ATIPPA STATUTORY REVIEW COMMITTEE 2020

Transcript Volume 8

Committee Chair: Honourable David B. Orsborn

Monday 10 May 2021

CHAIR D. ORSBORN: Good morning, all. Welcome to the resumption of the public hearings of the committee tasked with the 2020 statutory review of the *Access to Information and Protection of Privacy Act, 2015.*

As you perhaps know, the hearings were adjourned on January 28 because of the call of the election and the operation of the caretaker convention. The Government of Newfoundland and Labrador is now in a position to make its oral submissions. Those submissions on behalf of all government departments will be made by the Department of Justice and Public Safety.

I welcome Phil Osborne, Sonja El-Gohary and Jessica Pynn of that department. They're accompanied by Dr. Beverly Dawe, chief veterinarian of the province from the Animal Health Division of the Department of Fisheries, Forestry and Agriculture, who I understand will be also making a submission. In attendance also, we have the Privacy Commissioner, Mr. Michael Harvey, and Mr. Sean Murray from the office. Welcome.

The committee's final hearing will be this Wednesday on May 12 with the Office of the Information and Privacy Commissioner providing concluding comments.

So with that, thank you, Mr. Osborne.

P. OSBORNE: Thank you very much.

First of all, we want to thank you for taking on this task. Thank you for the opportunity to make these oral submissions. We're very confident that this collaborative approach will benefit us all.

In terms of the presentation today, as a general outline I'd like to address fees and costs and the issue of privilege, both solicitor-client and settlement. I'll also respond to the Speaker's submissions, whistle-blower, the duty to document, application of ATIPP, political parties, the issue of election documents as raised by the Chief Electoral Officer, the 50-year sunset clause, the (inaudible) of the Auditor General –

MS. MULROONEY: (Inaudible.)

CHAIR D. ORSBORN: There. Okay.

P. OSBORNE: Sorry. Thank you.

I'll also discuss Schedule A issues. Jessica is going to speak about section 39, the public interest override and the issues arising out of that. Dr. Dawe, of course, will speak to the issues of the veterinary records and why they should be kept confidential, and Sonja will address almost everything else. If you have questions, any one of us might jump in to answer them.

CHAIR D. ORSBORN: That should keep us going for a while.

P. OSBORNE: I think so.

Before we get into the issue of the fees, there are a couple of corrections or changes I'd like to make to government's written submissions; one is from Justice's submission. We don't think that section 8(1) needs to be included in Schedule A. The second is with respect to the OCIO's recommendation regarding putting on hold ATIPP requests that are the subject of a public inquiry for the duration of the inquiry. We'd ask you to disregard that recommendation.

CHAIR D. ORSBORN: All right.

Or if you get it then with section 8(1), perhaps I can just ask the Office of the Information and Privacy Commissioner – when he talks to us on May 12 he might want to comment on section 100, I think it is. I think your written submission was sort of in and out on it, if I will. Given the position of the government, you may want to perhaps be a little more specific as to whether or not – perhaps explain a little more of the need for that in, I think it's section 100, and whether that's needed or not.

Mr. Osborne, thank you.

P. OSBORNE: Thank you.

With respect to fees and costs, most of the government departments have advocated for the implementation of a fee or the implementation of an amendment to allow for the calculation of costs, or some combination of both. So there are really two components: one is the application fee

and the other is the processing fee, which includes the cost of reproducing records.

From the perspective of this review, the question is: What is the policy objective, or what's the mischief that the government departments are complaining about? Why are all of these departments making these recommendations? From reading the submissions, it seems like they're asking for frivolous, vexatious or nuisance requests, but that's not really the issue. Frivolous requests can be dealt with under the disregard provision, which Sonja is going to make recommendations on how to fine-tune and make that better. They're not really talking about frivolous requests – as we understand, frivolous and vexatious from a litigation context – they're getting at meaningful requests.

A theme running through all the submissions is both the quantity of the requests and the burden that puts on the system, and the applicant's commitments to the requests. You see that manifest in a few recommendations asking for a duty to impose an obligation on the applicant to co-operate.

We know that the requests are up 350 per cent since the fees were waived in 2015. This dramatic increase means there's a dramatic increase in workload. The execution of access requests is very time consuming and demanding. It's expensive; it imposes a burden on the normal operations of government. It ties up coordinators' times; there are legal resources and even deputy ministers involved in this process. Public bodies are beyond their capacity when it comes to processing ATIPP requests. There's a finite amount of resources that the government can dedicate to this service and recommending more resources is not really a solution.

I know that the OIPC has opposed fees and costs, and have publicly stated that the burden on the system is really a cost of democracy and that we should just accept that. We don't find that very compelling. There are many components required for a healthy democracy that have fees and costs. It costs money to run an election; it costs money to file a statement of claim. Elections and access to justice are very fundamental components of our democracy.

The real issue is how do we address this burden on the system. Well, there are elements that can be addressed with timelines – and Sonja will address that – but there is also reducing the amount of requests that aren't meaningful and requests that applicants aren't really committed to, and managing these requests to figure out what it is the applicants really want.

A recent example we've had the past couple of months is there was an access request for government documents related to Newfoundland's participation in a bankruptcy matter in a BC court in the late '90s, early 2000s. The request took in some 42 boxes of documents. The estimate of time was going to take two months for a lawyer to go through these requests.

The access coordinator was able to work with the applicant in that case to fine-tune and reduce, to figure out what it is that the applicant really wanted. It became a manageable request, but that's not always the situation. There's no duty on the applicants to participate. If that applicant had said nothing or not responded, this burden would be on the system; we'd have to go through that. Really, they only wanted a particular component of the file.

In the 2011 ATIPP review, the report discussed the value of the fees, the fee system as a tool to deal with these requests, the extent to fine-tune and limit requests to save money on the system and to find out how the applicants – what they wanted, to minimize the burden on the system.

The Wells report submissions indicated that most applicants assumed that there would be a cost. They said that most applicants didn't oppose a fee, they just didn't want punitive fees or overstated charges. In fact, I think in that report they indicated that the Privacy Commissioner wasn't opposed in the beginning to fees.

What we're recommending is reinstituting a nominal fee, just to place a value on the applicant of the service, not as a barrier to access but just as a deterrent to uncommitted requests. We're also recommending adjusting the fees, the processing costs – and that's outlined in our submission and Sonja will go through the

particulars of that. This is a tool to allow applicants –

CHAIR D. ORSBORN: You said earlier you weren't addressing the frivolous requests but you're suggesting that a nominal fee would be a deterrent. A deterrent to what?

P. OSBORNE: It makes people think about a request. We had a request recently, a request for COVID. The request was just COVID. So if there's a nominal fee, people think about the request, they'll put some thought into it. It will be a deterrent on just people filing off requests without putting thought into it. It's meant to deter meaningless requests, not frivolous.

The example I gave of the BC court, that wasn't frivolous or meaningless, that was a very valid request. Really, I guess the request was (inaudible) they'd be entitled to all of these documents, but the fee, I think, will cause people to think about what they're filing and place a value on it and have more focused requests.

CHAIR D. ORSBORN: Practically speaking, how do you collect it?

P. OSBORNE: I'm not sure of the mechanics of that, if it's electronically. I don't know. It's not a cost-recovery system. That's not what we're looking for.

CHAIR D. ORSBORN: Could you achieve the same objective by having a coordinator communicate with the applicant, as happened in the BC case?

P. OSBORNE: That'll address part of it. That will help focus. If there's a cost involved or if the applicant sees, okay, one request is going to cost this much, really (inaudible) statement or a small component of it. I think they have to work in harmony. I think part of it is the fee. A fee is going to stop some of these nuisance requests. Part of it is the processing costs to fine-tune the request.

CHAIR D. ORSBORN: Okay.

P. OSBORNE: Those are our submissions on fees and costs and our recommendations.

CHAIR D. ORSBORN: In terms of the costs, there is some ability there now to recover the costs for units where requested that will take two months. There is some ability in the legislation now to at least seek to recover those costs through estimating them and what have you. Over the last five years it seems to have very little use: Any idea why?

P. OSBORNE: I'm not sure. I think Sonja can speak to that.

S. EL-GOHARY: Now or after?

I think it's because there was a change in the cost estimate.

CHAIR D. ORSBORN: Because of the what?

S. EL-GOHARY: There was a change in the cost estimate schedule. It used to be you could charge for processing requests. Now, you can only charge for locating. So, in that case, it didn't take long at all to locate the records, they were in storage. It wouldn't have taken 15 hours to locate those records, but it could have taken months to process them. That's the part we're no longer allowed to charge for.

P. OSBORNE: Okay.

On to solicitor-client privilege.

CHAIR D. ORSBORN: Thank you.

P. OSBORNE: Our recommendation on solicitor-client privilege is that the act be amended to clarify that the Commissioner cannot compel production of documents subject to this privilege. We would recommend that when a record is subject to solicitor-client privilege that the public body produce a listing of the documents subject to the privilege to the Commissioner. If the Commissioner has questions, he can ask for further justification and if he is not satisfied with the justification then it can be subject to review by the court to determine if the privilege has been properly claimed.

In our submission, we go throughout the law for solicitor-client privileges and I won't go over that in depth. I want to make a couple of points

about the privilege just to frame our recommendation.

Solicitor-client privilege commands a unique status in our legal system. The Supreme Court of Canada views solicitor-client privilege as fundamental to the justice system in Canada. It notes that it is an important relationship between client and lawyer that stretches beyond the parties and is integral to the legal system. It is part of the system, it is not just ancillary to it. The courts have said that solicitor-client privilege must be as close to absolute as possible to ensure public confidence and to retain relevance; that it should only yield in certain clearly defined circumstances. The Supreme Court of Canada has repeatedly affirmed that it should not be interfered with unless it is absolutely necessary.

Now, absolutely necessary is about at restrictive a test as you could possibly have, short of an absolute prohibition in every case. In cases that have dealt with the absolutely necessary, have dealt with right to a full answer, like the McClure case, or very narrowly guided public safety, as in the prison mail, the Solosky case.

Notwithstanding that it's fundamental to the legal system, the courts recognize that government can make policy of whatever nature. The Legislature can abrogate solicitor-client privilege if they use clear and unambiguous language, but should it? Should you recommend making such a recommendation? We say no.

The University of Calgary case says that compelled disclosure, even to the Commissioner, is an infringement in itself regardless of whether or not the Commissioner may disclose onward.

So what's the purpose or rationale in infringing on a privilege? The way I understand it, at the heart of the Commissioner's concerns is one, that if left unchecked, there's a potential for abuse; that is the fear that the public body will claim the privilege inappropriately. They referenced in their submission all the cases in the past with government where the privilege had been overclaimed. Many of those (inaudible) relates to a single case that went to the court for clarity on the privilege.

Second, the OIPC, I think they view their ability to review provides a cost-effective way to objectively review the privilege, to see if it was claimed appropriately.

We know the purpose of the act is about transparency and accountability, but section 3(2) says: The purpose is to be achieved by specifying the limits that recognize established and accepted rights – we say solicitor-client privilege is one of these rights. It's telling us that the public policy behind the right to access isn't absolute. Solicitor-client privilege is near absolute.

The act does provide for an affordable and timely way to review information, and it's an alternative to the courts. One might argue that this goal would be defeated if the Commissioner couldn't review solicitor-client documents, particularly if they were forced to go to court to review solicitor-client privileged documents. However, I suggest that if the Commissioner was guided by the common law and subscribed to the view that even if he had the authority, the solicitor-client documents should only be viewed in the rarest of cases, only when absolutely necessary – one in 10,000 cases over the law suggests that there's very little risk of the purpose being defeated by going to court, because very few matters ever go to court.

We suggest that allowing the Privacy Commissioner the power to view solicitor-client privilege is a bad policy. The courts have repeatedly told us that the privilege should be as close to absolute as possible. It should only be pierced when absolutely necessary; that the compelled disclosure is, in itself, an infringement.

If the Commissioner only sought to pierce the privilege in the rarest of cases, there won't be that many cases going to court, plus, judicial economy is a terrible reason to infringe a fundamental privilege. Further, as noted in Ms. Thomson's submissions to this commission, some ATIPP requests, especially involving repeat requesters – solicitor-client documents relate to opinions about ATIPP or about the OIPC itself; therefore, it would be inappropriate for the Commissioner to review these documents.

Another consideration, if you accept our recommendations with respect to section 99(2) – that is, compelling the Commissioner or the office to testify if there has been an infringement related to the act – if the infringement relates to solicitor and client documents, there's a further risk of impinging on or breaching solicitor-client privilege. That won't be a factor if the judge reviews it.

We think that our recommendations are true to the purpose of ATIPP, with minimal infringement on solicitor-client privilege.

CHAIR D. ORSBORN: Just to be clear then, your recommendation is what.

P. OSBORNE: The Commissioner not be permitted – the act be clarified so that the Commissioner not be able to review solicitor-client documents; that the public body, when they're making a claim, produce a list of documents to provide to the Commissioner; if the Commissioner is not satisfied, he can ask the public body for clarification or particulars around those claims; and, if still not satisfied, that the matter can be referred to court for a judge to determine if a privilege has been properly claimed.

CHAIR D. ORSBORN: So, in essence, the absolutely necessary test, the listing and affidavit or whatever, in support of the documents, would go to the Commissioner. If the Commissioner felt that it was nonetheless – in light of that – still absolutely necessary to review the documents to assess the claim or privilege, you at that stage would shut the door and say, fine, we'll take it to court. Is that about it?

P. OSBORNE: Yes.

CHAIR D. ORSBORN: Okay.

P. OSBORNE: Now, I would like to discuss settlement privilege.

Our recommendation is that settlement privilege be explicitly included as an exemption to disclosure. I don't think there's any dispute about the fact that settlement privilege is a fundamental common-law privilege, or that there needs to be clear and explicit language to abrogate it. There are a number of authorities that settlement privilege is a sound judicial policy that contributes to the effective administration of justice.

In our written submissions, we cite Sable. That talks about the overarching purpose of settlement privilege. It notes that settlement privilege allows parties to reach mutually acceptable resolutions without prolonged personal or public expenses. The court has said that settlement privilege is essential to improving access to justice.

It's understandable why there might be some pause when considering our recommendation. It's an interesting problem. On the one hand, you have the competing interests between transparency versus the public interest in encouraging settlement. So on one hand, the public's right to know how much is being spent and to whom; on the other hand, the settlement privilege and all that's wrapped up with that and the public's interest in getting the best value for settlements.

The Ontario Court of Appeal grappled with this in the Magnotta case that's been filed with reference in various submissions. In that case, the Ontario Court of Appeal stated that the public interest in transparency is trumped by the more compelling public interest in encouraging settlement litigation. You can find that reference at paragraph 36.

If claims of settlement privilege can't be made by a public body, then also other documents and records that inform and support the subject of litigation – unsuccessful offers, claim demands, negotiations, without prejudice communications – unless they're subject to other exemptions, they'd have to be disclosed as well. This was recognized in the Trial Division in the Magnotta case, where a court noted that a party may be reluctant to entertain settlement discussions with a public authority if they thought that all of these settlement communications would be disclosed; particularly, if the admissions made concessions or may be detrimental to a party.

That touches on another aspect of settlement privilege. Settlement privilege doesn't just belong to the public body; it belongs to all parties of the settlement. So absent clear, express

language, the public body couldn't even disclose these amounts. You'd need the other party to agree to waive the settlement privilege.

CHAIR D. ORSBORN: How long does it last?

P. OSBORNE: I think settlement privilege lasts; I don't think there's a sunset on it. Whether there should be, I don't know.

CHAIR D. ORSBORN: Then what's the purpose of it?

P. OSBORNE: It's the access to justice. People can make –

CHAIR D. ORSBORN: No, what's the purpose of the privilege?

P. OSBORNE: The purpose of the privilege is to allow frank, open conversations and make concessions that aren't compellable in court.

CHAIR D. ORSBORN: In the context of litigation?

P. OSBORNE: That's correct.

CHAIR D. ORSBORN: Okay. And once the litigation is over?

P. OSBORNE: I think settlement privilege survives litigation privilege.

CHAIR D. ORSBORN: Why?

P. OSBORNE: There could be downstream effects if you're dealing with an institutional client, not a public body. But it could be a corporation that have repeated issues.

CHAIR D. ORSBORN: A school bus contract case. There was one, I think –

P. OSBORNE: That's correct. Yeah.

CHAIR D. ORSBORN: – went to the Privacy Commissioner.

P. OSBORNE: Some retailers, for instance, have policies that they take everything to court because they don't want – as part of their settlement strategies. That could be (inaudible) if they settle a case, that could impact future cases. Road construction – there are all kinds of issues, not just one-off matters.

CHAIR D. ORSBORN: Would that then involve a harm assessment in each case?

P. OSBORNE: No, I don't think. I think it should remain a protected privilege. We find the Ontario Court of Appeal reasoning compelling; however, if you don't, there might be a compromise. There are two components to settlement privilege: one is the amount of the settlement, the other is the bundle of documents, the communication without prejudice negotiations, briefs and claim demands that are made.

With respect to the settlement amount – so we don't think the second, the bundle, the communications negotiations should ever be released; we think that should remain confidential. With respect to the settlement amount, while there are checks and balances embedded in the system, the Legislature has to approve the settlement fund. There is a Public Accounts Committee that provides oversight and there are various levels of approval needed before a public body can enter a settlement.

It may be that the public settlement privilege can be abrogated with respect to the amount in certain circumstances. It may be that a public body is given discretion to disclose settlement amounts. In matters where there are similar or related claims, the public body may decide not to disclose immediately so that similar types of matters are not influenced by the settlement amount. If they have ongoing related claims, they might hold that back.

However, if there are one-off settlements related to like a construction project or another matter, they might decide to disclose immediately. I think for that to happen there should be adequate notice to third parties. So there would be notice provided to the other parties prior to disclosure and, then, a third party would have the right to raise an objection. The onus would be on the third party to satisfy the Commissioner that disclosure of the information could reasonably expect to result in prejudice or loss or interfere with other contract negotiations.

They're our submissions on settlement privilege.

CHAIR D. ORSBORN: Thank you.

P. OSBORNE: With respect to the Speaker's submissions, there are three main issues in there that we're going to address; one is whether the Management committee is the appropriate body to be named in section 4.

The Management Commission is an administrative body under the House of Assembly. We agree that it's inappropriately named in section 4 and that it should come out. We think it would just be appropriate to have the Lieutenant-Governor in Council named; strike the reference to the Management committee.

We acknowledge the section 85, appointment process, the comments made by the Speaker. It is anomalous for the Privacy Commissioner and we think that it should be in line with other public appointments for statutory offices.

CHAIR D. ORSBORN: Sorry, just run that by me again.

P. OSBORNE: So we agree with the Speaker's submissions that the appointment process should be similar to other statutory offices.

The Speaker also raised concerns about the reference – the time frames around next sitting. They're valid considerations, tying a matter to sitting temporally is very problematic. A session of the House can be super long or a sitting can be super short. It's not a good measure.

We welcome suggestions to reflect the intention that things should happen quickly and in a timely manner. We'd welcome your suggestions as to the time frames; perhaps a fixed period of time.

CHAIR D. ORSBORN: I can't simply throw it back and say that –

P. OSBORNE: How much?

CHAIR D. ORSBORN: – the sitting is your problem because it applies in other areas as well, I assume. There are a number of things that happen in government, I presume, that are tied to sittings of the House.

P. OSBORNE: They are and it's a problem. The definition of a sitting can be incredibly short or –

CHAIR D. ORSBORN: Yeah.

P. OSBORNE: The purpose is to have it done quickly but it's a –

CHAIR D. ORSBORN: Okay. It could be an arbitrary time really.

P. OSBORNE: With respect to whistle-blower, we recommend against having whistle-blower protection added to ATIPPA. A *Public Interest Disclosure and Whistleblower Protection Act* already provides a regime that protects employees and makes disclosure, when they reasonably believe a wrong has been committed or is about to be committed. This covers an offence under ATIPPA.

The whistle-blower current legislation has a full regime in place to determine if there's retaliation for disclosure and how to deal with it. We acknowledge that there's an issue with some public bodies being covered by ATIPPA that aren't covered by the current whistle-blower. Some of those were intentional by the Legislature including Memorial who have their own privacy regime in place as well as employees of the House of Assembly. They're covered by the *House of Assembly Accountability, Integrity and Administration Act*.

We'd considering any recommendations you have about including other public bodies, but that would, of course, require the appropriate analysis. If it's municipalities or something, we'd have to consider the other ramifications.

CHAIR D. ORSBORN: That can already be done now, can't it, by regulation?

P. OSBORNE: It can.

With respect to the duty to document, the OIPC has made recommendations, including legislating duty to document that the OIPC be given oversight of that duty. They've made recommendations about broadening the scope to apply to all public bodies covered by ATIPPA, except those covered by the Municipalities Act.

In response to the Muskrat Fall inquiry report, government advised that it would be implementing a duty to document. So there has been work ongoing within government to develop this legislation, there have been significant consultations held within government departments and public bodies, including the OIPC. Duty-to-document legislation is anticipated to be finalized this year. Included in that is, they're considering whether there will be reporting obligations to the House or not.

We disagree with the OIPC's recommendation that they be given oversight of the duty to document. The OIPC's mandate is strictly related to the functions of ATIPP. It's appropriate, we think, to have duty to document be contained within the OCIO, who controls the information management – responsible for the information management legislation.

This approach is similar to that used in British Colombia. BC is the only other Canadian jurisdiction that has implemented a duty to document in their legislation. They created a chief records officer, which is internal to government, that oversees the functions. I believe their officer reports to the house. So this approach ensures a separation of the information management responsibilities and the ATIPP, the privacy access responsibilities of the ATIPP legislation.

CHAIR D. ORSBORN: Yeah, my memory is a little fuzzy, but some of the discussions earlier with the OIPC about that, and I think recognition of that particular recommendation from the Muskrat Falls inquiry is not one that was specifically included in our Terms of Reference. Recommendation 15 –

P. OSBORNE: That's correct.

CHAIR D. ORSBORN: – I think it is, that's not specially included here.

You may not be able to answer this, but in terms of the duty to document, one of the specific recommendations that the OIPC made was in the area of artificial intelligence. Given the particular peculiarities, I suppose, of that activity, it was recommended that the processing activities be documented. That's something along the lines of the duty to document, I think, that the concern was where you have decisions being made within a box that somehow documentation be made of that decision, whether it be processing activities, or the algorithms or whatever, but some ability to, at least, look at a decision and assess it.

I don't know if you're in a position to comment on that or not, or I'm taking you by surprise.

P. OSBORNE: I'm not sure if – Sonja, going to speak about some artificial intelligence –

CHAIR D. ORSBORN: But let me just understand: Mr. Harvey, did I phrase your concern correctly on that?

M. HARVEY: Yes, that particular duty to document was an aspect of our recommendations on AI, that there be a duty to document specific to AI because of that nature of AI, that decisions made early in the process, because of the kind of on-going iterative nature of AI, they get baked into the process. So to be able to trace back the accountability, you need to really be able to document those (inaudible).

CHAIR D. ORSBORN: That's my understanding: specific aspect of the duty to document. So whether you're able to comment on that either now or later?

S. EL-GOHARY: I think that's outside of the, maybe, the – I can't speak to the duty to document legislation in the *Management of Information Act*, but I would imagine part of – if you're engaging an AI and it has to do with personal information and privacy issues, there would be privacy impact assessments or assessments of that where you would have to document that type of stuff. So I can't speak to the process outside of ATIPP, but that should be covered under the current legislation, at least for government because we're required to do privacy assessments.

CHAIR D. ORSBORN: Yeah, I think the recommendation was more directed to the operation of the system rather than its design in the first place.

All right, we'll move on. Thank you.

P. OSBORNE: So with respect to expanding the duty to document to cover all public bodies, OCIO hasn't done any sort of assessment of that. That's the significant piece and they'd have to consider that.

With respect to the inclusion of political parties as public bodies: the Privacy Commissioner's raised some very interesting concerns about political parties, the collection and use of personal information. At this time, British Columbia is the only jurisdiction in Canada that regulates the privacy practices of political parties. But political parties aren't covered by the public regime. It's separate privacy legislation which applies to private sector organization.

So the OIPC's recommendation would add political parties to the definition of public body in ATIPPA. It's noteworthy that ATIPPA, 2015 specifically excludes records of the constituency office of Members of the House of Assembly. That's in subsection 2(x)(vii). I believe that if the recommendation is accepted Newfoundland would be the only jurisdiction in Canada to regulate political parties in public sector legislation.

So there's a lot here to consider. It would mean that political parties would have to have increased focus on privacy in order to comply with the law. They'd need privacy policies, privacy statements to draft, develop retention, training for the staff and report privacy breaches. The OIPC would conduct privacy audits. They could mandate investigation of complaints.

It's conceivable that political parties would end up in court in this regard. I guess it's conceivable that this all could happen during an election. Certainly, fair treatment of personal information should be consideration for any private entity. Now, whether this is a legislated obligation or if it's expressed through privacy – just through guidelines – is an important consideration.

The recommendations would certainly protect privacy. I'm not sure what it does to facilitate democracy. All that to say that we'd consider any recommendations you've got on that.

CHAIR D. ORSBORN: Okay.

P. OSBORNE: With respect to the OIPC's recommendations regarding vacancy of the office and the formal delegation of authority, we have a few comments.

The current vacancy provisions we've noted are similar to provisions for other statutory offices, but we recognize the Commissioner's concerns that there are timelines in the ATTIPA that have to be complied with. It is important to balance the operational considerations of the Legislature with the office with the executive oversight. It might be inappropriate to have an amendment that allows the LGIC on a vacancy to appoint a Commissioner on an acting basis.

CHAIR D. ORSBORN: As opposed to the Commissioner making a formal delegation themselves.

P. OSBORNE: Yeah.

CHAIR D. ORSBORN: Why do you prefer one over the other?

P. OSBORNE: With the LGIC, Lieutenant-Governor in Council, prerogative who to appoint, I think they can do it if it wasn't bound to the normal appointment process, they could name somebody, name a temporary appointment and that's within their prerogative.

So the Chief Electoral Officer made some recommendations that are certainly worth considering. We advise the Commission that the Elections Act is currently under review, it is part of the Minister of Justice's mandate and as part of that review of the Elections Act, ATIPPA considerations will be considered.

With respect to the Auditor General: so the Executive Council's submissions recommended that amendments be made to ensure that the Auditor General's working papers related to an audit should be exempt from disclosure. That suggestion doesn't extend to the administrative or financial records of the Office of the Auditor General. We note that a jurisdictional scan seems that the Auditor General offices across the country are all exempt from ATIPP, but we don't see a compelling reason why the financial or administrative matters should be exempt.

CHAIR D. ORSBORN: Thank you.

That ties in, I think, with Chief Justice Green's recommendation, does it not, in his report?

P. OSBORNE: Yes.

CHAIR D. ORSBORN: Okay.

P. OSBORNE: A 50-year sunset clause for archived records: at first glance, 50 years seems to be a long time especially in consideration of other time frames contained inside the act. But after speaking with the provincial archivist it seems like it is actually a reasonable sound time frame. Other jurisdictions: PEI and the Yukon have the same 50-year provision; British Columbia, Manitoba and New Brunswick all have 100-year provisions for the archival records. It seems the 50-year time frame is tied to copyright protection and the protection of case files flowing through the Supreme Court of Canada.

According to the Canadian Intellectual Property Office, you have 50 years after a person dies for property rights – sorry for copyright. That's what that's tied in to. In 2017, the Supreme Court of Canada and the Library Archives of Canada announced a transfer of case files with the 50-year embargo. Our 50 years seems consistent with that.

The archivist also thinks it's tied to consensus records, most jurisdictions have 100-year-odd census information but we allow 50 years. We recommend staying with the 50-year sunset period.

CHAIR D. ORSBORN: The Wells committee felt that 50 years was extraordinarily long, I think, was the phrase that they used. Your submission is that for copyright purposes, census purposes and other purposes?

P. OSBORNE: Yeah, it seems that the archivist thinks that 50 years is a reasonable period of time and that's what they believe it is grounded in. I think the provision of the *Rooms Act* that is provided, it said: submissions other than a public body. If it's a person's private archive, files that they give to the archives, I'm not sure.

CHAIR D. ORSBORN: Yeah, the *Rooms Act* provides it when it's transferred from a public body that the head of the public body can attach some kind of a rider to it that when it gets – if it's asked for release that the archivist has to go back to the public body, is that …?

P. OSBORNE: I think so. That's how I understand it to work.

CHAIR D. ORSBORN: And then the normal harms tests would apply or whatever exceptions would be put there.

P. OSBORNE: Normal exceptions, that's right.

CHAIR D. ORSBORN: So then why do you need the 50 years?

P. OSBORNE: I guess for the ones that come from public documents, I guess it – I'm not sure. That's the recommendations, 50 year for –

CHAIR D. ORSBORN: That makes two of us.

Okay, all right. Thank you.

P. OSBORNE: Now we'll talk about some section A provisions.

CHAIR D. ORSBORN: I'm sorry, which ones?

P. OSBORNE: Section A – or Schedule A, sorry.

CHAIR D. ORSBORN: Schedule A, okay.

P. OSBORNE: Yeah, sorry.

So with respect to Oil and Gas Co. and 5.4 of the energy act, which ties into, I guess, recommendation 3 of the MFI report as well, it's our position that 5.4 should continue to apply to the oil and gas line of business. We don't think it's required for the hydro electricity line. The hydro line can be subject to the normal ATIPP considerations.

However, continuation of the priority given to section 23 of the Oil and Gas Co. is key to preserving the competitive commercial context in which Oil and Gas Co. operates. It provides Oil and Gas Co. and its co-ventures protection of commercially sensitive information from disclosure to competitors. The Oil and Gas Co. of course operates on behalf of the people of the province in a very competitive commercial

world. They feel it's required to keep certain aspects of its operations confidential from competitors. If it did not, it would run the risk of failure with the potential of massive adverse financial consequences for the people of the province.

Oil and Gas Co. partners with private sector commercial entities. These private sector entities would not be prepared to disclosure significant information to Oil and Gas Co. if there's a risk that disclosure can be obtained through ATIPP.

As well, Oil and Gas Co. manages Nalcor Energy's oil and gas interests and offshore developments. So this means there needs to be an equal need for both organizations to have the capacity to adequately protect commercially sensitive information from public disclosure. Altering this ability for either organization would jeopardize the ability for both organizations to maintain successful business relationships that drive economic growth and prosperity.

This is a core policy of the government, and government really wants this to remain for the oil and gas lines. It's essential for the functioning of the legislation that the information not be disclosed. Given the nature of the information, the public interest is best served that control of access continue under the relevant acts.

We also recommend not changing the degree of OIPC oversight. OIPC would not have the background context of what's commercially sensitive for a particular organization, so it would not be appropriate for the OIPC to determine this. I understand that the departmental staff already has challenges making these determinations through the current legislation, so the OIPC would have even less insight.

CHAIR D. ORSBORN: Well, right now, that's the only thing the OIPC can look at, isn't it, whether or not it's commercially sensitive?

P. OSBORNE: That's right, but it's still the decision of the– he could look at it, but he couldn't overturn the decision.

CHAIR D. ORSBORN: I understand that, yeah. As I understand the supervision regime now, the OIPC can look at whether something is commercially sensitive. If they determine it is commercially sensitive, then, essentially, they have to take the certification of the CEO or whatever, that it fits within one of the harm-based categories.

P. OSBORNE: That's correct.

CHAIR D. ORSBORN: The prejudice to allowing the OIPC to assess the harm that was asserted, would be what?

P. OSBORNE: Given the nature of the information, the regime, the act is specific. The Oil and Gas Co. is in a better position to determine if it's commercially sensitive or not. The OIPC, without the insight of the corporation, would have less of an ability to determine if it's commercially sensitive.

CHAIR D. ORSBORN: Wouldn't that be the same with any third party doing business with government?

P. OSBORNE: I take your point.

CHAIR D. ORSBORN: I guess I'm trying to work out – and you made the distinction yourself, the distinction between the substantive protection, which, arguably at least, it was the Wells committee's view that was a matter of government policy. But the oversight of that is a separate animal, is it not?

The oversight now in 5.4 in the Oil and Gas Corporation and the Innovation corporation is extremely limited. One could expand the oversight without changing the harm protection, could not one?

P. OSBORNE: I'm not sure. I think the act is designed to deal with the information and that's where it should remain.

CHAIR D. ORSBORN: Your view, then, is the same with the Oil and Gas Corporation as they are for Nalcor and the Innovation and Business development corporation. I think that's the same structure?

P. OSBORNE: Yes. Not for the hydroelectricity line for Nalcor –

CHAIR D. ORSBORN: No.

P. OSBORNE: – but with the oil and gas. The same considerations apply to the IBIC, yes, the section 23. We note that section 21 of that act is certainly much more limited than the previous research and development act. It's much narrower, but it's the same rationale.

With respect to the *Fisheries Act*, I can't add much more than what's contained in our written submissions, except that we'll highlight that the act only has eight sections and one of them mandates that the minister keep all information confidential. We think it's a large aspect of the act. Given that, and the purpose of the act, the growth, development and protection of the fishery and the importance of the fishery to the province, we recommend that it stay in Schedule A.

So all of section 5(1) of the *Fish Inspection Act*, the Legislature has specifically authorized the minister discretion to issue a refusal licence without providing reasons, and to include it in Schedule A of the act. It seems inappropriate to allow ATIPP to go in and undermine what the Legislature has directed. If somebody is aggrieved by a decision with the issuance or denial of a licence, they can JR that, judicially review that. If it's arbitrary or done in bad faith, the courts can deal with it.

CHAIR D. ORSBORN: The reason that – you can issue a licence or refuse a licence and give no reasons; therefore, it should not be covered by ATIPP. Is that the essence of it?

P. OSBORNE: Well, the essence is there is no – the Legislature has said, which is contrary to most things, that the minister can do it without reason. For whatever reason, the Legislature has done that, so it seems inappropriate to use ATIPP to go around that, to try to find out what the reasons were behind making the decision.

CHAIR D. ORSBORN: It doesn't change the substantive ability to do it with no reasons though, does it?

P. OSBORNE: The minister is certainly not going to do it without reason, without some justification. If the party involved is aggrieved, there's always recourse to JR. Transparency is not really an issue in this case.

The Pension Benefits Act: we've made a recommendation that 16 and 18 be included in Schedule A. The Pension Benefits Act applies to all pension plans for persons employed in the province, except those covered by an act of Parliament. This includes private plans. It's not just the public service plans, it's the private industry plans.

The act has a scheme in place where the administrator of a plan provides information to persons who are eligible to receive it. There's no reason why this information should be available under ATIPP.

CHAIR D. ORSBORN: I don't have the act in front of me; the administrator of a plan is outside the public body, right?

P. OSBORNE: That's correct. It could be 123 Inc.

CHAIR D. ORSBORN: It's not a question of ATIPPing the information that's in the hands of the administrator; it's a question of whatever general information, overall information, the administrator provides to the superintendent.

P. OSBORNE: That's correct. The legislation compels the administrator to provide certain information to the superintendent.

CHAIR D. ORSBORN: And that's an overall package of information, I take it. It's not related to individuals as such.

P. OSBORNE: I'm not sure if it's individual data or not.

CHAIR D. ORSBORN: No.

P. OSBORNE: The prescribed forms by the statute and the regs.

CHAIR D. ORSBORN: Yeah. My understanding when I looked at it was essentially the general data. What would be the purpose, then, in protecting the general data?

P. OSBORNE: Well, it provides no purpose to provide it through ATIPPA, it's not facilitated democracy; it's private parties pension plans through private corps. The government is regulating this or making sure it is mandated like funeral plans or whatever – prepaid. We require the administrators to make sure it is set up properly, so the government provides that oversight, but the legislative scheme is that the administrators give the information out to people eligible. Government doesn't know who's eligible to receive it, we don't control that data. There is no public purpose in providing this information.

CHAIR D. ORSBORN: You want to put a public purpose into ATIPPA for the (inaudible).

P. OSBORNE: No, that's correct.

CHAIR D. ORSBORN: Are there any legitimate privacy concerns or anything of that nature, as far as you know?

P. OSBORNE: I don't know specifically, no I don't.

CHAIR D. ORSBORN: Okay.

P. OSBORNE: With respect to the *Aquaculture Act*, we don't support inclusion of section 9.4 in Schedule A. The Department of Fisheries, Forestry and Agriculture supports strong public reporting requirements that enhance industry accountability and public trust.

There are public reporting policy requirements. They are required to publicly report reportable disease detections, escapes, quarantine orders, population orders, directives and other incidents. Some of these requirements, which are under regulation, are also captured by section 9.4. We think that ATIPPA should govern, and if there is an exemption then it would be captured by ATIPPA, but we don't think it should be included in Schedule A.

Unless you had specific questions about other acts in Schedule A, those are all of my submissions.

CHAIR D. ORSBORN: I was given to understand earlier, in terms of the Schools Act, that it is currently under revision. Is that your understanding?

P. OSBORNE: Yes.

CHAIR D. ORSBORN: Okay.

One of the suggestions that were made to us by Mr. Hollett, I believe, was in terms of Cabinet confidences that the word decisions should come out of section 27, simply because the decision itself does not reflect the substance of deliberations, which I understand is the general area for appropriate protection of Cabinet confidences. Do you have any comment on that?

P. OSBORNE: Yeah, we totally disagree with that. Decisions are made in series of increments. So if Cabinet makes a decision and it's publicly released, then the others – ATIPPA – would apply to that. Sometimes decisions are made, incrementally. It goes to core policy decisions, the Cabinet agenda. Government is not open at all to taking decisions out of that provision.

CHAIR D. ORSBORN: You're saying that the release of a decision in itself could reveal the substance of deliberations?

P. OSBORNE: Yeah, there could be micro-decisions, or the larger decisions are made incrementally and it could be part of a larger Cabinet directive and it's – Cabinet believes that it's not appropriate to remove decisions from the definition.

Thank you.

Next, I guess, Dr. Dawe.

CHAIR D. ORSBORN: Thank you, Dr. Dawe.

I heard from a couple of your colleagues earlier, Dr. Bulfon and Dr. Nicole, I think.

B. DAWE: Yes. So this will be, I guess, supplementary information regarding what they've already presented.

The Animal Health Division of the Department of Fisheries, Forestry and Agriculture employs large animal veterinarians with the primary role of providing a farm-animal veterinary service. These veterinarians are equipped with three-

quarter ton, four-by-four pickups with specialized heated veterinary clinic units in the bed which carry surgical, diagnostic, X-ray and ultrasound equipment and are capable of bringing a veterinary field hospital directly to a farm.

In most provinces, this type of farm-animal veterinary care is delivered by the private sector. The Government of Newfoundland and Labrador has been providing this service for approximately 50 years as a way of supporting livestock production, ensuring that farmers have access to affordable veterinary services and promoting the health and welfare of farm animals.

Our clientele include large and small commercial farmers. These include dairy, beef, sheep, goat, pigs, poultry and fur producers. Also, we have small non-commercial livestock owners who raise a variety of livestock to provide food for their families.

We also have clients who are horse owners, who keep horses for companion animals, for pleasure riding or competition and commercial riding stables.

We have a provincial diagnostic lab which accepts submissions from small animal clinics and their clients are pets; dogs and cats primarily.

There are aquaculture clients who are serviced by the aquaculture veterinarians in the Aquatic Animal Health Division.

The Newfoundland and Labrador College of Veterinarians is the licensing body for veterinarians. All veterinarians including those employed in the Animal Health Division are required to be licensed to legally practice veterinary medicine as defined by the *Veterinary Medical Act, 2004*.

Veterinarians are required to comply with the Veterinary Medical Act, Clinic Standards, By-laws and the Code of Ethics. The Veterinary Clinical Standards for Newfoundland, section 2.1.8 states: "Unless required for the purposes of a clinic inspection, or other legitimate action of the College, a medical record is considered to be a confidential record that is accessible only to the owner of the animal (or representative) and the attending veterinary clinic."

Veterinarians expect their employers, whether private or government, to protect and safeguard the legal responsibility of veterinarians to maintain confidential medical records and clients expect their veterinarians to safeguard their confidential medical records.

Farm medical records that are generated by the Animal Health Division include both individual animal records and also herd and flock health records. An example of a single animal record is a private citizen owning a pleasure horse. The medical records would include: contact information of the owner; signalment of the horse, such as age, gender, weight; details of medical history, such as vaccination status and past medical events; the presenting complaint; extensive notes on the assessment; diagnostic test results, such as lab and X-rays and interruption of these results; and then a differential diagnostic, treatments and prescriptions.

An example of a herd-flock health record, generated by the Animal Health Division, is the health records of a mink ranch that is participating in a veterinary herd-health program. These records include data generated or collected by the mink producer over a period of time and made available to the veterinarian for analysis and evaluation. Data would include mortality and morbidity numbers; i.e., the number of animals that die on a daily or weekly basis and the number that were sick and recovered.

The records would also include the veterinarian's notes on observations and evaluations of the farm during the regular farm visits, such as comments on barn hygiene, signs of disease, presence of wounds, body condition scores, abnormal or stress-related behaviours and handler technique. A final report is generated after each farm visit with written performance evaluations, targets and goals are set and there's a date for re-evaluation. Areas of concern and urgency are flagged in these medical records. The medical records would also include lab and necropsy reports, the biosecurity plan and emergency response plan, the veterinary client-patient relationship agreement

and it would include pharmaceutical prescriptions and treatment protocols.

There is potential harm from release of these records, both the privately owned clients and the population medicine records from commercial farms. The release of a private citizen's veterinary medical records could cause undue hardship, such as resale value of the animal, harsh judgment by peers in the equine community, mental health challenges and unnecessary stress.

I will provide a fictitious scenario. A young adult with very limited horse experience decides to embark on their lifelong dream and buy a horse. They believe they are educating themselves well with Internet research and talking to experienced horse owners. They build a small barn on a rural property, buy a hay supply for the winter and then buy a young horse. The owner does not realize that the horse's body condition is declining throughout the winter.

The horse is active and eats well, but in the spring, as the horse sheds the winter coat, they suddenly notice and are alarmed by visible ribs and hip bones. They place a call to the vet. The horse is indeed malnourished; lab results reveal a very heavy worm burden. Deworming treatments are started; however, the worm burden is very large and the dead worms create an intestinal blockage and the horse becomes extremely sick. Continued treatment is estimated to be $1,000 with a guarded prognosis. The owner makes the decision to euthanize the horse, based on finance and prognosis. The owner is traumatized by the experience and feels responsible for this tragic event.

Then the veterinarian receives a request for information on equine mortality events. The medical records contain detailed notes on the body condition, the absence of parasite control, pain control medications and decisions to euthanize. Release of these records would add to the distress of this owner. They would be judged by their peers. There might be support or criticism, or a combination. It is quite likely that this information would be shared widely on social media with many people posting negative comments.

The release of commercial producer records could also affect consumer confidence, sale of their product, adverse publicity; it could incite animal rights activism, disruption of business and farm worker harassment. A fictitious example is a mink farm notices a sudden onset of increased mortality. This farm participates in a herd-health program with the Animal Health Division and has written protocols to follow when mortalities exceed a certain level.

The mortalities are happening in one area of the farm, so this area can be isolated and immediate biosecurity measures put in place to limit spread. The veterinarian visits the farm, performs necropsies and collects samples for testing – diagnosis and outbreak of pneumonia with the source identified as a contaminated waterline. The outbreak is contained and the animals are treated; however, there is higher than normal mortality and lividity. The medical records reflect this and contain detailed information on mortality data provided by the farm, lab data, necropsy data and notes on assessments and treatments.

This is a significant mortality event and can be accessed through a request for information. Release of this information can result in negative media attention, harm to the producer, harm to the farm workers and their families. Access to the farm could be impaired by demonstrators disrupting normal business operations, such as access by workers and feed trucks, and then negatively impact the health and welfare of the animals that we are trying to protect. The health and welfare of the animals could be jeopardized if biosecurity plans become difficult to maintain.

Newfoundland has a large dairy sector that is serviced by the Farm Animal Veterinary Service. Regular herd-health visits are conducted anywhere from monthly to weekly, depending on size of the farm. Disease surveillance and monitoring is an integral part of this program and is very important to maintain animal health and food safety.

Mastitis is an infection in the utter of a cow. Mastitis control programs are very important to producing safe and high-quality milk. There are strict regulatory programs to ensure the milk that reaches the consumer is safe, high qualify and free of antibiotics. Our dairy producers, with the

help of their herd veterinarians, set targets in their mastitis control programs that are much more stringent than the regulatory requirements.

To allow the vet to monitor the effectiveness of these programs, farm data is provided to the veterinarian. The vet also collects samples and generates data, written assessments and sets targets and goals. Medical records note when targets are not reached and these targets may be far below the regulatory targets. They institute corrective actions for the producer to undertake when the targets are not reached.

A request for information on a mastitis control program could reveal farm records of cows that are diagnosed and treated for mastitis, milk that has been withheld due to antibiotic treatment, farm mastitis targets not being met and interventions taken. Release of these records could give the impression that milk is not safe and high quality; whereas in reality, it is this disease-monitoring program that safeguards the consumers, helps the producers achieve the highest standards of utter health and provides the consumer with wholesome, nutritious and safe milk.

The release of data from these monitoring programs could have the very unfortunate consequence of negatively affecting consumer confidence in the product. Negative publicity could affect milk sales and have financial consequences, not only to this farm but to the entire dairy industry.

These are three fictitious examples; however, there have been real-case scenarios where veterinary medical records of the Animal Health Division have been released publicly through access to information. This resulted in loss of trust, loss of free flow of information between vet and client and a broken vet-client patient relationship. This negatively affects the practice of veterinary medicine within the Government of Newfoundland and Labrador.

Veterinarians take the Code of Ethics very seriously. It is extremely difficult when we cannot provide confidentiality to our clients. Our role is to support producers, improve their productivity, control disease and improve animal health and welfare. Without confidential medical records, this role is in jeopardy.

Thank you for this opportunity.

CHAIR D. ORSBORN: Certainly, from the earlier part of your comments I gather that a fair bit of your work is done almost on a private basis outside of the regulatory regime. Did I gather that correctly? When you spoke about the example of the horse and going around in the trucks with the veterinary clinic and whatnot, are your government veterinarians in effect then operating as private veterinarians would?

B. DAWE: Yes, they are operating exactly like a private veterinarian in the delivery of this regional veterinary farm animal service. In most provinces, this is delivered through the public sector, but in Newfoundland –

CHAIR D. ORSBORN: Through the public sector or the private?

B. DAWE: Oh sorry. Yeah, the private sector.

CHAIR D. ORSBORN: Most provinces through the private sector.

B. DAWE: In most provinces, it's delivered through the private sector, but in Newfoundland it's such a large geography and the farms are located in remote regions, so it's very difficult to deliver it privately. It's financially not economical for a private veterinarian to deliver the service.

In Newfoundland, there are no private sector veterinarians. The government has delivered this service for many years, approximately 50 years.

CHAIR D. ORSBORN: Is there a charge for it?

B. DAWE: There is a charge for it, yes.

CHAIR D. ORSBORN: Okay.

B. DAWE: There is a call fee and an hourly fee. The call fee is standard no matter how far you go. If we leave, say, Pasadena and drive to St. Anthony, the call fee is the same as if we drive to Cormack to visit a farm. The reason why we do this is to give equal access to veterinary care to all the commercial farmers to support the commercial farmers. Also, for the private animal owner, it ensures a standard of animal health and welfare throughout the province.

CHAIR D. ORSBORN: Is it possible for you to draw any kind of a line between where you are stepping into the shoes of a private veterinarian as opposed to fulfilling a regulatory role of a government veterinarian?

B. DAWE: We also provide regulatory work. The regional veterinarians do very little regulatory work. As the chief veterinary officer, I do regulatory work, so there is a line drawn.

The regional veterinarians are the front-line eyes on the farm. They are there observing and will have a duty to report a reportable disease, a disease of economic importance, an emerging disease or a concern that that might be happening, or an animal welfare concern.

CHAIR D. ORSBORN: Okay, we'll take the last couple of things you mentioned. Did you say economic disease? Is that the phrase you used?

B. DAWE: Yeah, a disease of economic importance.

CHAIR D. ORSBORN: Would there be a public interest in knowing that there is such a disease around or possibly around?

B. DAWE: There would be, yes. Those diseases are reportable through the *Animal Health and Protection Act*. There is a duty to report a disease of – a reportable disease. There are provincial reportable diseases, which are reportable directly to me as chief veterinary officer. There are also federally reportable diseases, which get reported to the CFIA federally, and then to the OIE, which is the world organization for veterinarians.

CHAIR D. ORSBORN: The information that you are looking to protect is the records that are applicable to a particular animal?

B. DAWE: A particular animal and also a particular farm. We actually have some very large commercial farms and the practice of veterinary medicine on those farms we term population medicine. The medical records that are generated on a farm do include individual animal records, but they include a lot of production data, disease surveillance and preventative medicine strategies; standard operating protocols with monitoring for disease.

CHAIR D. ORSBORN: Is that information generated or provided to you – if you can separate it – in your public capacity or in your private capacity?

B. DAWE: That information is provided in the private capacity. So that –

CHAIR D. ORSBORN: So if there were private vets, that would be the information provided to the private vet and you wouldn't get it?

B. DAWE: I wouldn't get it, no. If there were private sector veterinarians in Newfoundland, those records would be held by the private veterinarians and would not come to my attention, unless it was a disease that was reportable or regulated.

CHAIR D. ORSBORN: Okay.

All right. Thank you very much, Dr. Dawe.

B. DAWE: Thank you.

CHAIR D. ORSBORN: I don't know if there's anything you wanted to add to that, Mr. Osborne.

P. OSBORNE: No, thank you.

CHAIR D. ORSBORN: All right.

P. OSBORNE: Jessica Pynn.

CHAIR D. ORSBORN: It's quarter to 11. I don't know how long you expect to be, Ms. Pynn. We can take a break now, rather than interrupt you in the middle of your presentation.

J. PYNN: My submissions aren't too long. I guess it depends on whether or not you have questions.

CHAIR D. ORSBORN: Go ahead.

J. PYNN: Thank you, Chair Orsborn.

As Philip mentioned earlier, I'm going to address section 39 of the act, as well as the public interest override. We previously heard, I guess, back in January during the round-table discussion, the three-part test outlined in section

39 of the act is a relatively high threshold to be met when we're determining whether third party business records should be disclosed. That provision has been somewhat challenging for the province and for our ATIPP coordinators. I would like to start with some of our practical experiences with the section. We canvassed the issue with our ATIPP coordinators and I'll describe some things that were outlined to us.

The province does often receive push back from third party businesses in relation to section 39. The release of information that the third party considers to be its own confidential, proprietary information. When we're talking about releasing that information, it does cause strain in relationships with third party businesses. Third party businesses have refused to provide us with information or they sometimes provide information in a redacted form. When information is received in a redacted form that makes the job of government employees or government lawyers who are tasked with reviewing information and providing advice on information more challenging because they don't have full access to the information required.

Receipt of redacted documents does create a risk that decisions could be made without information that could be crucial to the decision maker, and that can have financial implications for the province. One example would be funding programs. We have programs where funds are provided to third party businesses, so if the third party refuses to provide full information to the province, the province is then left to decide to either still provide the funds without full information or to not provide funds at all, and neither of those options are good options. They both could have negative financial implications for the province. A company's refusal to provide the necessary business information or the refusal to enter in to agreements with the province, because of their fear of disclosure, that can also stymie the provinces ability to deliver programs.

Government employees have also be asked to review documents at a third party's business location. So the employee can only take notes on the document. The province is never in custody or control of the document; that remains with the third party business. The employee has only short-term, fettered access to the documents and that limits the province's ability to complete our due diligence assessments when we are reviewing information from third party businesses.

Those have been some of the practical experiences that the province has had with section 39. I guess the big question is what can be done to address those concerns. We all know that the purpose of ATIPPA – one of the purposes – is to promote openness and transparency within a public body. Section 39 has been included by the Legislature in the act for a reason and the purpose of section 39 itself is to protect third party businesses from harm.

We have to balance the purpose of ATIPPA against the purpose of section 39, which has been explicitly included in the legislation. We believe that the focus of the section 39 test should be on potential harm to the third parties if the information were to be released. I believe there was some discussion at the round table about confidentiality in relation to section 39(1)(b) of the act. That's the second part of the test which requires –

CHAIR D. ORSBORN: Hypothetical.

J. PYNN: Yes, hypothetical – that requires information to be supplied in confidence. That is often where the section 39 test fails. We consider part one of the test, what type of information it is, and then we look at part 2, whether or not the information was supplied in confidence. Again, it often fails at that second part. We never really get to the third part of the test, which is the consideration as to whether or not the release of the information will create harm for the third party. In that way, section 39 is not really being used for its intended purpose.

Whether or not information is supplied in confidence to the public body, that's not really determinative of whether or not there will be harm if the information is released. Eliminating the requirement that information be supplied in confidence would focus the test more squarely on harm, which is what the province believes is a more appropriate test in relation to section 39.

CHAIR D. ORSBORN: Mr. Osborne was saying this morning, in talking about the Oil and

Gas Corporation, that confidentiality was everything.

J. PYNN: Right. I'm not familiar with –

CHAIR D. ORSBORN: You're dealing with a different section.

J. PYNN: I'm dealing with a different section, yes.

We're dealing with third party businesses who supply information for all different types of reasons. It can be for contractual reasons, it can be to receive funding from the province, to receive a licence from the province. I think those are different considerations than what Mr. Osborne addressed earlier.

Those are my comments on section 39 itself. I can discuss the public interest override if you don't have any questions.

CHAIR D. ORSBORN: Okay.

J. PYNN: There was also some discussion about the public interest override and whether or not it should apply to section 39. The province believes that it should not. We just discussed the section 39 harm's test and we all know that it's a very high threshold to be met. If a third party business meets the harm's test, they've proven that harm will come to their business if the information is released.

It's difficult to envision a circumstance where the public interest would override that harm. If there is such a circumstance, we believe it will be rare, but if it does exist, section 9(3) of the act, we believe already addresses this.

Section 9(3) requires proactive disclosure of any information. Do you want to pull up the act?

CHAIR D. ORSBORN: It's a safety issue, isn't it?

J. PYNN: Yes, so it deals with risk to the environment, health and safety to a group of people, a disclosure which is clearly in the public interest. If there is information of such public interest that it overrides the harm that a third party business has proven will result in release of the information, we believe that section 9(3) would already require disclosure of that information.

More generally, the province doesn't believe that this general section 9, public interest override, should apply to any of the mandatory exceptions in the act. I'll just list what those mandatory sections are: it's section 27, Cabinet confidences; section 33, which is about workplace investigation; section 39, which we just discussed; section 40 is about personal information; and section 41, disclosure of House of Assembly service and statutory office records.

CHAIR D. ORSBORN: There already is one in section 27.

J. PYNN: Yes, I was just going to say, section 27 and section 40, they have disclosure provisions built in. We think that's a more appropriate way to deal with those particular sections because of the type of information. The disclosure of public interest override sections have been tailored specific to that information and included in those provisions themselves. When we're looking at section 33 – the workplace investigation section – that would generally be dealing with very specific incidents that occur in a workplace or cases of harassment between co-workers. That's generally very sensitive information and, likely, it contains a great deal of personal information.

Again, similar to section 39, it's difficult to envision a scenario where the public interest would be so great that it would override that particular section to disclosure.

CHAIR D. ORSBORN: What if it were?

J. PYNN: Well, if it were, then we would say that section 9(3) already requires disclosure of the information.

CHAIR D. ORSBORN: Okay.

J. PYNN: I'd just like to –

CHAIR D. ORSBORN: So you –

J. PYNN: Oh, sorry.

CHAIR D. ORSBORN: So you don't lose anything by making it subject to the mandatory

public interest override, would you? Making the mandatory exception subject to the override.

J. PYNN: We don't think it should apply to section 9(1), which is the general override, which applies to most discretionary exceptions.

CHAIR D. ORSBORN: Yeah, I'm not sure why that's there, because the discretion is built in to the – the override is built in to the discretionary exception anyway.

J. PYNN: Yes. Generally, that would be true.

CHAIR D. ORSBORN: But let's assume for the sake of argument that you have a situation where – and I'm not sure how you define public interest anyway. Assume that it is clearly demonstrated that the public interest outweighs the harm in a section 39 situation, but also assume it's not a situation covered by 9(3). Should it be disclosed?

J. PYNN: No, because we don't believe there could be any type of public interest that would override the harm, unless it was the type of scenario outlined in section 9(3).

CHAIR D. ORSBORN: Okay. So you're saying that there's no situation in which a public interest outside 9(3) could outweigh a section 39 harm.

J. PYNN: We can't envision one.

CHAIR D. ORSBORN: Okay.

J. PYNN: Yeah, because it's been proven that harm will come to a third party if the information is disclosed. So situations where there's a risk of harm to health, safety –

CHAIR D. ORSBORN: So you have nothing to lose then by making it subject to the override, have you?

J. PYNN: To the general section –

CHAIR D. ORSBORN: If you can't envision a circumstance where it would ever happen.

J. PYNN: Technically, no, but I'm not clairvoyant, so there might be a situation that I'm not seeing. Again, I think it would only be overridden in situations of harm to health, safety and environment: those sorts of things.

I just want to address something that was noted in the Commissioner's submissions. They referred to the federal access to information legislation. They have a section similar to our 39 – I think it's section 20 – and there is a public interest override built into that section. However, I would note that there is no general public interest override in the federal legislation. There is no section 9(3) equivalent in the federal legislation.

I would also note that the built-in section in the federal legislation only relates to information relating to health, safety and the environment. We already have a section that addresses that and that's section 9(3).

Those are my submissions. Thank you.

CHAIR D. ORSBORN: Thank you.

S. EL-GOHARY: (Inaudible.)

CHAIR D. ORSBORN: No, I was going to make sure that you – if you have something to say.

It's two minutes to 11, so we'll take a 15-minute break and come back.

Thank you.

Recess

S. EL-GOHARY: (Inaudible) today, I'll be providing a summary of some of the key suggestions made by our office and other government departments, primarily related to administrative and procedural matters. Additionally, I'll provide a summary of our office's perspective on some recommendations made by other stakeholders. I guess in between items I can stop to see if you have any questions.

CHAIR D. ORSBORN: Thank you.

S. EL-GOHARY: Okay.

Before proceeding, I feel it's important to reiterate the purpose of the suggestions we brought forward and, in fact, many government

departments brought forward in relation to the access provisions.

As mentioned in our submission, there has been a significant increase in the number of requests received as well as the breadth and complexity of many. Even a straightforward request may require more time to process than in the past given the administrative requirements introduced in 2015. These administrative and procedural requirements are straining the system that has finite resources, which are unlikely to increase in the near future. As well, they are taking away time a coordinator could be spending on processing requests or assisting their public body with the privacy provisions of the act.

It remains our belief that the suggestions put forth by our office and many of the suggestions put forth by other departments will have limited impact on the primary purposes of the act, which are to ensure transparency, accountability, participation by the public and protecting the privacy of individuals in relation to the personal information held and used by public bodies.

It should be noted that while we are presenting on behalf of government, our submission was not limited to the experiences faced by government departments, and was meant to bring forward suggestions based on our experiences assisting all public bodies over the past five years.

The submissions brought forward by other departments, some of which I'll be summarizing, were made on behalf of those individual departments. The views in our submission or those of other departments do not necessarily reflect the opinions of government as a whole. For example, Immigration, Skills and Labour did not make a submission as they felt no amendments were required. For this reason, I will be noting which department made the various suggestions outlined in this presentation.

First section is one of the issues faced by coordinators, the requirement under the act to process requests for information that is readily available through another established process. This matter and suggestions for your consideration were brought forward by our office; Environment, Climate Change and Municipalities, or ECCM; and Executive Council.

A common example would be solicitors making ATIPP requests for records they can obtain through the discovery process if they are in litigation with a public body. Another example, brought forward by ECCM, which the experience frequently relates to their responsibility for regulating the cleanup of impacted sites. The department has an established process through its impacted site management section for conducting searches of department files; however, some applicants have been bypassing this process and submitting ATIPP requests for the information.

Our legislation notes that the act does not replace other procedures for access to information; however, the act in similar provisions in other jurisdictions have been interpreted not to preclude or limit an applicant's ability to submit an ATIPP request for records that can be obtained through another process. Allowing people to submit these types of requests is contributing to the unnecessary burden being placed on the system and may delay access for other applicants.

As noted in our submission, the fact that another process may take longer or require a fee should not negate the fact that it is unnecessary to place such a burden on the ATIPP process, which is already untenable for many public bodies. Furthermore, processing these requests does not support the primary purposes of the act, which are to ensure transparency and accountability as well as ensure citizens have the information required to participate meaningfully in the democratic process, as this information is available through other processes which allow this to occur.

In terms of suggestions made to the committee, ECCM suggested the act be amended to resolve the apparent conflict between section 3 and 5, while our office and Executive Council suggested consideration be given to amending the act to preclude applicants from submitting requests for records that can be obtained through another process.

CHAIR D. ORSBORN: How would you propose controlling that example? If you're

aware of another government process, that may be one thing, but how do you know that somebody is looking for it for the purposes of discovery?

S. EL-GOHARY: You won't always know, and in the case where you don't know, it would be processed. Sometimes you're aware, you happen to know because it is in the media that something is happening and then when the request comes in you know that applicant is involved or when you go out to departmental staff to look for records they may say there's litigation on this right now. They wouldn't know who is making the request but they would know this is something that's going on and then I would reach out, or someone could reach out, to the litigation unit to see if there is –

CHAIR D. ORSBORN: Would that lead to an uneven treatment of requests depending on what you know and what you don't know?

S. EL-GOHARY: It's possible, but I think in most cases it also depends on what point – I think one of the people who presented said that if you're in discovery there might be – it's easier to know that something is going on. So I think as long as we could weed out, at least most of the people who are bypassing other processes, that would help alleviate some of the pressures under the act.

CHAIR D. ORSBORN: Okay. And do it by how, just disregarding it or …?

S. EL-GOHARY: If there was an amendment to the act so we could cite that section and then advise them: You can go through this route. So you would still be assisting them and directing them to the right process.

The next section, we'll review various suggestions put forward regarding the role of the applicant and the impact on timelines, where there's either no response or a delayed response to a request for a clarification. As Philip mentioned earlier, a number of departments suggested that there be a requirement for applicants to communicate with the coordinator when needed. This included our office; Finance; Health and Community Services, or HCS; and Industry, Energy and Technology, or IET. In cases where applicants are unfamiliar with the process, or have submitted overly broad requests, communication is essential.

A common example is where an applicant submits a request for a topic but doesn't provide a time frame. Good communication between the applicant and the coordinator to clarify the scope can mean that the request is processed faster and they get what they are looking for. In most instances, applicants are responsive and communicative with coordinators when they are asked for additional details. However, there are some applicants who do not assist coordinators when additional information is required and ultimately delay and impede the process. In some cases, they may not respond to questions or even expand their request. There should be some onus on the applicant to communicate with the coordinator in a timely manner when required, or at the very least the time spent waiting for clarification should be taken into consideration.

To that end, in addition to suggesting a duty for the applicant to communicate, more departments suggest that the timelines be amended to accommodate the time required to seek or obtain clarification. This included our office; Child, Seniors and Social Development, or CSSD; Executive Council; Finance; IET; the Office of the Chief Information Officer, or OCIO; Tourism, Culture, Arts and Recreation, or TCAR; and Transportation and Infrastructure, or TI.

The first suggestion brought forward by Executive Council, IET, OCIO and TCAR was that the clock should stop while the public body waits for the applicant to respond. This would ensure public bodies are not adversely affected by delays caused by the applicant. The second suggestion brought forward by our office, DGSNL, Executive Council and Finance was that if the applicant does not respond to questions regarding clarification within a specific amount of time that the request could be considered abandoned. Various provisions from other jurisdictions within Canada were used as suggestions including PEI and Alberta. The third suggestion made by CSSD, OCIO and TI suggested a combination of the two. The clock would stop while waiting for clarification; however, if the applicant does not respond, the request can be considered abandoned or denied.

The next section is non-responsive information. It's another example of an unnecessary administrative and procedural burden placed on public bodies. Not only is it causing undue strain on the public body and coordinators in particular, it unnecessarily delays access to the requested information for the applicant and takes time away from other requests the coordinator is processing, causing further delays.

This matter and suggestions for your consideration were brought forward by our office, Executive Council and IET. We feel that amending the legislation similar to that of New Brunswick will resolve this matter quite easily. IET recommended that the OIPC policy on the matter be changed; however, our office feels it is essential that the legislation be amended to resolve this matter, given the OIPC's position on this has changed and could continue to change without legislative amendments.

CHAIR. D. ORSBORN: That would be done how? Just by blacking stuff out with no explanation?

S. EL-GOHARY: No, you would still have to explain that it's non-responsive. When you redact information, you put the exemption code. In this case, you could put non-responsive and explain to the applicant that it doesn't relate to the topic of their request.

CHAIR D. ORSBORN: Okay.

One of the risks, I assume, is that if somebody then wanted to go through the trouble of working through an exemption, they'd simply redact it as non-responsive and that would be that?

S. EL-GOHARY: Well, they can only do that if it is truly non-responsive to the request.

CHAIR D. ORSBORN: I understand that. How is somebody to know?

S. EL-GOHARY: I know when you're reviewing records, sometimes there may be an email that is clearly responsive, but it has attachments or it covers multiple topics, so you would know from that. For personal information requests, I know when I've processed them, sometimes there are emails relating to different employees or an email that covers multiple staff and then there are attachments for each staff. You would know that the three attachments unrelated to the applicant are non-responsive and should easily be able to be removed.

Topics like meeting minutes or agendas; often you're covering multiple topics. They would be separate and completely different. I'm not talking about redacting within a paragraph if something goes offside, but it's where it's clearly a different topic and separate in the document.

CHAIR D. ORSBORN: I assume there'd be some element of judgment involved in that, in determining whether something is responsive or not.

S. EL-GOHARY: Yes and that's part of communicating with the applicant. I know a lot of times it's going back and forth with them as you're going through the records, just to make sure what they're looking for. You could do the same, if there's a record that is responsive, but then there's information and you're unsure. Whenever you're unsure, the advice our office always gives is contact the applicant.

CHAIR D. ORSBORN: You mentioned New Brunswick. I take it then that this has not been addressed, other than in New Brunswick?

S. EL-GOHARY: That's the only one I found offhand. I'm not sure if other jurisdictions have it.

CHAIR D. ORSBORN: Okay.

S. EL-GOHARY: Jessica provided a summary of the issues outlined by departments in relation to section 39; however, our office feels that many of the issues relating to that section are inextricably connected to problems found within section 19 of the act relating to third party notification.

Under both previous versions of the act, time was provided for public bodies to consult with third parties, either through extensions or the notification process. It is our belief, and that of other departments, that removing these provisions from the act has negatively impacted the ability of public bodies to engage in a

meaningful dialogue with businesses, giving public bodies a better understanding of the records they have and whether they can be released.

As noted by IET, a lack of consultation is problematic because neither the ATIPP coordinator nor the head of the public body are able to, or should be required to, decide on behalf of the third party what they think may be harmful and therefore exempt under section 39. It may not be possible to undertake this decision without properly consulting the third party before deciding to release the information. A number of departments suggested that section 19 allows for these consultations, including our office, DGSNL, Finance and OCIO. Both our office and DGSNL also suggested the legislation allow time for these consultations to occur.

One of the primary issues with section 19 is the disparity of opinion regarding notification requirements. While it appears that the OIPC finds there are almost no circumstances under which a third party should be notified, and admonishes public bodies when they do so, decisions of the court appear to recognize that the threshold for notification should be lower, as public bodies may not have enough information to make a correct judgment without notice. Given the uncertainty coordinators face when trying to determine when third party notification is required as a result of the contrast between the OIPC and court decisions, our office and Executive Council suggested that the legislation be clarified on the matter.

Another section of the act that many public bodies find problematic is the timeline for submitting a request to disregard to the OIPC, and the limitations placed on the OIPC's authority to approve disregards relating to vexatious applicants. The five-day deadline for submitting a request to disregard has been problematic since it was introduced in 2015. It becomes an even greater problem when the deadline coincides with holidays or an office closure, which still count as business days for the purposes of the act.

CHAIR D. ORSBORN: I think the OIPC agrees with you on the five-day limit, doesn't it?

S. EL-GOHARY: Yes.

CHAIR D. ORSBORN: Yes.

S. EL-GOHARY: I can bypass this then, if you –

CHAIR D. ORSBORN: No, no that's fine. Is there anything else you wanted to add to it?

S. EL-GOHARY: I was just explaining why it's difficult. Also, there were different suggestions on time frames, so I'll skip everything else

TCAR suggested the deadline be extended to day 10 at a minimum. I think that's in line with what the OIPC recommended. Our office, DGSNL and Executive Council suggested day 15, and IET suggested eliminating the deadline altogether. Furthermore, DGSNL, OCIO and TCAR suggested that the clock should stop between the time the coordinator submits the request to disregard and the time it takes the OIPC to respond.

In our submission, we also reviewed the issue of vexatious applicants who continue to submit requests for the same or similar information even after the OIPC has approved a disregard. For this reason, we have suggested that the legislation be amended, similar to BC's act, to give the OIPC the authority to limit future requests from a vexatious applicant.

The next section, we'll review three matters relating to extensions: the requirement to seek approval from the OIPC for all extensions, the time limit for submitting a request for an extension and the response provided by the OIPC when they do not approve or partially approve an extension.

Section 16 of the act allows a public body 20 business days to respond to a request, unless they receive approval from the OIPC. For the most part, this process is workable; however, one consequence of this process that may not have been considered in 2015 was the additional administrative burden it places on public bodies. The OIPC has released guidelines which outline the information they require when considering whether to approve an extension. IET feels that the level of detail required should be reviewed and reduced in many circumstances. Our office noted that while it's understandable that such details are required when considering larger

extension requests, it is quite cumbersome in circumstances where a public body requires a short extension.

Suggestions were made by various government departments on this matter, including our office, CSSD, DGSNL, ECCM, Executive Council, Finance, HCS and IET. For the reasons outlined above, we suggest that the consideration be given to allowing public bodies to apply short extensions of up to 10 days, under specific circumstances, without the requirement for approval from the OIPC. Any additional extensions will continue to require OIPC approval. This should balance the overall desire to ensure public bodies are responding without delay and the practical reality of processing requests. This was further supported by the submissions from CSSD, Finance and IET.

ECCM and HCS recommended that public bodies be able to grant initial extensions but did not provide a specific time frame. TI suggested similar language to the federal act; Executive Council suggested 20 days, while DGSNL suggested up to 30 days, similar to other jurisdictions.

CHAIR D. ORSBORN: You suggested specific circumstances, being what?

S. EL-GOHARY: Most jurisdictions have common ones: if consultations are required either with a third party or with other public bodies; if you needed additional time for clarification from the applicant. There might be others; it has been a while since we had them. One that most don't have, but might be beneficial, would be if there are multiple concurrent requests. I know that's one of the ones that the OIPC considers, but it might be beneficial for the short extension as well.

A further issue with OIPC extensions is the deadline for submitting these requests: they must be submitted by day 15 except under extraordinary circumstances. While this appears to be a reasonable time frame, it has been our experience that it is not always known by day 15 whether an extension is required. While not the norm, small unexpected issues can arise after day 15 that could affect the time frame required to process a request. Without flexibility within the legislation, the OIPC is unable to consider such requests unless they meet the high threshold of an extraordinary circumstance. This can result in situations where a public body requires an extension that otherwise would have been approved by the OIPC, if not for being submitted after day 15.

Conversely, you may also have public bodies submitting a request for extension on day 15 because they're not sure if they'll need one, but know they won't be able to get one if they don't submit the request by that day. This is not only a waste of the coordinators time but the time of the OIPC, which is required to review the request. Our office suggested that the legislation be amended to allow the OIPC to consider extensions beyond day 15 where they deem it reasonable to do so, while IET suggested that the deadline be removed entirely.

Both our office and IET feel that the legislation should be amended to require the OIPC to provide more detail regarding their decisions to deny or partially approve an extension request. It is extremely frustrating for coordinators to be required to provide the level of detail that the OIPC expects and to have them deny the request, partially approve it, or to partially approve and advise they can submit another extension, if needed. Part of this frustration lies in the fact that there is very limited detail provided to public bodies explaining why the amount of time being requested has been denied or partially approved and how they came to this determination.

In some cases, it may be caused by lack of detail provided by the public body; however, in other cases the public body appears to have provided a detailed and reasonable explanation outlining the need for an extension. While it is likely based on detailed analysis without said details of how they came to their decision, it can often seem arbitrary to the coordinator. Additionally frustrating can be some of the time that the OIPC does not appear to agree is necessary when requesting an extension. For example, our office has heard of cases where the OIPC has questioned a public body for including time for the head of the public body to review the records prior to responding, even though the act clearly requires the final decision to be made by the head of the public body or their delegate.

Some requests involve hundreds or thousands of pages of documents or require complex discussions and analysis. The process of applying for an extension takes time and thought. It can be a challenge to articulate to the OIPC the complexity of records or why it may take additional time to respond to the request. Without additional details outlining why a request for extension was not approved or partially approved, the public body cannot learn from this experience and improve their submissions for future requests.

Our office and a number of departmental coordinators have met with the OIPC previously to discuss this matter and were advised that the process would not change. For this reason, and those above, both our office and IET feel that the legislation should be amended to require a detailed overview of how they came to their determination.

Philip talked about application fees and processing fees. I'll just give a bit of explanation around the processing fees and why we felt they were important. Our office suggested to the committee that the act allow for charging for processing requests not just locating records. The purpose of this suggestion was not to create barriers to access to information by requiring applicants to incur unreasonable costs. Furthermore, in order to ensure this affects as few applicants as possible, we suggested that consideration be given to increasing the number of free hours per request for public bodies other than municipalities.

The next section we'll talk about is workplace investigations. I have a submission from Treasury Board Secretariat and then comments from our office.

During the section 33 round table, there was significant discussion regarding the current problems with mandatory disclosure requirements under section 33. While not here today, TBS requested that the following be conveyed to the committee. They agree with the concerns that other public bodies brought forward during the round table and how the current legislation is negatively impacting workplace investigations. As an employer, GNL has a responsibility to not only ensure safe and respectful work environment but to enforce workplace rules and policies and to ensure consistent practices.

Mandatory disclosure requirements under section 33 have caused serious issues for GNL as an employer and have, in some cases, hurt not only GNL's ability to fully and independently investigate issues that come to light but also its ability to improve the workplace after the investigation has concluded. In some cases, has led to a reduction in employee safety.

Investigations often rest upon witnesses coming forward or participating in the process. If employees fail to come forward to either identify an issue within the workplace or to speak with an investigator, truthfully and openly, to tell them the events of an incident as they saw it, a proper investigation is impossible. Witnesses have asked investigators: If this information is ATIPPed, am I protected? There's no definitive answer to this question as it depends on the wording of the request. Knowing their identity is not protected under ATIPPA, 2015 may cause individuals not to come forward with the information about a workplace issue or as a witness to an incident. The fear of retribution may also result in witnesses being less forthright than they would otherwise.

Very few investigations result in termination. This often means that the witnesses and the employee who receives discipline will end up working together in the same office, or even in adjoining cubicles. In some instances, they even have to share living quarters for weeks at a time, as well as work together. Releasing witness names, or information that can identify the witness, will not only bring unnecessarily increased tensions in a probably already tense workplace, but undermines the employer's ability to improve the workplace for everyone.

Employees are stressed and some are taking leave to remove themselves from the workplace because they are fearful of the repercussions against them once their names are released. Releasing identifying information regarding witnesses can result in more harm in the workplace, and the employer may not be made aware because people refuse to come forward to avoid having their identities released through a request. Witnesses deserve some level of protection and the employer should be able to

ensure it in cases where it determines an employee may be put at risk.

As many participants in the round table discussed, disclosure of records during an investigation can have a negative impact. If an applicant submits an ATIPP request mid investigation to determine who is a witness, what has been said so far, if any discipline has been decided or a decision made, weeks, months or even years of work can be for nothing. The potential avenues available to the employer for resolution or discipline or legal proceedings are jeopardized. While the employer stresses confidentiality during an investigation, the release of information prior to its conclusion can and may taint further witness accounts, result in people removing themselves from the process or becoming hostile towards investigators.

Fully 75 per cent of GNL's workforce is unionized and represented by a shop steward or other union representative of their choice. They have the right to grieve and refer any matter to arbitration. ATIPP is being used to circumvent this process in their collective agreements and allow employees access to information while the matter is still outstanding in the labour management relationship process. This not only impedes the employer's ability to successfully conclude disputes with the union, it undermines the employer's position.

Investigations that have not been concluded or are the subject of grievances, arbitrations or a legal proceeding should not have any information released outside the parameters set out in the negotiated collective agreements and human resource policies as applicable. This –

CHAIR D. ORSBORN: Those latter cases would be where no discipline resulted?

S. EL-GOHARY: I think there might be discipline, but it might not be termination.

CHAIR D. ORSBORN: Not grieved.

S. EL-GOHARY: Yeah, I'm not sure how many cases where there's discipline that isn't grieved. I could follow up with TBS on that.

CHAIR D. ORSBORN: No, it's (inaudible).

S. EL-GOHARY: Okay.

CHAIR D. ORSBORN: Are there workplace conduct issues and discussions with employees and supervisors that would not necessarily get to the level of what you would call an investigation?

S. EL-GOHARY: I'm sure there would be.

CHAIR D. ORSBORN: Are you suggesting the same protections should apply?

S. EL-GOHARY: I think if they didn't get to a workplace investigation, section 33 wouldn't apply, so we wouldn't have the same issue. They would be protected or could be protected, possibly, with other exceptions.

CHAIR D. ORSBORN: Not if my opinion of you becomes your information.

S. EL-GOHARY: That's true. That's an issue with section 40, your personal information; I think MUN brought that up. That's another issue that possibly could be resolved by reinstating the definition of personal information from 2005.

CHAIR D. ORSBORN: I think, from what I gather generally from the positions of the OIPC – has somewhat similar concerns about how to deal with this issue effectively.

S. EL-GOHARY: Yeah.

CHAIR D ORSBORN: Yeah, okay.

S. EL-GOHARY: That was almost the end of TBS's submission. They did suggest that section 19 of the Yukon's act could be looked at for outlining what information about a workplace investigation may be released.

I'll just go through what our office's opinion is, because it differs slightly from most of the submissions that were focused primarily on ongoing investigations. I would note while it's true that it's problematic and is a true issue, we feel that the issue doesn't end once an investigation is completed. While the impacts on a specific investigation will no longer exist, the impacts on the individuals affected remain.

Recent OIPC decisions highlight the incongruity of subsection 33(3) with the privacy provisions of the act. In a privacy complaint, it was found that letters, which were released outside of an ATIPP request, constituted a privacy breach\; however, an access complaint that included the same letters, which were released through an ATIPP request, found they had been disclosed in compliance with the act. In both cases, the letters had been disclosed to the same person.

An additional issue with disclosure under section 33(3) is that the information cannot be controlled once provided to the applicant. We mentioned that in our original submission. Basically, if you're releasing information through the workplace investigation process, a public body can put limitations on how that information is to be used. Whereas if it's released through an ATIPP request, an applicant can do whatever they want with the information and it could actually be used to further harass the complainant.

We recognize that administrative fairness requires that a person accused of harassment or other unacceptable behaviour has a right to know the case against them. If the party is an applicant, they have a right to know enough details to respond to the accusation. We feel that the wording of the original provision in the 2012 legislation appeared to at least attempt to balance the right of access with the right of privacy; however, when this section was amended in 2015, a significant imbalance was created.

This is a complicated issue that requires solutions. Various stakeholders have brought forward suggestions on how to resolve the problem. Our primary suggestion was that the committee consider removing the requirement for disclosure. While we feel mandatory disclosure should not be required, we do not feel that public bodies should be able to use this section – the mandatory exception to disclosure part – to withhold information that the applicant would currently be entitled to under subsection 33(3). However, we believe they should be able to use other exceptions within the act, such as section 40 and section 37.

Our office recognizes that the purpose of the act is to balance both access and privacy rights. For the most part, the act achieves this balance. However, in relation to subsection 33(3), a clear imbalance has been created that unfairly requires the disclosure of personal information that is recognized to be an unreasonable invasion of privacy, and in any other circumstance would be recognized as a privacy breach that may cause significant harm. Additionally, in some cases, the disclosure could in fact be harmful to an individual's health or safety. Amendments must be made to ensure this imbalance is rectified.

CHAIR D. ORSBORN: Any room for public interest overriding any of that?

S. EL-GOHARY: I don't think, just given the nature of the records that are involved with that, as Jessica noted with all mandatory exceptions. But I think with workplace investigations, you're dealing with such sensitive personal information that it would be difficult to think of a circumstance where you would release it.

While the main portion of our submission related to all public bodies, including municipalities, we felt it was also important to discuss in further detail some of the unique challenges faced by smaller municipalities. As with most other public bodies, municipalities have seen a significant increase in the number of requests received each fiscal year, with some municipalities being impacted to a greater degree than others.

Since 2015, municipalities have seen a 280 per cent increase in requests received. In our submission, we reviewed the limited capacity many smaller municipalities have. We suggested some amendments that we felt would help some of these smaller municipalities, including: amending the definition of business day for towns that are not open five days a week; extending the 20-day timeline for responding to requests for smaller municipalities; allowing smaller municipalities to charge reasonable fees related to material resources expended processing requests on a cost-recovery basis; consider allowing public bodies to charge for processing a request, not just locating records – that applied to all public bodies but is even more important, I think, for municipalities – and, also, consider reducing the number of free hours they have to provide per request. Currently, they have

to provide 10 free hours. Consider maybe reducing it to four.

CHAIR D. ORSBORN: Yeah, just going back to what you talked about. Before you talked about processing fees, you talked about reasonable fees for what, for copying or whatever, I guess. The question that comes to mind is that because an applicant happens to be dealing with a small municipality, should they be treated differently than if they're dealing with the Department of Finance or something?

S. EL-GOHARY: I think it recognizes that it's a larger burden placed on a small municipality, so –

CHAIR D. ORSBORN: I understand that, yeah. But from the applicant's point of view, is there a rationale that they should be treated differently? The fact they happen to be applying to a smaller body?

S. EL-GOHARY: I think the issue is maybe they're being treated differently in that they're being required to contribute more to that process than with a larger department that can incur the fee. So we wouldn't want to balance it for everyone to mean everyone can charge the way that small municipalities do.

CHAIR D. ORSBORN: Is that fair to the applicant?

S. EL-GOHARY: I think so.

CHAIR D. ORSBORN: I guess you would.

S. EL-GOHARY: I'm just looking at small municipalities with less than $50,000 –

CHAIR D. ORSBORN: Sure.

S. EL-GOHARY: – for budget who don't have copiers or literally don't have the supplies that most public bodies take for granted.

CHAIR D. ORSBORN: What does a small municipality do if they're faced with a situation where they could well have to get legal advice in terms of the applicability of an exception or something of that nature? Are they –?

S. EL-GOHARY: I'm not sure what they do. I could be wrong but I think there is a service that provides limited legal advice maybe, like (inaudible).

CHAIR D. ORSBORN: A service within government?

S. EL-GOHARY: No, I think it's a private entity.

CHAIR D. ORSBORN: Okay.

S. EL-GOHARY: I'm not sure. Maybe it's through MNL. I'm not sure about what it is specifically. We provide as much advice as we can but, obviously, we can't provide legal advice. That's where our (inaudible).

CHAIR D. ORSBORN: Yeah. Anyway, they're similar issues that I've read from the coordinators and others in small municipalities in terms of getting the IT, IM and other support that is available to larger bodies.

S. EL-GOHARY: Yeah. Like I said, we provide as much support as we can, but there are limitations to what our office can (inaudible).

CHAIR D. ORSBORN: Yeah. You have a municipal analyst in your office?

S. EL-GOHARY: Yeah. That came after the 2015 review.

CHAIR D. ORSBORN: Yeah.

S. EL-GOHARY: He solely supports municipalities. All of us do, but having a defined position for it has really helped because there's just so much work with 275 municipalities, and it ranges in the type of assistance they need.

CHAIR D. ORSBORN: Yeah. I don't recall the exact figure off the top of my head, but looking at the municipalities under the act, my recollection was in 2019-20 the total number of requests was only 120, 130. Would I have that right?

S. EL-GOHARY: I think so. That sounds about right.

CHAIR D. ORSBORN: Okay.

S. EL-GOHARY: If they were divided amongst all the public bodies, that wouldn't be an issue, but you have –

CHAIR D. ORSBORN: I understand, yeah. Not really divided equally among the municipalities either.

S. EL-GOHARY: That number would be correct if you don't count – I'm not sure if it would be a little larger, because City of St. John's gets a fair –

CHAIR D. ORSBORN: No, just the ones under the 1999 legislation.

S. EL-GOHARY: Okay, yes.

CHAIR D. ORSBORN: Yeah.

Okay, thanks.

S. EL-GOHARY: In the last section of our presentation, I'll provide a brief overview of our position on some of the recommendations brought forward by the OIPC. In their submission, they had put forward several recommendations based on definitions or provisions found within the *Personal Health Information Act*, or PHIA.

While there may be merit with updating the privacy provisions of the act, our office has some concerns with amendments being made based on provisions of PHIA. Personal health information is wildly recognized as highly sensitive personal information. There's also a necessity for health professionals to share information within the circle of care.

The creation of PHIA was in recognition of the fact that personal health information as a subcategory requires a higher threshold of protection and potentially more flexibility in regard to sharing within the circle of care. Furthermore, PHIA is unique in that it encompasses both public bodies and other non-public body health care providers that do not fall under the act. Public bodies that fall under ATIPPA, 2015 have varying mandates, and as a result, the scope and type of personal information in their custody and control varies vastly.

The recommendations put forward by the OIPC do not appear to recognize this distinction between PHIA and the act. While it is possible that provisions within PHIA may be applicable to some of the personal information that public bodies have, it is highly unlikely that they would apply to all personal information, including that which is not overly sensitive or may not be considered an unreasonable invasion of privacy under the act.

The privacy provisions of the act are based on reasonableness. It would not be reasonable by any standard to expect the same level of protection for a moose-hunting permit as a mental health referral. For the reasons outlined above, our office suggests that the committee not adopt provisions from PHIA as amendments to the act. Alternatively, if the committee determines that amendments to the act based on PHIA are appropriate, our office would suggest that the committee consider modifying any provisions to include a reasonableness clause.

One of the recommendations that the OIPC made based on PHIA is that there be a legislative requirement to develop information policies and procedures. If the committee determines that it would be appropriate to legislate this requirement, our office would suggest that it be based, again, on reasonableness, which would be in line with other provisions of the act. In most instances, a general overarching policy should be sufficient with additional procedures developed where necessary. It should only be in circumstances where the general policy and additional procedures unique to a specific program are not reasonably sufficient that additional policies should be developed; this can be identified through a privacy assessment.

CHAIR D. ORSBORN: Okay, just so we're talking with the same language. When you use the phrase information policies and procedures, you're talking about the general policies that are in place for the protection of personal information. Do I have that right?

S. EL-GOHARY: Yeah.

CHAIR D. ORSBORN: Okay.

S. EL-GOHARY: The OIPC has recommended that a definition of a common or integrated program be added to the act and that it be based on BC's definition. In their submission, they refer to the difference between our office and theirs in terms of the definitions we have adopted. We would ask if you feel that there is a need for a definition that it be considered the definition our office has relied on since the act was amended in 2012.

One of the primary factors that contributed to our office relying on this definition was the role OCIO has within government. While some programs and services they provide are being brought forward by OCIO in concert with other departments, and would therefore be common or integrated programs, in most instances they are simply providing a service to their client, similar to that of other functions that many IT divisions within other public bodies provide. There are other departments or divisions within government that have similar roles; for example, the Public Engagement Division of the Communications and Public Engagement Branch, or CPEB, often assists departments with public engagement initiatives.

If the definition the OIPC is recommending is adopted, it would essentially result in any assistance that these government departments provide to other departments being considered a common or integrated program. This does not appear to be within the spirit of the legislation or the purpose for which paragraph 68(1)(u) was adopted. If the committee determines that the definition recommended by the OIPC is appropriate, we would suggest consideration be given to adding provisions to the act, noting that where departments such as OCIO or CPEB is providing purely support services to a client department, that those services do not fit within the definition.

Related to the above matter is the OIPC recommendation that an information sharing agreement, or ISA, be required for every common or integrated program. This, in conjunction with their recommendation regarding the definition for a common or integrated program, would result in ISAs being required in any instance where a department such as OCIO or CPEB provides support services to a client department. Such a requirement would appear to be unwarranted and unnecessarily increase the administrative burden of the act.

For this reason, our office would suggest that the committee consider whether it is necessary to include a legislative requirement for ISAs to be completed for every comment or integrated program. The determination of whether an ISA should be completed can be made during the privacy assessment, which would be in line with the privacy provisions that are based on reasonableness.

In conclusion, I'd like to thank the committee for giving our office the opportunity to present today. I'm happy to discuss further or answer any questions you may have.

CHAIR D. ORSBORN: There are a couple of issues we haven't talked about. I'm not sure who wants to address them. There have been some concerns raised in these submissions about the ability of a person to go to court when something other than an issue of refusal or grant of access or the collection of personal information. For example, if there is a recommendation to conduct a new search or a recommendation to reconsider a decision or – I think as in the recent case before Justice Noel – an issue involving a duty to assist.

Do you have any views on what the options for an applicant should be if there is a concern about a public body's response to a recommendation of that nature?

P. OSBORNE: On subject to an appeal?

CHAIR D. ORSBORN: Well, the question is, assume that there is a recommendation on 47(b), whatever it is, to reconsider a decision; assume the public body says get lost. What does an applicant do?

P. OSBORNE: The option then is (inaudible.) I think Memorial called them hard or soft recommendations.

CHAIR D. ORSBORN: Yeah.

P. OSBORNE: So there are certain soft recommendations that shouldn't be subject to appeal or to recourse by the courts, that's what

the Commissioner says (inaudible) that engages expenditure of funds and that shouldn't be up to the court or the Privacy Commissioner, that sort of the product of the Legislature.

If it's a recommendation like search a different way, something that's not captured, then I think that the OIPC has mechanisms in their reporting, their reporting to the House, the list of recommendations they make annually and the recourse is advocacy. They can say: Look, we've told the Department of Justice to change this process each request, and they won't do it. That's the recourse: the political pressure, the public advocacy.

CHAIR D. ORSBORN: Okay.

What about the situation that was faced by Justice Noel where there was a claim that a public body had breached its statutory duty to assist. Should they have recourse to the court?

P. OSBORNE: In that case, it would seem so.

CHAIR D. ORSBORN: Okay. Because I don't think there is anything in there now that speaks to the remedial authority of the court in that situation.

P. OSBORNE: No, there seems to be a gap.

CHAIR D. ORSBORN: Yes. Okay. And there may be other obligations under the act. I'm not sure if somebody could create an obligation somewhere. All right.

It doesn't seem quite right that a person should be refused access to the court somehow, or if there has been a legal obligation – at least an accusation or a legal obligation breach.

The whole business of the publication schemes, there's a whole section in the act there that talks about – and as I understand it, this is information that may well be duplicated on a website of a public body, but it's designed to provide a snapshot of what the public body does and the general inventory of information, if you will, that it has.

Under section 111, it provides that there should be regulations passed describing or stipulating what bodies are subject to that. They're not. Do we know why or what should happen with it? Or should we just get rid of the section?

S. EL-GOHARY: We feel there are issues with section 111 as it currently is worded. The legislative requirements do not lend themselves to being user-friendly. As you mentioned, there is a lot of duplication under the publication scheme for information that's already available through public websites. Also, the level of detail for some aspects of it, again, isn't overly user-friendly. We developed a guide that we feel would meet the legislative requirements, but it really isn't user-friendly.

If you feel it does need to remain, we feel that the OIPC should be required to meet their legislative requirement to create a standard template.

CHAIR D. ORSBORN: I guess the question is, forget 111, but in the whole context of transparency and accountability and whether it's done through your own website or whatever, is it appropriate that a public body should make available to the public a general description of what it does, perhaps its manuals, its key personnel and its general inventory of information? In principle, is there anything objectionable about requiring that?

S. EL-GOHARY: I think in principle, no, but in application the level of detail and the type of information.

CHAIR D. ORSBORN: Sure, fair enough. I think that –

S. EL-GOHARY: At least I can say for government departments, a lot of that information is available. If you look at the government website, each department has a section on the branches and divisions in that department, and what their mandate is.

CHAIR D. ORSBORN: It was a specific recommendation, I think, of the Department of Health. If I remember correctly, they reproduced part of the federal legislation I think it was.

Along the same vein, proactive disclosure has been suggested in a number of submissions or others, that it could well be some stipulation of the certain categories of information that are

required to be published routinely without the need of having to make an ATIPP request, subject to redactions and whatnot. Do you have any views on that?

For example, one that's mentioned a lot – and we went over, I think it was, three or four months of access requests – you see repeated requests for ministerial briefing notes. Is there any reason in principle why they should not be proactively disclosed subject to redaction issues?

P. OSBORNE: I can't think of anything. I don't have specific instructions on that, but we'd certainly welcome recommendations.

CHAIR D. ORSBORN: Yeah.

P. OSBORNE: There seems to be merit in what you're saying.

CHAIR D. ORSBORN: There is some stuff, granted, already in the *Public Procurement Act.* I think there is a minimal level of disclosure of contracts and whatnot.

S. EL-GOHARY: I think as a whole, government is happy to look at ways to proactively disclose more information, but I think the position is that it be done through policy versus legislation.

CHAIR D. ORSBORN: I have an issue you may or may not be able to comment on. It's raised by a couple of municipalities in terms of privileged meetings of committees. I think there is some question as to whether or not the legislation contemplates protection of information coming out of a privileged committee meeting. Anything you want to comment on that?

S. EL-GOHARY: I think we noted that in our submission as well there's a bit of unclarity around section 28, whether some committees of council are covered by that section or not.

CHAIR D. ORSBORN: Yeah, that's the point. I think it was suggested by one or more of the parties that probably ATIPP should include the circumstances under which a committee of council could hold a privileged meeting. It strikes me that's probably a better –

S. EL-GOHARY: Yeah, I don't –

CHAIR D. ORSBORN: – fit for a municipality's legislation, rather than this.

S. EL-GOHARY: Yeah, it would be more appropriate because they'd know under what circumstances meetings should be held privileged, whereas ATIPPA is about access and disclosure.

CHAIR D. ORSBORN: Yeah.

S. EL-GOHARY: So I think it would be a better fit under those legislations.

CHAIR D. ORSBORN: An issue that's mentioned by the OIPC's submission – I'm not sure what the answer is. The OIPC functions also as a public body. To make a simple example, what happens if somebody wants to file a complaint about a refusal by the OIPC to supply the information? What do they do?

The OIPC in its submission talks about sort of the easier ones where they're looking for approval to extend the time limit or whatever. But on a more fundamental nature, if someone wishes to make a complaint about the OIPC's actions as a public body, I'm not quite sure what happens.

You ever had a complaint, Mr. Harvey?

M. HARVEY: I don't believe so. I can't imagine. I don't believe so.

CHAIR D. ORSBORN: Well, what would you do if you had one?

S. MURRAY: We notify applicants, when we give them the response to an access request, that they have a right to appeal to court. We indicate that legislation also gives them a right to come to us, but we say, obviously, we've made the decision so it wouldn't be appropriate to use that route. That's the only thing we can do at present and we haven't gotten any appeals.

CHAIR D. ORSBORN: Well, essentially any situation where you would make a decision as a public body, then you end up effectively with a direct appeal to court.

S. MURRAY: Yeah.

CHAIR D. ORSBORN: Yeah, okay.

No role for a body like the Citizens' Representative to get involved in that, is there? I'm just trying to think of some other independent bodies that could come in between there.

M. HARVEY: We considered that and we considered models like an ad hoc commissioner that could be, let's say, the Citizens' Rep or an adjudicator, as is used in other jurisdictions. We found that those would be cumbersome. There's already a path to court and we feel that's the most logical one.

CHAIR D. ORSBORN: I guess the situation would be the same if you take some of the recommendations that are made by the government; a disregard, for example. Just assume, for the sake of argument only, that you had an ability as a public body to disregard an application request for a specific circumstance, then the option would be a direct appeal to the court, I presume, in that respect if you're acting as a public body.

Let's just assume for the sake of argument that as a public body, you have the ability to disregard a request on your own decision for a particular circumstance – just assume that – and you notify the applicant, then the recourse of the applicant would be then to appeal it. There's not much else left, is there?

M. HARVEY: That's what seems logical to us, yes.

CHAIR D. ORSBORN: Yeah, okay.

Anything further?

S. EL-GOHARY: Chair, I'd just like to clarify my comments on confidentiality, because I don't believe what I've said conflicts with what Philip said about confidentiality in the oil and gas context.

In relation to section 39, I'm certainly not saying that confidentiality isn't an important consideration; we're just saying that the test shouldn't stop or turn on whether or not something is confidential. We should be able to get to a consideration of whether or not there's harm. Confidentiality is still an important factor, but should not be a determining factor; harm should be the determining factor. I don't think that conflicts with what we've said previously on –

CHAIR D. ORSBORN: As long as it's in there it's a determining factor, is it?

S. EL-GOHARY: Right. So right now, we're in a one-two-three test. We get part one; okay, we go to part two. Then, it stops at part two if the information is found not to be confidential.

We can still consider confidentiality, but maybe just not in part two. Perhaps we consider it in relation to whether or not there will be harm if the information is released.

CHAIR D. ORSBORN: (Inaudible.)

S. EL-GOHARY: Yeah.

Okay, thank you.

CHAIR D. ORSBORN: Thank you all very much.

Again, I appreciate the sense of the collaborative approach. I look forward to hearing from the Commissioner on Wednesday, 9:30 in the morning.

Thank you.