is designed – at least it can be interpreted – to protect the rights of people who are under investigation. These rights – more specifically the right to know the case to be met – are recognized as one of the foundational principles of procedural justice. It means that any restriction that can be imposed on section 33 will involve also restrictions on the right to know the case to be met. That's something that we need to bear in mind because I believe that when the Legislature introduced section 33, had the intention, indeed, to provide as much information as possible to people who are involved and, especially, subject to workplace investigations, to enable them to defend themselves. That's my position and that's what the reading of that section suggests.

Furthermore, the fact that – again, based on the Commissioner's interpretation of that subsection – it trumps any other exemptions. That further confirms that it relates to the basic right to know the case to be met. Because if this charge – say, okay, that exemption may trump over section 33 privilege, at the end of the day what will be left is just a small piece of information that supports the public body's position. That's exactly the opposite of what the Legislature wanted.

I would like – and I will develop further after hearing other submissions – to invite you, Sir, to also pay attention to tensions between the laws, ATIPPA, in this case, and institutional bylaws. If you read written submissions that are available on the website, we can easily highlight or recognize the following argument: let's not release anything before the investigation is over. It's a very tricky argument. Why? Because how an investigation is carried out is subject to institutional bylaws. Institutional bylaws can be changed virtually overnight and they can be

changed in the way that essentially nullifies all privileges that are supported by section 33.

Let me give you an example. In the case of Memorial, there is a rule that after receiving the report, a party to the investigation has just five days to respond. What is proposed, and not only by MUN but several other public bodies as well, is that let's just seal everything until the investigation is over. Let's now put it in the context of that institutional bylaw at Memorial University. Everything is sealed; nothing is disclosed until the moment when the report is issued. Then the parties will have just five days to respond.

According to the law, it takes at least 20 working days – not even calendar days, working days – to get the information. So, essentially, the information will be provided too late and it will be no use unless the party will be willing to go to the court, but that's exactly the opposite of the intention because it will overburden the system. It means labour arbitration boards, the Supreme Court of Newfoundland and Labrador and so forth. Why not to deal with everything at the first level, instead of again denying all information and then saying now it's too late, decision is taken, sorry; you have the right to appeal that.

I will stop here because I would like to develop further my argument within function of what other people at this round table are going to say.

Thank you.

CHAIR ORSBORN: All right, we'll see how it progresses, Sir. I think a lot of that is covered in your submission, as well, that I have read.

I believe we have Mr. Hoh available now?

MR. HOH: (Inaudible) you're muted for us.

CHAIR ORSBORN: Hello? Can you hear me, Mr. Hoh? Gone again.

MR. HOH: Testing, testing.

CHAIR ORSBORN: Can you hear me, Mr. Hoh? My understanding is that the difficulties are on that end and not on this end.

MR. HOH: Mr. Orsborn, you're muted. We can't hear you.

CHAIR ORSBORN: You can't hear me?

MR. HOH: Or anything.

CHAIR ORSBORN: Well, my microphone is on. I think we'll have to move on.

Let me ask the City of St. John's, perhaps, for your comments, please.

MS. PHILPOTT: Thank you.

Thanks again for the opportunity to take part in the discussion about this somewhat challenging section of the act. Ms. Cutler, our ATIPP coordinator, is unfortunately unable to attend today, but she sends her regrets.

First and foremost, the city is very cognizant of the personal nature of the information collected in the course of a workplace investigation. We believe it's our duty not to undermine the confidentiality in that system, and protect employees from reprisals or retaliation. We also want to support a culture where employees feel comfortable coming forward as victims or witnesses, and not deterred from engaging in the process.

The act currently does not offer adequate protections in this regard. We believe there needs to be limitations on access, most notably a limitation with regard to individual or public safety as outlined in section 37. As well, other exceptions to access such as legal advice, disclosure harmful to law enforcement and unreasonable invasion of personal privacy should also apply. It's also critical that disclosure not occur until the investigation has concluded. That's to help prevent derailing of the investigation or interference into the workplace investigators' duties. In that same vein, we also believe draft or incomplete reports should not have to be disclosed.

The city would also like to comment on an issue raised in the Privacy Commissioner's submissions, and that's whether section 33 should be expanded to cover harassment investigations in public sector contexts other than the employment relationship. Looking here

at elected officials of municipalities, for example, or boards of directors for public bodies. That's something that the city absolutely supports.

These elected officials or boards of directors for public bodies are not employees as contemplated in the act currently, yet they can absolutely be parties to an investigation into their conduct in the workplace. We would support an amending of the definition of "workplace investigation" to cover these individuals, which we believe would be in line with the purposes of the act, specifically section 3(1)(b), which deals with keeping elected officials and officers of public bodies accountable.

Those are the comments of the city.

Thank you.

CHAIR ORSBORN: Thank you.

Mount Pearl.

Mr. Wall, thank you.

MR. WALL: Thanks for inviting us here today.

One comment that we wanted to make in relation to our previous submission is, we made a suggestion to remove section 33 from the act, and after reading some other submissions and things like that, we are reconsidering that, so remove that suggestion that we had in our original submission.

CHAIR ORSBORN: Yeah, the Privacy Commissioner commented on that in his submission and indicated that in previous times there was a lot of difficulty sorting out the personal information if that section was not there.

MR. WALL: Yeah, and it was reading through that submission, along with some others, that changed our opinion on that piece.

While the City of Mount Pearl respects the right to access to information, we believe the current legislation under section 33 will prevent or prohibit public servants from coming forward in any workplace investigation. As such, we strongly recommend that this section be rewritten to focus on how to protect public service employees in harassment investigations in which they may be witnesses or parties to.

My colleague, Cassie Pittman, is going to talk about, sort of, what we've labelled the human component of section 33.

MS. PITTMAN: Thank you, Darren.

As Darren mentioned, we respect the act and we certainly respect the right to access to information. We welcome the opportunity to bring forward the input of our municipality, and we wish to bring forward the real-life impact of section 33 to this round-table discussion.

The City of Mount Pearl has been subject to the impact that section 33 can have on the workplace and questions the broad nature on which the section is applied, and if consideration is given to the mental and physical harm that can come from upholding this section of act as it is currently written, interpreted and applied.

The city has recently had a very public investigation, which under ATIPP legislation required us to release witness statements from witnesses in a workplace investigation to the respondent in a harassment investigation. While we respect access to information, we question the rationale behind full disclosure where protection of complainants and witnesses comes into play.

Witnesses often have significant personal concern over coming forward in a workplace investigation, especially when the party in question is in a position of authority. The legislation is presently written with no protection for these parties who are terrified of retaliation and outcomes of an investigation, especially if all parties return to the workplace.

The City of Mount Pearl had a large number of people come forward providing what were believed to be confidential statements. However, once the OIPC ruling was made releasing the statements to the respondent, city staff experienced torment, complemented with increased sick leave and stress-related leave. In addition, the mental anguish caused by the release of this information resulted in employees crying in offices over the fear that they and/or

their families would be retaliated against by the respondent. This specific example generated a significant concern in relation to the likelihood of information provided via witness statements being used against someone as a form of retaliation or reprisal.

In these cases, especially if the respondent is no longer an employee, it is next to impossible to prove retaliation has occurred. As such, municipalities have no manner in which to protect complainants and witnesses. While we respect the act, we feel it is not supportive in the pursuit of protecting those who come forward and will prohibit the ability for an employer to provide a workplace safe from harassment.

The timeline of the request for workplace investigations has the ability to significantly draw out a process that should, under most policies, take less than a month to assess and complete. The longer the process continues, the larger the likelihood of negatively impacting staff members involved.

In the city's case, the request for records delayed the completion of the investigation by over seven months, which caused near-irreparable damage to staff members involved. In short, this has the ability to drag investigation time frames on and further has the ability to impact the integrity of the investigation if records are requested midstream. Both are reasons to limit the timeline in which access to information is available to the end of the investigation. We have compiled some recommendations that Darren will walk through.

CHAIR ORSBORN: Thank you.

MR. WALL: The recommendations that we put forward are not dissimilar to some of the other recommendations put forward by people already today.

One of them is the investigator as the custodian of the records related to the investigation. We feel that the investigator alone should have access to the witness statements and, in certain circumstances, the complainant's statement. While we believe a statement of facts and findings or allegations should be presented to the respondent based on the statements provided so the individual can properly respond to the accusations, and we question whether verbatim witness statements should be exempted from disclosure, we ask that: Aside from enabling retribution or reprisal, what is the purpose of providing a verbatim witness statement and names to the applicant?

The timing of requests and investigation: Request for workplace investigation materials should be refused until the investigation is completed.

The ability to apply exceptions to documentation: Public bodies need the ability to apply sections of the act for redaction purposes, specifically section 30, 31, 37(1)(a) and 40 – which I think a number of people have already touched on and addressed – as, in some instances, there may be information presented in the investigator's report that should be withheld for a variety of reasons, so the public body should have the ability to apply these sections to the act under a request.

CHAIR ORSBORN: Thank you.

Do we have anybody?

MS. MULROONEY: (Inaudible.)

CHAIR ORSBORN: Yes.

MR. MURRAY: Mr. Commissioner.

CHAIR ORSBORN: Mr. Murray.

MR. HARVEY: Thank you, Sir.

Thank you for convening this round-table approach to this particular section. In this particular section, we have made a number of recommendations and I'll review those. We've talked about them already; other parties here have.

I will say that with these recommendations in particular we're not, I'll say, married to any of them. We recognize, like the other people here and others who made submissions to the Committee but aren't here, that there is a problem with this section of the act. We're here in a problem-solving mode and with an open mind. I think this format is excellent for that purpose.

I'll start by talking a little bit about what we understand to be the intent of this section of the act, based on our understanding of the history. It is unique in Canada – even though in Yukon and in New Brunswick there are sections related to workplace investigations. This particular one is unique in that it creates, at the same time, a mandatory exception to access for people that aren't parties to a workplace investigation. It also creates a mandatory right of access that's very broad to anybody who is a party to a workplace investigation.

Other people here talked about the policy intent and what we believe it should be. We agree. I think that it should balance the rights of the parties in a workplace investigation but also, in our view, should recognize there is a power imbalance that is inherent in many workplace investigations as well. We do agree that to the extent possible it should avoid deterring complainants and deterring people from bearing witness to a workplace investigation but, again, to the extent possible, as those rights of the parties to the workplace investigation are also protected. It's a careful balancing act.

I think it's important to talk a little bit about the history – and you've alluded to this already – of how it came to be in the act. Really, we don't really know. These amendments were introduced along with the Bill 29 recommendations. But while there was some discussion during this equivalent stage of the review process, being led by Mr. Cummings at the time, there wasn't an extensive discussion in the report and, from my understanding, not in *Hansard* either.

The amendments appeared in Bill 29 without a very clear statement of the policy intent. That said, I would not, as Dr. Oleynik has stated, necessarily conclude exactly the – I wouldn't come to exactly the same conclusion that the intent of the way that section 33 overrides all of the other mandatory exceptions in the act was necessarily intended to override all of those exceptions to provide a maximal right of access.

I put a bit of a nuance. It's very clear that to operate properly, section 33 must override section 40, and that is to untangle the mischief that was identified at the time. The mischief at the time was the ATIPP coordinators, prior to these amendments, were encountering difficulty disentangling what personal information belonged to whom. In particular, if I expressed an opinion about Mr. Murray here, is that my personal information or is it his personal information, or is it somehow both of our personal information? What's to be done with that? How do we disentangle that?

I think it's the clear intent that section 33 was intended to override section 40; however, the way the act was structured, though, does not differentiate section 40 from any of the other exceptions in the act. So structurally, therefore, we can only logically conclude that section 33 does override all of the other exceptions in the act.

I will say this has put me personally in an uncomfortable situation. I think my predecessors have found this as well, but I'll speak personally about how I felt uncomfortable. There were two reports in which the public body was suggesting there was some risk of personal harm that may arise if personal information was disclosed. They cited section 37. Now, as it happened we – this is all, of course, in the public domain because it was the subject of two reports that were written within the past year – probed the public body to see if indeed they could bring forward evidence that there was such a risk of harm.

They weren't able to do so and so we proceeded to recommend disclosure. I felt quite uncomfortable because even if they had come forward with evidence that would support a claim of section 37, I would've still felt obliged to find that section 33 was paramount and that the information should still be disclosed. That would put me in a very uncomfortable situation to recommend the disclosure of information that could create a risk of harm. I also feel that it doesn't make sense for section 33 to override certain other exceptions in the act and that it's not necessary for it to do so.

Hence, the first recommendation that we made in our submission – that's Recommendation 2.1 – is that your committee recommend that the government "Amend section 33 to provide that certain other exceptions in the *Act* are to be applied to the records before any disclosure, regardless of section 33." We identify section

27, which is Cabinet confidences; section 30, which is legal advice; section 31, law enforcement; and section 37(1)(a), individual or public safety. We do list those ones but we don't intend that necessarily to be a truly exclusive list. We would certainly be happy to discuss other possibilities as well.

The second set of recommendations that we discuss is a limitation of when the right of access to the parties to a workplace investigation should be provided. We characterize that as limiting the temporal application of the right of access, in particular, that it applies when the investigation has concluded and prior to the initiation of any disciplinary procedure.

To recognize a point that Dr. Oleynik has made, this does require solid policies, clear policies by public bodies. If such an amendment were made by the Legislature, it would certainly place a burden on our office to do training for public bodies, to make sure that they understood the importance of clear policies to make sure that this section could be properly implemented.

The intent of our recommendation is to really prevent the right of access from interfering with the investigatory process. As it currently stands, parties to a workplace investigation can seek access to documents while the investigation is happening. This can interfere with the course of the investigation, but we do not feel that limiting the right of access in this way is limiting the principle of natural justice, the right to meet the case that is being brought.

A workplace investigation itself is not inherently a legal proceeding. The disciplinary process that may follow after the conclusion of that process may well be, so it is the report that is brought forward from that process that we feel it is important to provide the applicant a right to. We feel that it would be appropriate, to protect the integrity of the investigation, to limit it in this temporal manner and to provide for the investigator to control the process while it's happening.

The final recommendation that we made – the third one – is related to the scope of section 33. Currently, it applies to employees, but we recommend that it be considered and we recommend that you consult – as you are, of course, currently doing – with public bodies on whether it should be broadened to apply to other contexts within the public sector, such as boards of directors. We advance that for consideration because we do feel that within the public sector the same basic logic applies.

I do recognize the submissions that were made by the Citizens' Rep and the Commissioner for Legislative Standards about the particular nature of investigations into MHAs, and I recognize that. I think one way that you could approach this, while at the same time recognizing the points made by the City of St. John's, would be to include section 41 as one of those clauses that would not be subordinate to section 33. This would protect the MHA investigatory process while at the same time providing the possibility for it to be broadened outside of that particular MHA process.

That, I think, concludes what I wanted to say as introductory comments. Although, I'll ask Mr. Murray if I missed anything.

MR. MURRAY: The only thing I would –

CHAIR ORSBORN: Just turn your mic on, please.

MR. MURRAY: Yes, Sir.

The only thing I would like to add is – unfortunately, the ATIPP office can't be here today, but they did make a couple of recommendations and I would just like to throw out a couple of thoughts on those. They did reference a couple of other jurisdictions which do have provisions relating to workplace investigations: one is New Brunswick and the other being the Yukon.

They're interesting to look at and consider, but when you look at them I think it's worth reflecting on the fact that neither of those provisions recognize the temporal issue that most of the people have identified here today. Also, they introduce discretionary exceptions for this information that could be applied unevenly. If we're trying to find a balance between protecting privacy and allowing certain amount of disclosure for procedural fairness, it's not clear that these two provisions would help public bodies strike that balance. It pretty well opens it

pretty wide open as to how they might exercise their discretion. The other thing with that, there's no recognition of the inherent power imbalance, which Commissioner Harvey has mentioned as well.

I think one of the issues that have been identified in Mount Pearl, and some of the other submissions, is that I think there's a desire for some clarity and certainty from the point of view of potential complainants so that they will not be fearful of coming forward because of retaliation and things of that nature. Exceptions that are discretionary but applicants could get the entire record – they might not get any of it – might not really meet that goal.

New Brunswick's in particular, which allows records to be viewed but not accessed, that's not something we see in much access to information legislation, which is typically about obtaining copies of records. It could also cause its own problems in terms of different people seeing different things in records and coming away with different impressions. That could cause its own set of problems.

I just wanted to comment on a couple of those things. As well, the recommendation was also made, I think, by Memorial to change the definition of personal information so that you wouldn't get someone else's opinion about you, which is, I think, one of the key things you get in workplace investigations. I did hear your exchange with Memorial when they presented and I think you pointed out that could cause a problem for – someone could send a letter in to a public body about an employee and the public body could act on that letter. It may be incorrect, having incorrect information, and the employee would have no way sort of countering that or responding to it.

That's all I want to add at this point.

CHAIR ORSBORN: Thank you.

Do we have anybody? Who do we have?

MS. MULROONEY: (Inaudible.)

CHAIR ORSBORN: All right.

Can I call on the Centre for Law and Democracy, please, to make your comments? Either Mr. Mendel or Mr. Hoh.

Thank you.

MR. HOH: Good morning to the Chair.

Can I just confirm that you are able to hear and see (inaudible)?

CHAIR ORSBORN: Can anybody help me with what he said?

MR. HOH: Is the Chair able to hear me?

CHAIR ORSBORN: Yeah, we can hear you.

MR. MENDEL: Mr. Orsborn, J. Y. is asking if you can hear him.

CHAIR ORSBORN: Yeah, I can see him and now I can see you.

MR. MENDEL: You can hear me. Can you hear him?

MR. HOH: Are you able to hear me, Mr. Orsborn?

CHAIR ORSBORN: Yes, I can hear you now, thank you.

MR. HOH: Okay, thank you very much.

We will begin our presentation. Unfortunately, we haven't been able to (inaudible) the earlier presentation. So we apologize if I'm in a bit of a (inaudible) here, but we just have a few brief remarks on section 33.

This is a preliminary point; we understand that there are really two parts to section 33. The first being a mandatory exception to access and the second being unless you are a party to the investigation, in which case you have a right of access to your personal information. Really, our focus today is on that first part of (inaudible) of that mandatory exception to access, given that overbroad exceptions of one of our previous issues with the (inaudible).

So we're just going to give a few remarks on (inaudible) a bit further. You may recall, Mr.

Chair, during our earlier presentation and on our earlier submissions we spoke about the need to move from an approach that emphasizes (inaudible) or types of document, and move towards more of an approach that looks at exceptions from the perspective of preventing harms to legitimate interests, such as privacy. We won't belabour the point here since we've already made it in our earlier submissions, except to say that we recognize, in many cases, this is (inaudible) section 33 on workplace investigations.

Many of those documents, if they are witness statements or include personal information, or, for example, any kind of legal advice that would fall under the solicitor-client privilege protection, many of those documents don't fall under an existing exception. So, in that sense, this specific provision is somewhat (inaudible) in that sense.

That said, there may be some kinds of documents in the situation where there is, for example, a witness statement (inaudible) personal information could be redacted or in the course of the investigation if any evidence about a certain departmental practice comes up that isn't sensitive, we think an approach that emphasizes preventing harm to a legitimate interest would subject those documents to be (inaudible). We think that's the more narrow and the more tailored approach.

We also think there is some value in just getting the public official to ask themselves the question: Is there a legitimate interest here? Is there harm? Even if the answer to this question is yes and the document isn't disclosed, there's intrinsic value in getting the public official to ask themselves that question. That's kind of another point in favour of moving away from a class of (inaudible).

There are a number of ways to view these problems. One, and possibly the best way, might be to completely remove this exception entirely. It's not one that's generally found in other jurisdictions. I'm pretty sure some of the other parties to the court have spoken about how this provision or a similar version of it exists in other Canadian provinces, like the Yukon or New Brunswick.

Globally, the experience has been not to have a provision that's uniquely dedicated to workplace investigations. Generally what they do is they have an exception for, say, criminal investigations and in some instances they expand the definition of investigations to include those that don't necessarily involve criminal charges, like administrative investigations or, for example, ones that might lead to a disciplinary procedure. That could be another option for Newfoundland to take, which is to expand the existing section 31 law enforcement exception and use it to include workplace investigations under (inaudible).

Just to cite an example of another jurisdiction that has done this, I'm going to read out a provision from Romania. It says: Information on the procedures for doing criminal and disciplinary investigations. If the result of the investigation is jeopardized, confidential sources are disclosed or the person's life, liberty and health are in danger after or during the investigation. In that language they have kind of (inaudible) the duty to disclose is the exception if there's harm to a specific (inaudible). Another option, which we put forth in our earlier submissions, would be simply to have a separate provision that is a harm-test provision and it applies across the board to all exceptions. It is our position that all exceptions should be subject to a harm test. That could be another option that (inaudible).

The second and final point that I just want to make on this provision has to do with the public interest test. I believe, in this case, section 9 of the act, which is about the public interest test, is not subject to (inaudible). It is our position that all exceptions should be subject to a public interest test so that even if it falls under that exception the information can still be released if it is deemed to be in the public interest to do so.

Many of the interests in this provision are very well protected with a time privilege, administration of justice, privacy and so on. What we don't want is a situation where if a public official is holding onto this information and (inaudible) it falls under the exception, if for some really clear reason that information should be disclosed in the public interest (inaudible) such as it may be implicated in a serious corruption case, we want that information to be

disclosed even if it falls under the exception. We do think that the public interest override should be applicable to this provision, as with all exceptions in the law.

That's all I have for my opening remarks today. I'll hand my time back.

CHAIR ORSBORN: Thank you, Mr. Hoh.

Did Mr. Mendel want to make any concluding comments?

MR. MENDEL: No, not really, just to endorse what Mr. Hoh has said.

Our preference would be to broaden the law enforcement exception in section 31 so that it would cover investigations. Quite a lot of the language in the more specific elements of that already appears to be beyond law enforcement. It's not tethered to law enforcement in the hap of that section either, so it may not even need much revision. For example, safety was mentioned, I think, by the first speaker. Safety is broadly protected in section 31(1)(f). I'm not sure if that has been interpreted to apply only in the context of law enforcement actions or it's applied more broadly. That would be our primary submission.

Absolutely, as J. Y. has mentioned, we believe that every exception should protect an interest and not be class-based, as this one is, and that it should be subject to a harm test and a public interest test. I would note the sweeping breadth of the exception part of section 33, namely section 33(2), which says shall refuse all relevant information created or gathered for the purpose of workplace investigation, much of which may not be sensitive at all or would not create any harm if it was disclosed, so really the breadth of the language of that.

Also, although it's not our primary focus, we do agree with the points made by some of the other speakers. If the required disclosure elements of this in sections 33(3) and (4) have been interpreted to override the other exceptions, then obviously that's not correct, and privacy, safety and solicitor-client privilege and whatever should continue to apply even in the context of a workplace investigation. That should be addressed.

I think we'll stop with that.

CHAIR ORSBORN: Thank you, Mr. Mendel.

Do we have the school district?

MS. COLE GENDRON: Yes, I am here, Chair.

CHAIR ORSBORN: Thank you.

Bernadette Cole Gendron from the Newfoundland and Labrador English School District. Thank you.

MS. COLE GENDRON: Can you hear me okay?

CHAIR ORSBORN: Yes.

MS. COLE GENDRON: Okay, perfect. Thank you.

I apologize for our earlier issues. We actually, in fact, had to get another computer set up. I've been kind of listening on my phone, trying to listen at the same time as getting all that resolved. I have heard, I think, most of the other presentations, so I don't want to repeat a lot of what's already been said.

Looking at the recommendations made by the OIPC, our position is in line with the recommendations made by the OIPC, at least the first two recommendations. Our primary issue that we've identified is the timing of the release of information and the concerns, and that's been set out. I think the City of Mount Pearl had specific examples of where that became a real issue and the potential for that is there.

People come forward with information; in my world, I work in a very highly unionized environment, so the majority of our workplace investigations are investigations carried out with unionized employees. There is certainly a very clear process there, an understanding of what an investigation has to look like. The rules of natural justice govern our workplace investigations. We're all aware of those, one being the requirement, of course, that all information and allegations have to be put before an employee before a decision can be made.

Appreciating the act is covering a lot of different public bodies and different experiences – different breadth of experience and size in terms of their employees – we can only speak for, obviously, our own involvement in those. What we have seen is increasingly requests made as soon as someone is even notified they're under investigation. A lot of concerns with that, firstly being the integrity of the investigation.

Again, it's certainly our practice that employees would be notified that they're under investigation, whether it's required anywhere or not, as a matter of procedural fairness, natural justice, but the timing of that is often an issue. There has to be protection of evidence, for example. Sometimes, if you're dealing with having to secure evidence, we've had that issue arise. We have given a lot of thought as to when an employee is even notified. If they become aware, though, that someone has made a complaint and make an ATIPP request, the question is how are we able to withhold that information, knowing, as well, the OIPC's submissions on the lack of applicability of the other sections of the act in terms of withholding information, and section 33 sort of overriding those.

I will say, in listening to those and reading the submissions earlier, that I don't believe we've ever had experience with that. Only thinking in hindsight, I don't know if I even realized that was a position because we've never run into that here. Certainly, ATIPP requests I've been involved in on workplace investigations have been withheld on occasion, applying some of the exemptions in the act and they were never challenged. I really wasn't live, I would say, to that issue, but I agree with the OIPC's submissions on that, that there should be applicability of other exemptions when you're looking through the information.

When we look at the primary purpose of the legislation, I think in reading it, it's ensuring – and that's understandable, given the power that employers have, generally, public and private sectors – that we aren't able to go out and make decisions on employees without the employee knowing everything that was taken into consideration. Is there some hidden information there that maybe we can't substantiate, but it's in your mind and it's a part of the decision? That could be a way that employees are able to get access to that. There's certainly no issue with that.

The issue is, again, the timing. It's about protecting the integrity of the process, which has already been raised, and the involvement of the complainant and other co-workers, particularly where one person might come forward but it might be about concerns of a person's behaviour in the workplace that could be impacting other people. There has to be – a lot of thought is given as to the timing: When is the individual notified? Who do we need to speak to? All of that has to be done up front, looking at where this is going and what issues it will have on the workplace. That all has to be considered before we would even start into the formal process.

Certainly, if there are any concerns that as soon as an individual finds out that a complaint has been made, issues of retaliation that could be held against, potentially, other co-workers because they don't know who the complainant is. There are certainly concerns about that and that needs to be protected. Which is why at the beginning of any investigation it would be standard for investigators to tell the person: You're under investigation but you can't speak about it in the workplace, that we wouldn't accept any retaliation and the importance of confidentiality. That discussion is had not only with the complainant and the respondent, but any witnesses. There is a process there that would take care of all these issues. Section 33 should be – the main issue is we agree that there should be a temporal limit put on it that the investigations cannot be disclosed while they're ongoing.

I see in the OIPC's submissions they say prior: But would have to be disclosed prior to an employer making a decision or rendering a discipline, for example. To me, as legal counsel for the district, that would go without saying, because any employer who doesn't do that, the decision would never stand up to challenge, in any event, under the rules of natural justice. I wouldn't see that as really being necessary. Not saying that's not a reality, potentially, that some people may have experienced, but it wouldn't be my experience in the public sector organizations that I have worked with because it's well known

that you would have to disclose that in any event.

I think the OIPC mentions this in their submissions as well, about the fact that when I read the legislation I read it, as well, as seeing – I think the intention was it was looking at more formal workplace investigations, so harassment investigations. We use the terms complainant and respondent, very formalized terms, keeping in mind that workplace investigations go from that to very simple complaints. We still call them investigations, in terms of the principles of natural justice that could be challenged (inaudible) through an arbitration process. They wouldn't look anything like a formal investigation like a harassment investigation, so there's a breadth of investigations that might take place in the workplace.

Questions come up then: Who is a complainant? Do you always have a complainant? Is that someone who brings the information forward or is it they officially file a complaint? It's easy to identify when you have a workplace investigation such as a harassment investigation and have a clear policy on that, how that has to go: Someone has to put a complaint in writing; they're the complainant.

The vast majority of workplace investigations, I would suggest, would be people bringing information forward that may impact them, may impact the workplace generally and maybe other people. Are they a complainant? I wouldn't necessarily see that under the legislation, but I have seen examples of the situation where someone has come forward afterwards asking questions: Okay, I brought this information forward, so I would like to know what happened, and the first response being: Well, they brought the information forward, but now what are they entitled to in terms of the outcome.

We had to put our mind around the question: Are they a complainant? They're simply someone who brought information forward, but they weren't a complainant in the sense of I'm complaining about a wrong against me in particular. The use of those terms, I think – and I think it's important to get back to looking at what was the purpose of that section. Was it meant to cover every single workplace investigation? Who is the complainant? The respondent, usually, is pretty easy. But who would a complainant be that would be entitled to information under that?

Just the last note I think I'll make is on the identity of the complainant. I certainly think, looking at that section of the act, there would be no ability to protect the identity of a complainant. Again, looking at the process we would apply in workplace investigations, the rules of natural justice, that question comes up all the time when people make a complaint: Can I be anonymous?

Of course, whistle-blower legislation allows for anonymous complaints to be made. We deal with that very frequently. The OIPC may be aware as well of an issue we were involved in with the OIPC on this very issue, where there was a complaint made where a complaint to the district was passed along to someone and the individual took great exception that it had been passed along, along with their name.

We were requested by OIPC – and have put in place a sort of directive for our HR staff on how to handle anonymous complaints. Looking at that, we always would assess that on the rules of natural justice. We would tell people in order for us to proceed with an investigation and to make any findings against an individual, if their ability to respond to those allegations is impacted by a failure to disclose the complainant, then we're limited in what we can do with it. That process is – and, again, it all stems from the rules of natural justice.

Sometimes, however, an individual brings forward information that can be independently verified, so the identity of the close complainant is completely unnecessary, in terms of the rules of natural justice and the investigation, but would that be accessible under ATIPP? I don't think the intention of ATIPP would be to give someone more access to information than they would under the rules of natural justice. I think that seems to extend from maybe people weren't following the rules of natural justice in doing these investigations.

I think those are all my comments for now, Chair Orsborn, subject to any questions.

CHAIR ORSBORN: Thank you.

Just one question. It's mentioned in your submissions – a small one – if you're not going to call someone a complainant, what are you going to call them?

MS. COLE GENDRON: Well, you call them a complainant but the question is under the legislation – is the legislation intended to cover every single investigation that a public sector entity does?

CHAIR ORSBORN: Okay.

MS. COLE GENDRON: Because if we say the word "investigation," that could be someone makes a complaint, we speak to that person, we get the other person's view on it; maybe you speak to one person, maybe you don't. That would be an investigation for the purposes of the rules of natural justice, their ability to grieve it – did we put all the information to them.

Was this really the intention of what the act was meant to cover or were we talking about the more formal investigations that can have more significant consequences on an employee? I don't know where that line would be drawn. I think it's just important to think back, because the situation that I gave, a person brings forward information, then comes forward weeks later: Well, I'd like to know what was done with that and what the outcome was. I want to know everything and it's: Well, you brought the information forward, but it wasn't a complaint that affected you personally.

So a complainant, I would see under section 33, when I read it, would be: I make a complaint against something that is impacting me personally, such as a harassment complaint; I'm being harassed, I'm making the complaint versus I'm someone who brings forward the information.

CHAIR ORSBORN: All right, yes. I may have a question related to that later.

Thank you, Ms. Cole Gendron.

This is an interesting section. I'd be interested in your views on the interests that are involved. As the Commissioner pointed out in his written submission, if I remember correctly, it says the intent of the section is to make sure that the parties to a complaint have equal access to information. I guess I'd be interested in your views on the interests that the section is directed to.

Is it directed to the parties' interests? Is there a public interest involved in the section at all? Because there is no right of access to a member of the public. One either has to be a complainant, a respondent or a witness and there's no right of access to the public. This goes to a point that Dr. Oleynik and others have made, the relationship between the access to information under the legislation and access to information in the context of employment relationship, which may engage discipline, arbitration and whatever. I'd be interested in your comments on particularly what public interest is involved in the application of this section.

I'm going to ask you some of my questions all at once, but to go to the point that Ms. Cole Gendron just made, if you have an individual that goes to a supervisor and – I've used this example before – say Mr. Murray is my immediate supervisor and Mr. Harvey is the supervisor above him. I go to see Mr. Harvey and say: B'y, I have some real problems with the way Mr. Murray is treating me. He's always complaining about my work, I can never seem to satisfy him and I'm on the verge of quitting. Mr. Harvey makes a few notes, puts down Mr. Murray's name and puts down my name. He said: Why don't you try this? Thank you very much. So I go try that and Mr. Murray and I are fine afterwards.

Now, that's a workplace conduct issue. Are there public interests involved in releasing Mr. Harvey's notes when I spoke about my issues with Mr. Murray?

Shall I start at the back, or do you just want to put your hand up if you want to say something? Nobody wants to help me?

Dr. Oleynik, thank you.

DR. OLEYNIK: Yes, I will try to. I'm not sure that's what you expect, nevertheless there are some (inaudible) in this respect.

I would like to differentiate, not only between individual and public interests, as you suggest, but also between individual, public and group interests because all three (inaudible) –

CHAIR ORSBORN: I'm sorry, the last one?

DR. OLEYNIK: Group.

CHAIR ORSBORN: Group.

DR. OLEYNIK: Group interests, because associations were mentioned on several occasions, previously, unionized environment. It's very important because ATIPPA speaks about individual interests and when public interest comes into play, it's something that overrides exemptions. The foundation of ATIPPA is about individual rights of accessing information, not about public rights, not about group rights to access information.

For example, it comes as no surprise that there are no representatives of unions here or labour arbitration boards, because I forwarded them the information about these hearings, but they are not interested. That's not by a coincidence because ATIPPA is about individual interests; how to provide the individual with the information that he or she seeks. When it comes to arbitration, when it comes to a unionized environment, indeed, some other procedures can apply. It's in this context that group interest may come into play.

Back to your question about public interest, whether public interest may override individual interests in accessing information. Some reasons were suggested by many contributors today, for example, interest in safety that can be considered as public interest, interest in maintaining safety. Here I would like to say: Why don't we think about a separate mechanism for protecting whistle-blowers? Because, essentially, complainants are whistle-blowers and there is already an established procedure for protecting them.

If there is any ground to believe that they may be in danger, instead of trying to impose additional restrictions here in ATIPPA, why don't you just refer to a special act? We have in this province a special act for whistle-blower protection. This reference is missing.

The Commissioner was right to suggest that reference to the Whistleblower Protection Act is a must or it's something that may benefit ATIPPA in the development. It's not just in one section. Even in section 33 a reference to the Whistleblower Protection Act may address most of the concerns about safety that were voiced today, I believe. Because if there are any reasons to believe that, indeed, someone is held or just well-being in (inaudible), okay, then Whistleblower Protection Act should be engaged.

I can cite a relevant section from the Whistleblower Protection Act: "This Act applies to the following wrongdoings in or relating to the public service …." There is a clause that can be relevant to our discussion: "an act or omission that creates a substantial or specific danger to the life, health or safety of persons, or to the environment, other than a danger inherent in the performance of the duties or functions of an employee …." That's exactly what we are discussing. It's an unsafe environment, and unsafe environment, it's covered by whistle-blower protection.

I believe it would be a wrong strategy to create a Frankenstein instead of ATIPPA. It means let's just try to put that and that and that. There are several acts. There is *Management of Information Act* related to ATIPPA; there is Whistleblower Protection Act also relevant to ATIPPA. Why don't just explicitly refer in the text of ATIPPA to these acts?

Thank you.

CHAIR ORSBORN: Thank you.

Anybody else jumping up and down?

Mr. Murray.

MR. MURRAY: Just one comment on that one. I don't think the whistle-blower law applies to all public bodies that are subject to ATIPPA. I think if there was any consideration to be given to that, I think that would have to be …

CHAIR ORSBORN: It would be extended.

MR. MURRAY: Yes.

CHAIR ORSBORN: Yes.

MS. COLE GENDRON: Chair Orsborn, if I may make a comment.

CHAIR ORSBORN: Thank you. Go ahead.

MS. COLE GENDRON: I can understand Mr. Oleynik's comments on looking at some of the examples he gave at MUN. It is very different from my world in terms of being in that heavily unionized environment where we sort of have these things figured out, I guess, from day to day, in terms of all the employee investigations that we deal with and that we are dealing with much bigger, significant issues, such as harassment, big issues. There would be different things at play there.

Again, this section applies to all workplace investigations, so we have to take them all into consideration. I think saying that we could engage occupational health and safety legislation to address the issue of when we might be able to withhold information because of harm to an employee is adding another layer, another complication to the process. What would you have to meet to show harm to the employee?

We're talking about, at a first level, just employees coming to a work environment that they are able to come to everyday and not be worried about an employee knowing they put a complaint in about them, working out general workplace issues that may not be at the level where you could establish, okay, harm under the occupational health and safety legislation. I think that's adding another element to it that I'm not so sure would not really complicate the process anymore. I just wanted make that comment, I guess.

CHAIR ORSBORN: Thank you.

Any other comment on the interests that are involved in that section?

MS. ELDRIDGE: If I may.

It's my impression that there's the opposite of a public interest in the example you gave because the confidentiality is completely necessary there in order for that particular issue to be straightened out and resolved in the workplace. So it's actually in the public interest to allow for that to be confidential.

CHAIR ORSBORN: Related to the point that Dr. Oleynik made, and recognizing that this act applies to a huge range of public bodies, if people are to be fairly treated – and assume for the moment that ATIPPA is not there – that body would either have to get involvements from legal process, which would then bring up your entitlement to natural justice and fairness and whatnot. But short of a legal process, how is an employee to be protected against arbitrary management decisions in the absence of fairly decent policies and procedures within that employment context to enable people to know what's being said about them?

Everybody nods their heads but I don't get any answers.

I'm trying to get my understanding of the interests that are involved here. Looking at the section itself – I'm repeating myself – but where the access is limited to the direct people involved, where does the public interest come into that, into the application of the section?

Can you help me at all, Mr. Harvey?

MR. HARVEY: That particular question I hadn't given a lot of thought before.

CHAIR ORSBORN: You have or you haven't?

MR. HARVEY: I haven't. So I'm just trying to puzzle it through in my mind now, so certainly any answer I give first would be off the top of my head.

I mean, to a certain extent, my reaction is similar to Donna's, that, particularly knowing that we're dealing with public bodies here, there is a public interest in knowing that the principles – and I think it's very clear, and this is something that Bernadette said, that clearly this section is inspired by the principles of natural justice. That's what breathes life into it; that's what it's meant to reflect. So there is a public interest in knowing that those principles are being applied in the public sector context.

How does that public interest apply to the rights of access, and should the right of access be

broader than a right of access to be held by individuals? I'm not sure that I would take that logic that far.

That said, given the potential to expand the scope of the application of section 33 and who may end up being applied and if this investigation may go beyond or may have broad implications for the operation of public bodies and, indeed, the government, if there was a workplace investigation that uncovered information that was in the public interest to disclose, we mention that theoretically there could be a section 9 implication.

That said, I would imagine that if we were in that realm, we would be talking about things like criminality and we would be beyond the scope of ATIPPA and into the realms of other legal proceedings.

CHAIR ORSBORN: Is there a public interest, generally, in good management of public bodies?

MR. HARVEY: I think that was what I was implying, that there is public interest in knowing that there is an integrity to this, to workplace investigations in how they operate and in the rights of the parties to have access to the information that they need to have access to. I think that would be my initial reaction.

CHAIR ORSBORN: Thank you.

Ms. Staeben-Simmons?

MS. STAEBEN-SIMMONS: I think you've asked us a really good questions here this morning. I think you're sensing from a little bit of the silence that this is something that we're really grappling with.

I think that if there's any public interest – you just alluded to it there a moment ago in terms of the promotion of a healthy workplace within the public service where people feel that they can come forward with their concerns and complaints in a manner that's free from reprisal.

I think what we've seen in the practical application for us at the college is the really delicate balance of the principles of natural justice for somebody who is coming forward or witness to the issue at hand and the complainant. It is a real delicate balance in terms of managing the rights of both those individuals. The burden of section 37(1)(a), (b) and (2) is concerning in terms of the ability to maybe enable the act in future to provide for some ability to exempt from disclosure.

But how do you quantify or describe in a meaningful way situations where people are threatened for their safety from a mental and physical health? Probably physical health is a lot easier to define than mental health, and everyone's reaction and interpretations of threats to their own mental health and safety are very different. So it does provide the public body significant challenge when we would interpret those reactions as maybe more subtle or not as clear and direct. Obviously, everybody understands the threat of physical harm, but the threat from mental harm is very, very complex and it provides a unique challenge within the act.

CHAIR ORSBORN: This doesn't apply to anybody here, but I'm looking at the practicalities of it. You take a very small municipality with one or two staff that work two to three days a week. If the ambit is extended to elected officials, they can be faced with a very difficult situation – perhaps a dispute between an elected official and perhaps the ATIPP coordinator themselves – probably lacking the resources and the expertise to work through all of the issues that you've mentioned, what will they do?

Mr. Harvey.

MR. HARVEY: I would say this is not a hypothetical situation.

CHAIR ORSBORN: No.

MR. HARVEY: It's exactly the kind of thing we see on a regular basis.

There are resources available. From an ATIPP perspective, both we and the office can provide some assistance. We're not experts, however, in workplace investigations, but there are resources available and supports that can be provided. These small municipalities are not entirely on their own, but that is not to undermine the difficult situation they would find themselves in.

In the absence of clarity, they are currently in that difficult situation right now.

CHAIR ORSBORN: Yeah. One of the specific terms in my terms of reference is to consider whether the provisions of the act, generally, are appropriate for municipalities outside the City of St. John's, Mount Pearl and Corner Brook. That's a situation, I should point out, that was certainly mentioned to me.

Mr. Murray.

MR. MURRAY: If I could just jump in on that one.

We always have to bear in mind in terms of how these things impact smaller public bodies. That if we say: Okay, well, section 33 won't apply to certain municipalities, let's say, the rest of the act still exists, so anyone can be an applicant for access to information. Whether there is an automatic right under section 33 or whether someone can come in as a requester and say: I want all information about this investigation as it relates to me because I'm one of the parties; we're going to be back to where we were before there was a section 33. If that's where we're going, we can have that discussion today, too.

CHAIR ORSBORN: I don't know where we're going. That's what I'm trying to find out.

MS. COLE GENDRON: Chair Orsborn, if I may.

I don't think there is a place on here, unlike in Zoom meetings you can put your hand up to let them know you want to speak. I don't see that option.

CHAIR ORSBORN: You're on now.

MS. COLE GENDRON: Yes, I don't see that option here, so forgive me if I interrupt sometimes.

I just want to comment on the public interest. I've been thinking about that as I listen to the other speakers. When I look at that section the way section 33 is worded, I don't see what public interest is addressed there because it's limited to the respondent and complainant. Those are the only two people that are able to get the information, so it is very individual.

In my 12 years or so of doing labour relations work with public sector employers, I always say the public interest is in knowing that investigations are being done and that issues are being addressed. We are entrusted with public services, public funds and that employees in our workplaces are doing their jobs and living up to the standards that are expected as a public employee. That's where the public interest lies. This particular section that's about access to information being limited to only the respondent and the complainant, I'm not sure I see a big public interest issue in that particular article and the application of that article.

CHAIR ORSBORN: All right, thank you.

Just help me out with this; I think I know the answer but I'm not sure. Assume that a workplace investigation is conducted and completed. If there is any discipline, that's over on another side in another procedure and the public body has this workplace investigation report in its files. Is that accessible under the act?

MR. MURRAY: To the parties, to the complainant and the respondents.

CHAIR ORSBORN: Only to the parties.

MR. MURRAY: Yes.

CHAIR ORSBORN: Okay, that's what I assumed.

MR. MURRAY: If someone other than the respondent or the complainant requested access to it, I guess it's conceivable they might get a redacted title page or something to indicate there has been an investigation.

CHAIR ORSBORN: Okay.

Dr. Oleynik.

DR. OLEYNIK: One more comment about that interplay between the individual and public interest. I would like, again, to come to the individual end because, from my point of view, that's about protecting fair process and giving,

indeed, everyone involved opportunity to see how it goes and whether principles of natural justice are defended.

There was a misunderstanding in several submissions, saying that essentially harassment is about power differential, or power differential is expected to be involved in most cases. This is not true, because if you look at the definition of harassment, harassment can take the form of bullying. Bullying is about a group who is targeting one of its peers and a supervisor may not be involved at all.

What I would like to say: The right of access to information is a very powerful tool exactly to protect minorities against potential bullying from a majority in a unit. This is often overlooked because even in submissions made by the Commissioner, the focus is on power differential, which is very important, indeed. But I would like to say that harassment is not stopped here, not stopped in the situation of when we have a superior and subordinate.

Harassment can also flourish – and this would be observed in high schools. When we have bullying by a group of schoolboys or schoolgirls, they can bully one of the peers. Unfortunately, this culture penetrates even in the adult world more and more. Again, the access to information is one of the forces that can contravene, can block or at least limit that tendency, from my point of view.

It's less about public or general interest; it's more about protecting as an element of democracy. When we talk about democracy, it's not only about the rule of majority; it's also about protecting minorities.

Thank you.

CHAIR ORSBORN: Thank you.

Mr. Murray.

MR. MURRAY: I would just comment on that. In a bullying situation, even if there is no formal hierarchy involved – i.e., it's between people of the same rank in an organization – there are other factors that contribute to determining whether someone is in a vulnerable situation in their environment.

You may have people of the same formal rank in an organization; however, somebody who is being bullied, there is sort of an inherent weakness. If a group of people has ganged up on them, there is a power imbalance there that's just inherent in that. That ganging up and that bullying I don't think can happen unless there's a perception that due to difficult-to-define social context issues, that person has obviously been identified as vulnerable and could be a target of bullying.

I think it's a little more subtle than that.

CHAIR ORSBORN: Any final comments?

Yes.

MS. PITTMAN: Thank you.

I've been reflecting on what everybody is talking about, about the interest of the public in a workplace investigation. As we kind of alluded to or talked about in our comments, we have had a lot of public interest over the last year or so in a workplace investigation. The predominant themes that come up in the public interest and what's been brought forward are time, resources and costs associated with the procedure that we were following, which we do respect. Essentially, I think the public interest is, of course, in the management of a city, how long does the management of the process take and what is the costing to the taxpayers. Unfortunately, for us, it was a very long process, which kind of gave, I think, an imbalance of power in the parties involved.

I think it's important to reflect on the timeline as we talk about the interest of the public body. That's kind of why our recommendation naturally filtered, if access is available, to be at the end of an investigation because the timeline has the opportunity to extend considerably based on the appeal process and negatively impact both the integrity of the process and also the resources required, both cost and time, to complete it.

So I'd suggest timeline is the interest of the public body as opposed to just the actual categories or content of the investigation. It is: What does it mean to us? I think we have to answer that question when we're talking about

the public: What does it mean to them? I'll ask this question respectfully: Do the public really care about the content of a workplace investigation or should they be privy to that information? My thought is no, but they care about what it means to them, which means potentially cost and potentially a concern about management of the process.

Thank you.

CHAIR ORSBORN: Thank you.

Well, thank you all very much for participating. I have benefited from your thoughtful and co-operative approach to this. It think as Mr. Harvey said right at the outset, approaching it on a co-operative basis with a very, I think, difficult section has certainly been helpful to me and I hope helpful to you.

I'll just to go back to what Mr. Harvey said about the role he has to play as Commissioner and in that independent role finding it personally difficult to reach an interpretation of the act, which he felt was in accordance with the act, but gave him personal difficulties. I think that reflects what the general consensus of feelings that we've had about this section. I think it was reinforced by Dr. Oleynik.

It's an intensely personal section between individuals in the context of a public sector workplace and because it is a public sector workplace – and this was mentioned in one of the written submissions to me – you perhaps end up where public sector employees' privacy interests are more at risk than those of private sector employees in exactly the same situation. But I am really grateful to you for the co-operative approach and the good faith that you've shown in addressing this.

I'll adjourn this morning's session now. We're back tomorrow morning at 9:30 to talk about section 39. So if any of you want to come back, feel free.

Thank you very much.