ATIPPA STATUTORY REVIEW COMMITTEE 2020

Transcript Volume 9

Committee Chair: Honourable David B. Orsborn

Wednesday 12 May 2021

CHAIR D. ORSBORN: Good morning. Welcome to the final public hearing session of the 2020 statutory review of the *Access to Information and Protection of Privacy Act, 2015*.

These hearings were adjourned on January 28 because of the call of the election and the operation of the caretaker convention. We were able to resume only on Monday past with submissions of the Government of Newfoundland and Labrador. Today's final session will provide the Office of the Information and Privacy Commissioner with an opportunity to make concluding comments, and any response they may wish to make to other submissions that have been made to the committee.

I welcome the Information and Privacy Commissioner, Mr. Michael Harvey, and with him, Mr. Sean Murray, director of research and quality assurance with the Commissioner's office.

Mr. Harvey, thank you, Sir.

M. HARVEY: Thank you very much, Chair Orsborn, for giving us the opportunity to appear again before you, and also for the careful attention that you've given to all the issues related to ATIPPA throughout the course of this review. We very much look forward to your report.

This supplementary submission will attempt to focus on the more substantial recommendations from written submissions, which we believe would represent a retrenchment or a step back from the hard-won rights and effective procedure found in ATIPPA, 2015. By and large, as I speak today I'll refer to ATIPPA as just ATIPPA when I mean ATIPPA, 2015, just for the sake of clarity. If I refer to the previous statute, I'll make it clear that's the one I'm referring to.

We're not able to address here every single recommendation that people have made in written submissions or in oral submissions. We generally have refrained from commenting on the positive and helpful recommendations that are meant to enhance or protect the rights of Newfoundlanders and Labradorians, just for the sake of brevity. So while this means that almost all of what I'll say here today will be focusing on recommendations that we have some issue with or some disagreement with, please note that this may make me seem much more disagreeable than I actually am.

We really do appreciate all of the submissions that have been made. I do believe that these submissions were made in good faith from the perspectives, through the lenses of the people and the public bodies that made them. Of course, these are the lenses that they bring to these matters.

One theme that runs through many of the submissions from public bodies relates to the challenges faced by coordinators in implementing access to information. From our broad perspective – across the entire ATIPP perspective in which we hear the points of view of not just public bodies, but also access to information requesters and third parties – many of these challenges are, first of all, inherent in any access to information statutory regime; and, second, in many cases are best addressed through procedural improvements rather than statutory amendments. Any administrative initiatives that can make the request process more efficient without impacting the rights, safeguards and oversight in ATIPPA should be considered.

Just to note, I come to the Office of the Information and Privacy Commissioner after four years working in the Department of Health and Community Services at the executive level. During that period, we performed quite well from an ATIPP perspective. Not due to my performance per se, but because the department as a whole took the position, first, that we needed to provide executive access to ATIPP coordinators and we had to give priority to ATIPP. Those two simple things significantly increased our ability to comply with timelines. Access to decision makers, I think, is one of the most critical things that, at an administrative level, could really significantly improve timeliness of ATIPP requests and the day-to-day working lives of ATIPP coordinators.

This was a finding of the Wells committee, that executive really needed to respect the role of the ATIPP coordinator, I still think it is very much

true. The point I'm trying to make is that the ATIPP – to the extent that the ATIPP process can be improved to improve the working lives of ATIPP coordinators, I think there is a great deal of progress yet to be made, internally, on administrative procedures. Jumping to statutory fixes is, I think, unnecessary and could result in a retrenchment of rights to access.

CHAIR D. ORSBORN: Executive support is not something that you would normally mandate by statute so how would you suggest, as a committee, I deal with that or address it, other than saying be more supportive.

M. HARVEY: That's what I would recommend that you say. That's what the Wells committee said back in 2015, is to continue to strongly encourage executive and core government to respect the role of the ATIPP coordinator. He, at that time, and the committee with Mr. Letto and former Commissioner Stoddart, they didn't recommend legislative changes to deal with the org structure for ATIPP coordinator, but they did comment on the role of the ATIPP coordinator and their status. I think that not every fix needs to be a statutory fix.

CHAIR D. ORSBORN: What's you assessment of how that's worked?

M. HARVEY: That it is varied. First of all, I feel that we did not change – the provincial government did not change the organization structure for ATIPP coordinators after 2015. By and large, the structure remained the same. There are a lot of considerations that went into the recommendations of that committee, at that time, but, ultimately, by and large, the resources dedicated to ATIPP within departments remained, by and large, the same.

Commissioners before me have commented on the fact that additional resources are required in the system; I'm not recommending that today. We're in a very challenging fiscal circumstance. For me to recommend a big pile of new fiscal resources to go there, I think would be tone-deaf at this juncture. In fact, I would say – and this is one of the stories that I hope will come out of my submission today – the story of ATIPP since 2015 is a story of a success. You, I'm sure, have had heard from ATIPP coordinators about the difficulties that they face. There is no doubt that this is hard work that they do. I very much respect their hard work and also, sometimes, the many challenges that they face.

Adjectives like "untenable" have been used to describe the ATIPP system, and I don't think that's the case. When I look around this province, I see a lot of public services that are under enormous pressure, leading to challenges with service delivery. I won't call them out, but when I look at the metrics of the access to information system, what I see are metrics that any service would be very jealous to have. Metrics such as the fact that there are between 1,000 and 2,000 ATIPP requests every year, and only between 100 to 200 requests for extensions.

CHAIR D. ORSBORN: That number is closer to 3,000, isn't it?

S. MURRAY: Yes.

M. HARVEY: Yes.

The vast majority of ATIPP requests are successfully dealt with. Very small numbers of complaints are received by my office, and most of those are dealt with informally. These are the metrics of a system that works.

There's no question that if you ask officials about what challenges are you facing with your work and what changes could be made to the statute to improve that, they're going to tell you what their challenges are. Everyone has challenges with their work. The provision of public service to the aims of democracy is difficult, but I think from our broad perspective, what we are looking at is success.

Recently, our investigators took part in a national investigators' conference in which they compared notes with their colleagues in other jurisdictions. The performance of our system is really the envy of other jurisdictions, just from the perspective of how access requests are dealt with, the timeliness in which they are dealt with and the investigative process that happens on complaints. It is the story of success. That's been part of the narrative that we've tried to communicate since the very beginning, that we think, particularly on the access to information side, ATIPPA, 2015 is a world-class act.

It can stand for improvement, and that's why we had 56 recommendations, but that said, I really want to get across our perspective that we think this is an act that actually works and adjectives like "untenable" we think are quite strong.

CHAIR D. ORSBORN: Yeah, that's not a word I've come across.

M. HARVEY: It was one that I heard on Monday and so it stuck with me.

Just to return now to the content of our submission here today. I just want to make a few specific notes about Schedule A.

There were a number of submissions – so as an introductory remark – several submissions propose adding provisions of specific acts to Schedule A, such that they would prevail over ATIPPA. We think that any addition to Schedule A should be done on the basis of necessity rather than convenience. If exceptions to access exist in the body of the act that help attain the policy goal, then we think that those should be the ones to rely upon, rather than by adding a provision to Schedule A.

Similarly, but even more, I think, significant, any suggestion by public bodies to put categories of records in section 5 should be treated with the greatest of care because records that are subject to section 5, which is essentially not subject to the act at all or not only subject to the access portions of that act, but they would also not be subject to the privacy and security protections of the act as well. We would think that using section 5 of the act is an extreme and unjustifiable step that could harm the privacy interest of Newfoundlanders and Labradorians.

Just as some final introductory remarks, we would encourage you to consider that when considering of the many proposals to curtail or to make changes that would have the effect of curtailing access to information rights, I think it's important to consider: What is the purpose of those amendments and who would benefit from them?

I think it's only normal that public bodies have provided you with submissions that advance their own interests, but we would encourage you, in considering them all in their aggregate, to consider how do they add up to the interests of Newfoundlanders and Labradorians. I want to say that we have a specific mandate as an oversight body to speak for the interests of Newfoundlanders and Labradorians as they relate to this act, as opposed to the interests of this office. I would hope that you wouldn't interpret our remarks as, in some sense, a pursuit of the interests of the office per se.

But it would be normal, I think, for a regulatory body in this process to purport to speak for the interests of Newfoundlanders and Labradorians. Not that we have a monopoly on that view, but I think that in their submissions, public bodies and other entities that have made submissions – and individuals – it's only normal for them to speak on behalf of their own interests. In the aggregate, we need to find a way of letting the interest of Newfoundlanders and Labradorians rise to the top, as it relates to the purposes of the act.

In short, and as a final introductory remarks, I'll say that, again, ATIPPA is an excellent statute. We fought hard for it. The political circumstances surrounding ATIPPA, 2015 were very, very challenging ones, and we emerged from that process as leaders in the country – true leaders. I think we are seen across the country as true leaders. I think it's really important that we not waste that and let that be a victim of this process.

I'll make some very brief comments on information security. I would say that I'll now respond to specific suggestions. Some of them I'll have much more brief comments about, but I feel that I should make them orally anyway. Of course, we can get into them in more detail if you wish. Our written submission that we will be presenting to you by end of day on Friday will, of course, deal with these in more detail.

The first of these I want to talk about is information security. The OCIO has made recommendations related to information security. In particular, they focus on 31(1)(l). We agree with them on the importance of protecting against disclosure of information security arrangements and that this is a vital public policy interest; 31(1)(l) is a broadly worded provision that does not require proof of harm. It already establishes a low threshold to

protect such information. So, in our view, while we agree with OCIO in principle, they have not established a rationale for why 31(1)(l) is inadequate for its intended purposes, and they don't cite any examples about where information security arrangements have been required to be disclosed by a court or recommended to be disclosed by this office.

Memorial also spoke on this matter in its supplementary submission and endorsed OCIO's perspective on information security, suggesting that a separate section on IT security protection be added to the act. While section 64 of ATIPPA requires the head of a public body to take steps that are reasonable in the circumstances to protect personal information, it should be more in mind that the security information that is not personal information is outside the scope of ATIPPA. That is more properly the purview of information management and falls squarely within the *Management of Information Act*; 6(1) in particular lists protection of records as a responsibility of the permanent head of a public body.

There has been some discussion about the *Management of Information Act* not applying to all of the public bodies that ATIPPA does, but it does apply to Memorial – is our understanding.

I'll turn now and talk just very briefly about a submission –

CHAIR D. ORSBORN: I'll just ask you to explain one comment to me. You said the security of information that is not personal information is outside ATIPPA.

M. HARVEY: Yes, ATIPPA deals with personal information, but not information in general. The security of information that is not personal information, let's say, any forms of information about, let's say, financial information that is not specific to an individual, is a matter for the *Management of Information Act*, not ATIPPA. ATIPPA is –

CHAIR D. ORSBORN: Maybe I'm misunderstanding you, because there is information in there that law enforcement has and whatnot, but there are limits on disclosure. Maybe I'm not understanding the point.

M. HARVEY: ATIPPA and the privacy elements of ATIPPA and the security elements of ATIIPA relate to personal information as defined as –

CHAIR D. ORSBORN: Yeah, I understand that.

M. HARVEY: Right. But government holds all manner of forms of information.

CHAIR D. ORSBORN: Right.

M. HARVEY: Much of which does not specifically relate to an identifiable individual. The secure handling of that information is a matter for the *Management of Information Act*.

CHAIR D. ORSBORN: But the disclosure of such information would be within ATIPPA?

M. HARVEY: On the access side, yeah.

CHAIR D. ORSBORN: Yeah.

M. HARVEY: Yeah. So here I'm –

CHAIR D. ORSBORN: That's my understanding.

M. HARVEY: – just talking about the security provisions.

CHAIR D. ORSBORN: Okay. My understanding was that the – your view is that 31 provides sufficient general protection on the disclosure side. I gather OCIO and MUN have a different perspective on the specificity of the disclosure exception as required. Is that about it?

M. HARVEY: Yes, that's okay.

CHAIR D. ORSBORN: Yeah.

M. HARVEY: Just very briefly, the College of the North Atlantic proposed that additional language be added to ATIPPA to protect information of third parties that have provided for the public body for the purpose of facilitating a contract where the public body is a service provider. CNA, in our view, has not explained in sufficient detail why section 35 and 39 do not provide sufficient protection against disclosure of information in this circumstance. They didn't

bring any evidence of past harm. We do not believe that was a clear identification of a statutory gap.

I'll move now to talk about section 19 and section 39. Starting with section 39, we've spoken quite a lot about this in our original appearance and then again during the round table. Then, of course, we have had some exchanges in writing since that time so I don't know that we need to spend an enormous amount of time here on this.

As we indicated in our original submission, one of the advantages of the three-part harm's test as currently found in ATIPPA is that it is shared with the larger jurisdictions of Alberta, British Columbia and Ontario. As a result, there is decades of jurisprudence that has developed and there is a great deal of clarity regarding the interpretation of the exception. So we maintain our original recommendation that the elements of the test, under section 39, should not be amended. However, since a hypothetical revision was suggested by the Chair during this review and several submissions for proposed changes, I feel I need to comment on that here.

The first part I'll comment on is the elimination of supplied in confidence, the second part of the test. Nalcor and the Oil and Gas Corporation say in their submission that information in a contract cannot meet part (2) of section 39. While this is often the case, it is not always the case. The exception is immutable information, information that the third party can change. Changeable information is the subject and the result of negotiation between the parties that has led to the agreement.

Even if no actual negotiation occurs – in other words, if an offer is made and accepted with no further discussion – a contract arrived at between two parties is a product of both of those parties. The negotiated information must be disclosed so that the public can scrutinize how much a public body is paying to whom and for what. These are the specifications, unit prices and quantities that are the core of every performance contract. This is the essence of accountability. There's no more important measure of the effectiveness of an access to information statute than the mechanism through which it makes available information about how and on what public money is spent. We think it speaks to the core of the act.

It is not because the disclosure of the information of such contracts cannot effect confidentiality or the competitive position of suppliers – and sometimes it will – rather, it's fundamentally because government procurement must be done on the basis of open contracts openly arrived at. Some loss of confidentiality or intensification of competition is to be regarded as a necessary effect of doing business with public bodies. We think that indeed this is desirable. The idea of intense competition provides better value for the taxpayer. We feel that this is entirely consistent with the purpose.

The Department of IET submitted that the definition of "supplied" must be changed. That third party companies may not do business in the province because of the current section 39 or that the province may lose opportunities. To this, we reiterate our original submission that jurisdictions operating with the three-part harms test that is now in ATIPPA have been doing so for decades and, in our case, for five years. Fears that third parties will no longer do business with public bodies, unless access to information is weakened, have not been borne out.

On Monday, we heard stories of companies providing partially redacted contracts to government departments. I'd really encourage you not to base recommendations for statutory change on strange and unsubstantiated anecdotes. These kind of strange stories coming out from departments, but without specific examples of redacted information coming in from companies – I mean, strange things will happen and companies, certain third parties, may behave in strange ways, but these strange circumstances are not in argue or reason to change the law.

The reality is – and I mean the fiscal circumstance of the province is – that we seem to have had no problem procuring goods and services from the private sector over the last five years; we've been able to spend our money as a government. There really is no – and none of the submissions we read provided concrete examples of companies that would not do business with us. There were fears and strange

stories, but these were anecdotal, not substantiated.

Another important rationale for retaining the current three-part test with the supplied-in-confidence threshold, which is common to several jurisdictions across Canada, is that it facilitates informal resolution of complaints. When we have – and this is another theme that will come through in our submission: the extent to which the informal resolution of complaints is a significant part of our business.

When we have a well-established, clear threshold in the statute, we have the ability to walk through the guidance in case law with third parties to resolve cases that would otherwise absorb the resources of public bodies and third parties, and potentially delay access for applicants unnecessarily. It would be much more difficult to resolve these cases if the second part of the step was removed and that entire conversation needed to focus on harms. Those kinds of conversations will be much more challenging to have with third parties.

The key to the predictable, smooth and efficient operation of this provision of the act is not the harms test or even the confidentiality test it is the supply test. It neatly and clearly encapsulates the distinction between the terms of a negotiated agreement on the one hand, and the other background information that may be provided by a third party to support its position on the other hand. That is the distinction between what is negotiated and what is supplied. Certainty and ease of operation require that the negotiated or supplied distinction should be kept as a component to section 39. Without it, we would lose the clarity we now have and along with it, 30 or more years of Canadian case law.

TCAR and IET recommended a threshold of two out of three, rather than all three parts of the test. JPS has recommended a move to the Manitoba and Nunavut version, which is an exception to the standard across Canada and would be the lowest threshold in Canada. So this would lead to a reduction in the public right of access.

Just turning now to some other proposed changes to this section. Redesigning a statutory provision in ATIPPA by carving out a special place for trade secrets is something that has emerged. We feel it is unnecessary because it is extremely unlikely that trade secrets would be subject to access to information requests because of the apparent rarity of such information actually being disclosed to public bodies by third parties. If such information, however, is captured by an access request, as pointed out in our earlier submission, the statute already protects this type of information appropriately. We have evidence that it has and it does.

Another proposed change is related to changing section 39(1)(b) to read: information of or about a third party. That is intended to correct an issue, in our view, that does not frequently arise. There will rarely be records about a third party that are not involved in some sort of direct relationship with the public body. The one instance we have encountered will soon be resolved by the Court of Appeal, which will decide whether or not the section should include parties that are not the primary owners of the information, but perhaps have some lesser degree of proprietary interest. This is related to the Beverage Industry Association that's currently under appeal. Our position is that the court will resolve any ambiguity, so further clarity on this point through a statutory review is not required.

The proposed revision of adding section 39(4), a discretionary public interest override, raised many practical complications for us. As we set out in our response to the proposal, it's our view that the hypothetical section 39(4) could not result in a recommendation for disclosure once we have concluded that the exception applies. As such, a recommendation would not likely survive a declaration application or, for that matter, an appeal by the third party.

Functionally, the hypothetical section 39 cannot be considered an override protection because it does not actually override the exception. The override in section 9(1), when we find that it applies, the implication is that the exception does not apply. When 9(1) overrides, let's say, section 29, the implication is the exception in 29 does not apply, but the hypothetical discretionary public interest override in 39(4) wouldn't operate that way.

CHAIR D. ORSBORN: Leaving aside the wording, did you have a general position on whether or not the override, either mandatory or

discretionary, should apply to the third party interests?

M. HARVEY: We do. In our original submission, we proposed that a mandatory public interest override would apply. In fact, I was just about to comment on that.

In the presentation by JPS on Monday, they relied on section 9(3) as providing protection in the public interest. In our view, the protection offered by section 9(3) is too limited; it's limited to that when there's a risk of significant harm to the environment or the health and safety of the public or a group of people.

Ms. Pynn remarked that she could not imagine anything else that would override the harm protected against in section 29. I have a more active imagination I guess. I could imagine such information that could reveal a very significant financial harm to the province. In particular, related to matters that might be subject to section 39. I could imagine some information, I don't have specific imaginations but I could, in general, imagine something that would be significantly harmful to the public interest in a financial sense that could override the financial harm to a third party.

CHAIR D. ORSBORN: That whole issue – and you mentioned earlier in your brief – about how the public interest gets assessed and who assesses it and where the onus of proof lies and whatnot is a bit tangly. I think Justice Murphy's decision – I forget the name of the case – has left that open.

Are you suggesting that you would need a statutory amendment in order for the Commissioner's office to bring forth evidence that it felt that it should be put – likely more than not, that the public interest issues are probably going to end up in court, I suspect, I don't know. But would you require a statutory amendment to ensure that your office has the ability to put forward whatever evidence that it thinks is appropriate?

M. HARVEY: In our original submission, we dealt with this and where does the burden of proof lie as it relates to section 9(1). I think we called – if I recall correctly – for a minor amendment there. We also called for an amendment to 9(1) to include section 39.

CHAIR D. ORSBORN: Yeah, I understand that.

M. HARVEY: We think that's where it goes.

As it relates to its actual operation, we would still imagine that the use of section 9(1) over this or any other would be a very high bar. I would say, personally, I believe I said it to you when I first appeared, that I would be extremely reluctant – as it so states in the act – it would have to be really clear and incontrovertible evidence for me to presume to substitute my own definition of the public interest over the head of a public body that works in that. Knowing that also, I have the abilities to recommend that they reconsider their discretion, although that is yet another option that is available.

It's been in this many years and we haven't ever used it. I considered it, as recently as Monday, in a report that I released that would be probably in the public domain today about a matter related to Eastern Health. I did consider and ultimately found that it didn't meet the threshold. We consider that all the time; we haven't yet been there. We may someday be there, but I can say, personally, it would have to be pretty clear-cut for me to presume to substitute. But it is, we feel, an essential safeguard to have in the act.

CHAIR D. ORSBORN: But as the legislation stands now, should you happen to make a recommendation on that basis and should the public body say no, there's nothing in the legislation that would preclude your office from putting forward whatever you thought was appropriate evidence in the court proceeding.

M. HARVEY: We don't think so. I think the proposal we made to section 9(1) was for the sake of clarity.

CHAIR D. ORSBORN: Yeah.

M. HARVEY: But faced with the act, were we to do that today, we would.

CHAIR D. ORSBORN: Yeah. There's nothing says you can't.

M. HARVEY: No.

CHAIR D. ORSBORN: No. Okay.

M. HARVEY: I want to turn now – if it's okay – to talking about section 19. The ATIPP Office submits that there's confusion about the threshold for notifying a third party. It believes, with regard to the notification threshold in section 19, that intending and considering are the same; we disagree with that. Considering is a decidedly lower threshold. Anytime information about a third party appears in a record, the public body has to consider it. Intending to release information means that, based on the public body's assessment, the information must be released. We think this is a very clear distinction between those two terms.

I mentioned earlier the case of the Beverage Industry Association is currently before the Court of Appeal. I just wanted to note again that that matter is still before the courts.

The ATIPP Office references guidance and decisions from the OIPC in contrast from recent court decisions. There was a comment on this on Monday. We do not believe that these are in conflict. The court decisions, yes, emphasize that the threshold is low, and we do acknowledge that it is low. But we also are of the view that a low threshold doesn't mean that there is no threshold. The threshold is based on the words in the statutes, and we base our decisions and guidance on that. We believe that those decisions and guidance are not in conflict with the court rulings.

As we indicated in our initial submission, section 19 exists for circumstances that fall into a grey area where there is a lack of certainty about whether or not section 39 applies. If the public body determines that section 39 applies, it is a mandatory exception and the public body must refuse disclosure; no notification is required and the public body bears the burden of proof in the event of a complaint. If the public body determines that section 39 does not apply, it must disclose. Section 19 speaks to that in-between circumstance where there is at least a reason to believe that section 39 might apply. Absent that reason, the information should be released to the applicant.

In practice, notice provides an opportunity for a third party to object and provide any argument or evidence in support of its position against release of the information. It is our view that if the notification in section 39 were broadened that it would have no measurable impact on the protection of the third party business information. It would, however, cause an increase in complaints and court appeals, slowing down the access to information process.

One of the things that we have found is that no third party has yet won the claim in court. In fact, most appeals have been discontinued by the third party on the eve of a court hearing. The 2014 review understood this, which is why the provision was amended.

We note, as well, whether out of an abundance of caution or a desire to maintain a positive relationship with a third party, public bodies sometimes issue a section 19 notification even when it is not warranted. This is not a neutral decision, as it can substantially impact an applicant's rights by significantly delaying disclosure where there are no grounds to do so.

On Monday, the Department of Justice and Public Safety suggested that this office admonishes public bodies for giving section 19 notices. Any admonishment that we have given – and I will admit that we have pointed out to public bodies that have provided section 19 notices when they shouldn't have and it was a mistake. I wouldn't call that admonishment, but there have been instances in which we – public bodies without a fair amount of experience – pointed out to them that this was a mistake.

But if we're to be accused of admonishing public bodies – and we certainly have done so in situations where they have admitted to us over the course of our investigation that, yes, they knew perfectly well that section 39 did not apply and they did the notification anyway, and they did it for relationship management.

The problem is this triggers the right to complain to the third party and many third parties will have an interest in using that right to complain, even if even they know that it doesn't have much of a right to succeed because it will delay the right of access. If they don't want the information released, then simply triggering the

complaint gets them 65 days and then, of course, they can go to court, all the while delaying the access to the applicant. Perhaps the applicant will lose interest or perhaps the issue will become less relevant.

The other effect that this will have, as well as delaying the right of access – and that access delayed is access denied – is the notion that all of these are doomed to fail. If the public body knows perfectly well that it doesn't meet the test, then it's going to fail the three tests in our investigation as well. The consequence will be yet another report that will find that it doesn't meet the test adding to a body of reports that all say the same thing.

Anyone reading all of these reports would conclude that, surely, it's an impossible test to pass. If that's all you read, that would be a natural conclusion of reading all of those reports, but it's a one-sided story. The reality is that section 39 does actually provide protection to legitimate, confidential information.

The most recent statistics published by the ATIPP Office from '18-'19 show that section 19 was relied on by public bodies 122 times just in that year.

S. MURRAY: Section 39.

M. HARVEY: Section 39 was relied upon, sorry, 122 times.

This shows that requests are being made and refusals are being issued for information that is truly confidential. No section 19 notification to third parties would occur in these cases. This demonstrates that public bodies are getting it right. The fact that we don't have complaints about this is suggesting that third parties are getting it right.

The third parties who have made representation to this statutory review, they may only be aware of the decisions issued by the OIPC that have not accepted third party claims, but they may not be aware of the 122 times in that one year that section 39 was applied by public bodies. This is the other secret, the less transparent side of the story.

The ATIPP Office has also proposed that additional time be built into section 19 for the third party process. In our view, this would also unnecessarily delay access. In many cases, third parties can be identified shortly after the receipt of a request and if notification is required, it can be done at that time. If additional time is necessary, an application to the Commissioner can be made for an extension.

Finally, the ATIPP Office has proposed that section 91 be amended to change "notify" to "consult with." We have no concern with that particular recommendation.

I'll move on now to talking about section 33, workplace investigations.

CHAIR D. ORSBORN: Thank you.

M. HARVEY: Of course, this is something that we've all also talked quite a lot about already. As I already noted, section 33 is unique in Canada. It creates a mandatory exception, but also a mandatory disclosure provision, depending on the identity of the party requesting it.

The OIPC's initial written submission addresses our proposals for amendment to this provision, which are, first, to make certain exceptions paramount. So although we didn't reference it in our initial submissions, some parties have expressed that section 41(c) should be paramount to section 33. We have no objection to that proposal.

We are, however, of the view that section 33 should be subject to the public interest provision. In circumstances where high-level public officials are involved in perpetuating serious workplace harassment, there can be a public interest in a certain amount of transparency in order to facilitate appropriate accountability. But, again, as noted, the use of the public interest override for this, as any other exception, will be quite a high bar to pass over.

CHAIR D. ORSBORN: Were you going to move on to something else because I had a question.

M. HARVEY: Yes, go ahead.

CHAIR D. ORSBORN: Just assume then you have a workplace investigation. Who should have access to what in your view? Leave aside the question of some kind of discipline proceeding, a court proceeding –

M. HARVEY: Yes.

CHAIR D. ORSBORN: – with its own access provisions and what have you. Aside of that, in a workplace investigation who should have access to what?

M. HARVEY: Well, it does relate to some of the other recommendations that we made as well; the next one that I was going to mention, the limit of the temporal – when they should have access to it. So what someone should have access to and when are, in our view, related questions.

The notion is that the individual who is a party to it and is subject to the workplace investigation, should be able to meet the case that is being brought against them. That is a principle of administrative law and natural justice, and we agree with that notion. That said, does that amount to an entitlement to get every record that is relevant, essentially real-time as it is being produced. That's what's happening now. Applicants, while an investigation is still going on, are asking for documents, like witness statements, as they're being produced in real time. We don't feel this is necessary to meet those principles that I mentioned.

Instead, to meet the case that is being brought against you, we feel that the party to the workplace investigation should be entitled to see that investigator's report. That is why we recommend that the access right be limited in time to when that report is issued. That way, if there is a subsequent disciplinary process, then the person that is subject to the workplace harassment investigation can have access to the report that is being used in that disciplinary process. But because this is occurring at a moment in time after the investigation is concluded, then the witness statements and so on can be essentially cleaned up, treated.

As long it's being done in a manner appropriate by law and these are legitimately transitory documents, they can be appropriately destroyed. That way, there's not a prospect for someone that is subject to a workplace investigation to try in real time, as the investigation is going on, to frustrate that investigation, to intimidate witnesses by trying to seek witness statements and other related documents, essentially in real time as they're being developed.

CHAIR D. ORSBORN: Just come back a little bit from the formal investigation. I think I'm representing things fairly, but this whole workplace conduct investigation issue is an issue that's been a concern both to yourself and to the public bodies, and you're much on the same page.

M. HARVEY: Yes.

CHAIR D. ORSBORN: Take a simple case. Forget the investigation but let's assume that you are my supervisor and I'm having difficulties working with Mr. Murray. I come and talk to you, hopefully confidentially, about it. You make a few notes and you suggest that I do this, this and this, and I go out and adjust myself accordingly and everything is fine; no more to it than that. What access should Mr. Murray have to your notes?

M. HARVEY: So the notes I've taken are – well, I think the first question we would have to answer is, is that a workplace investigation?

CHAIR D. ORSBORN: Well, let's assume that it's not, in terms of the formal sense with somebody coming in from outside and writing a report. It's a workplace conduct investigation between an employee and the employee's supervisor about difficulties you're having with another employee and, as between the supervisor and the employee, it gets resolved; no more to it than that.

M. HARVEY: If that's all that it was, I'm not sure that we would imagine that such a thing would meet the threshold to be defined as subject to section 33. If it's a simple matter of that. Therefore, if that's the case, I don't think the notes that you would take would qualify as a –

CHAIR D. ORSBORN: You write down my opinion of Mr. Murray.

M. HARVEY: Right.

CHAIR D. ORSBORN: As I understand it, that's his information.

M. HARVEY: Yes, so if that's what we're talking about, then section 2 would apply.

CHAIR D. ORSBORN: Should he get it?

M. HARVEY: I've taken down notes that contain your opinion about Mr. Murray, per the definition of personal information in our act, that's his information –

CHAIR D. ORSBORN: Is that right?

M. HARVEY: – and he should get it.

CHAIR D. ORSBORN: Is that right?

M. HARVEY: That's a difficult question to answer but I would say it is. It's not an easy answer, but the alternative is that you could come in and say all manner of false things about Mr. Murray and I could write them down. Me writing them down on a piece of paper, I could delete them as transitory, but I could not. They could also stay on and form part of the records of a public body. Those records could last on through time containing false and scurrilous statements about Mr. Murray that, in 10 years, someone could come across and here are these statements written down in a document.

The alternative, if Mr. Murray didn't have access to those, then what would happen is public bodies could potentially have all manner of records containing facts and opinions about Mr. Murray that may or may not have any grounding and he wouldn't be able to do anything about it. That, I think, is the concern that we would want to protect against.

I know that Memorial has proposed to change the definition of personal information in this way, to revert to what I understand is Ontario's definition. Ontario's definition is not the standard in the country. Ontario's act is one of the older acts in the country, not subject to regular review. I'm not sure that it would (inaudible).

CHAIR D. ORSBORN: Yeah, this one is more directed simply to the workplace conduct matter that doesn't reach the level of an investigation.

M. HARVEY: Yeah, I would still maintain that we would, on the balance – again, the notion that your opinion of him somehow is his information is not an easy hair to split, but if we had to split it, that's how we would split it.

I've spoken –

CHAIR D. ORSBORN: Sorry.

Again, in the workplace conduct investigation issue, do you have any comment on the scope of that? Right now, I think it's limited to employees –

M. HARVEY: Yes.

CHAIR D. ORSBORN: – but you can have individuals that may be directors, councillors or whatever in different capacities.

M. HARVEY: Yes, our original recommendation was to consider expanding to public sector context, other than the employment relationship. We didn't get into details in our original submission about who we were talking about, but I think we did reference directors and boards and so on.

The City of St. John's expressed concern about how we have found that elected officials are not employees. They recommended that elected municipal officials be captured under the scope of an amended exception, and we don't object to that proposal. But that said, the Commissioner for Legislative Standards wants to remove his office from the scope of ATIPPA completely. As I mentioned before, we don't think that should be done. He proposed, as an alternative to that, that section 41 override section 33. As I mentioned before, we do agree with that.

The implication of that would be that investigations done by the Commissioner for Legislative Standards under the House of Assembly's harassment act would be protected.

CHAIR D. ORSBORN: Right.

M. HARVEY: The implication of that would be that there's a differential treatment between MHAs and elected municipal officials.

In our view, this different treatment is justified by, essentially, the higher political stakes that are faced by Members of the House of Assembly, and that policy was specifically designed for a very expeditious review in order to deal with those high political stakes. I'd also point out that this is a review that would be undertaken under specific legislative authority by a statutory officer of the House of Assembly.

CHAIR D. ORSBORN: Specific reporting requirements as well, I think.

M. HARVEY: Yes, that's right. We feel that the differential treatment is justified.

I'll move on now, if that's okay, from section 33 to talking about settlement privilege.

CHAIR D. ORSBORN: Talk about what?

M. HARVEY: Settlement privilege.

CHAIR D. ORSBORN: Okay.

M. HARVEY: Yes, I have a fair amount of notes here on settlement privilege, but I really want to boil it down to its essence.

There have been a number of reports that my office has issued – I've issued one; my predecessors have issued a couple – on settlement privilege. One day we indeed may find ourselves before the courts on settlement privilege.

One of the issues were the current act to be interpreted by the courts would be whether or not settlement privilege essentially should be read into the statute. Our position is that the statute, as it currently exists, is a complete code and that settlement privilege does not and should not be read into the statute.

That said, that's not really what you're here to consider; you're here to consider: Should an amendment be made to the statute to be explicit about settlement privilege? If that were the case, then obviously that first question is moot.

One thing I would point out about the submission that the Department of Justice made on this matter is that they didn't consider all of the decisions that the OIPC has made about settlement privilege. I think you noted one related to school bus contracts, and then there was also report A-2019-017 that also recommended that – those two reports recommended that the information not be disclosed. They did so on the basis of exceptions that currently exist within ATIPPA.

CHAIR D. ORSBORN: Just to put a very simple and probably extreme example to you: Let's say litigation is ongoing and the Crown is being sued by a bunch of defendants; they settle with one in the course of the trial, the trial is continuing and one of the defendants makes an access to information request for the settlement.

M. HARVEY: Well, if the trial is continuing then litigation privilege would apply, wouldn't it?

S. MURRAY: Even if it doesn't, though, I think they would have a case to make under section 35 of harm to the financial and economic interests of a public body. Because if they're settled with one plaintiff and there are others sort of lined up in related issues, then they'd be able to establish that if we disclose this settlement, then we are putting ourselves in a bad position for future negotiations.

CHAIR D. ORSBORN: Your assessment is that in an admittedly extreme situation, it should not be difficult to establish the harm exception, either to the financial interest of the public body or to the litigation itself.

M. HARVEY: That's right. That's our view.

CHAIR D. ORSBORN: Okay.

M. HARVEY: The act currently provides protections. If, on the other hand, there was a broad exception for settlement privilege in the statute, then there could be legitimate things – and there was some discussion about the amounts of settlements – that are indeed in the public interest to be accessible.

An explicit new exception on settlement privilege, on the one hand, we view is not

necessary and, on the other hand, if introduced, could end up being overbroad for the public purpose that it would be intended.

CHAIR D. ORSBORN: Yes, okay.

M. HARVEY: I'll move on now to talking about section 38, labour relations.

Executive Council has proposed making section 38 mandatory and removing it from section 9, the public interest. I'll admit that when we went through the process of preparing our submission, this section was one of the ones that, I'll say, didn't make the cut. Believe it or not, we had a longer submission and we edited it for length. This was one of the ones that we felt did not meet the test for really a true priority for legislative amendment. Our recommendation would have, had we made it, probably been to remove it altogether.

Again, I'm not necessarily making that recommendation here to you today, but the reason that we were considering recommending removing it is because it doesn't exist really anywhere else in the country, except for in a certain form in Ontario. Our view is essentially not dissimilar to what I just said, that there are other protections that should be in the act that should be easy for a public body to rely upon.

CHAIR D. ORSBORN: Have you ever had occasion to consider it?

M. HARVEY: We have not, no.

S. MURRAY: It's been claimed but it didn't come anywhere near – it's been one of the exceptions that were thrown at a set of records and it didn't come anywhere near it.

M. HARVEY: We'll have some more in our written submission about this, but I think the bottom line is we really don't agree with the submission of Executive Council in this regard. Indeed we're not really possessing the necessity for section 38 at all. Again, I'm not sure that we need to talk a whole lot more about that today.

A topic, however, that we are more interested in is section 5.4 of the *Energy Corporation Act*. We were very pleased to hear on Monday from the Department of Justice and Public Safety that section 5.4 of the *Energy Corporation Act* does not need to apply to Hydro, and that it was intended to protect the private business relationship in the oil and gas industry. We hope to see Hydro removed from that section of the *Energy Corporation Act*.

This point, I still think we need to speak about the submissions on section 5.4. On page 7 of its submission, Nalcor proposed a five-point plan to amend the Commissioner's oversight role regarding section 5.4 of ATIPPA. The proposal would see Nalcor providing a submission to the Commissioner as an alternative, that would be preliminary to the court process, which it says could result in informal resolution of complaints. One issue is that under the proposal, the Commissioner doesn't get to see the records, but some form of information package developed by Nalcor in support of its decision to deny access.

This is not ideal from an oversight perspective, as it could put me in an awkward position of being asked to agree upon something on the basis of some information package, rather than the records themselves. If the information package looks good, I might agree with them, but having seen the records themselves, I might come to a different conclusion. Just on principle, we'd have a challenge with that.

On page 10 of the Oil and Gas Corporation submission, it indicates – and this is just a matter of some inconsistency in our understanding of how section 5.4 is used – that Nalcor has only availed of section 5.4 of the *Energy Corporation Act* on one occasion, but Nalcor itself says that it applies it in relation to approximately 10 per cent of requests. In the case of the complaints to the OIPC, the board has agreed with its application.

Our records, however, indicate that we've received 38 complaints pertaining to Nalcor since 2013. Some were resolved informally and some were withdrawn or discontinued for other reasons. While we haven't assessed whether all of these specifically invoked section 5.4, the reports that we have issued related to Nalcor that emerged out of this, each one of them did involve a provision of certificate as described in section 5.4. So the process that's currently in the act is occurring.

The challenge that we face with the Energy Corporation Act – that my office faces, that I face personally with the act – is that the definition of commercially sensitive is very broad. It includes financial information, so that's exceptionally broad. It has a simple meaning related to finance, so that's going to be pretty much everything. Under 5.4, the decision to withhold financial information lies with the CEO using a threshold of reasonable belief that it may – may – cause one of the enumerated harms.

On a complaint to the OIPC, the board is called upon to certify the CEO's belief. If it does so – and it's always going to do so; we're certainly not aware of any instance in which is hasn't – we are required by the statute to uphold the decision so long as the certification is in place and we're satisfied that the information meets the definition, which, as noted, it's always going to because the definition is so broad. So the language in 5.4 does not explicitly contemplate the Commissioner inquiring as to whether the CEO's belief was, in fact, reasonable. I can't really see how that's going to work in this context.

CHAIR D. ORSBORN: If I can split for a moment the oversight process and the substantive protection that's granted by 5.4. As I read the report of the Wells committee, they took the view, as I appreciated as a matter of principle, that where government has decided as a matter of policy to include particular substantive protection in a separate statute, that it would not be appropriate for the review committee to, sort of, second-guess that substantive level of protection in the separate statute. Do you take issue with that?

M. HARVEY: No, I agree with that. Essentially, my bottom line would be if there was a role for me in this process, then make it a substantive role, but if there's no role, then take me out of it altogether. Right now, the way that the process works is with such a broad definition that my role in the process is essentially a rubber stamp.

CHAIR D. ORSBORN: I guess that's my point.

M. HARVEY: Yes.

CHAIR D. ORSBORN: The oversight is one thing, but when you're overseeing a substantive level of protection, which includes a very gently worded exception provision and a very broad definition of commercially sensitive information, even if you were to have a full oversight role, it's not as significant as it might otherwise be.

M. HARVEY: No, and –

CHAIR D. ORSBORN: I guess my question is, given the substantive level that's in 5.4 and the approach that the Wells committee took that – forget the oversight side of it –

M. HARVEY: Yeah.

CHAIR D. ORSBORN: – but on the substantive side they felt it was not appropriate for their committee to adjust government's policy decision in terms of the substantive level of protection. I guess my question is: On that side of it, do you share that view?

M. HARVEY: Yes, I think I do.

CHAIR D. ORSBORN: Okay.

M. HARVEY: Yes.

CHAIR D. ORSBORN: So what's left for me to do, in your view?

M. HARVEY: So my understanding is, what's being proposed is the amendments to section 5.4 on the –

CHAIR D. ORSBORN: On the oversight side.

M. HARVEY: – on the oversight side, to remove the role of the Commissioner from that process.

CHAIR D. ORSBORN: I see.

M. HARVEY: That's essentially our recommendation.

CHAIR D. ORSBORN: Well, let me ask you this, assume the definition of commercially sensitive information stays the same and the three or four harm exceptions in there stay the same, just that alone.

M. HARVEY: Yes.

CHAIR D. ORSBORN: Is there then an area for your office to have legitimate oversight, if that substantive regime was subject to all of the other provisions in ATIPPA, including the complaint process and whatnot?

M. HARVEY: So the thought exercise is if essentially we were in the situation that Manitoba Hydro is in, where they're subject to our act, do the protections in our act provide adequate protection for Nalcor? Our position –

CHAIR D. ORSBORN: (Inaudible.)

M. HARVEY: No, that's not (inaudible).

CHAIR D. ORSBORN: You said level of protection. I'm differentiating between level of protection and the oversight process.

M. HARVEY: Yeah. So what you're proposing – I just want to make sure I understand here.

CHAIR D. ORSBORN: I'm not proposing anything.

M. HARVEY: No, okay.

CHAIR D. ORSBORN: I'm just trying to understand that if I follow the approach of the Wells committee, which is not to adjust the substantive cone of protection, if you will, which is a policy issue for government in separate legislation.

M. HARVEY: Yes.

CHAIR D. ORSBORN: And that cone of protection includes the definition of commercially sensitive information and includes the fairly gently worded harm exceptions.

M. HARVEY: Yes.

CHAIR D. ORSBORN: If that stays the same, my question is – which is essentially, you know, you could carve that out and put that as, this is the exception in ATIPPA – is there nonetheless room, in your view, for an expanded oversight process which would involve your assessment of that decision as you would do it for any other public body, albeit with a different substantive protection level?

M. HARVEY: I may be failing to understand the –

CHAIR D. ORSBORN: I'm not explaining it very well.

S. MURRAY: I think what the Commissioner is referring to is the fact that in section 5.4(2), when an applicant is denied access and a request for a review of that decision is made to the Commissioner, where the Commissioner determines that the information is commercially sensitive information, in other words, we resort to that very broad definition which includes financial information, which is pretty much everything. Then, on receipt of the chief executive officer's certification and confirmation by the board, we have to uphold that decision.

Basically, I think the Commissioner's point is what is the point of sort of this – we're going through these motions almost and maybe it undermines the creditability of our oversight process. We could be allowed to review the records or – we can review them now I suppose, but really is there any point?

CHAIR D. ORSBORN: Let's just cut it off short of that certification process and just look at 5.4 itself, the definition –

S. MURRAY: Right.

CHAIR D. ORSBORN: – and the harms and cut it off there.

S. MURRAY: Right. If there was no certification process, would it be worthwhile?

CHAIR D. ORSBORN: That's essentially my question because you're dealing with a substantive level of protection that's being decided by the Legislature.

S. MURRAY: Mm-hmm.

M. HARVEY: I'm not sure whether there would be any scope for oversight if that certification process were – I guess, are you imagining that if that certification process was

removed that these decisions of Nalcor, that it would take under section 5, under the residual section 5.4, would still be reviewable in some sense.

CHAIR D. ORSBORN: Yeah, what I'm trying to get across is just, again, for discussion purposes only. Put it this way, assume that there was an exception provision within ATIPPA for Nalcor, which matched 5.4(1), the definition and the harm's test and no more than that. Then Nalcor makes a decision and you then get to review whether or not the exception is properly applied. Is there any point to that?

M. HARVEY: I would argue that if instead of there being a certification process as currently exists –

CHAIR D. ORSBORN: Forget that.

M. HARVEY: – and you took that and put it in ATIPPA, I'd find myself in exactly the same –

CHAIR D. ORSBORN: Forget certification, it's not even there.

M. HARVEY: Yeah, I know.

CHAIR D. ORSBORN: No certification process. They simply make a decision. Is there any point in your reviewing the decision to see whether or not, number one, commercially sensitive and, number two, whether or not any of the harms have been established?

M. HARVEY: The challenge is that the threshold is so low. The threshold is so low that the definition of commercial information is so broad that asking me to review a wide range of documents simply when almost they're going to meet that threshold by definition is not, I don't think, a meaningful override – or, sorry, a meaningful oversight.

If the Legislature has the desire for my office to have oversight of this, then there needs to be a meaningful threshold to be passed. There needs to be something (inaudible).

CHAIR D. ORSBORN: It would be up to the Legislature to water down the definitions somewhat?

M. HARVEY: I think it would need to either tighten up the definition or remove the Commissioner from the process altogether.

If I understand the position of the government, as it was expressed yesterday, that they're content to withdraw on Hydro side but maintain the current level of protection from a policy prospective on the Oil and Gas side; I can appreciate the difference between Oil and Gas and Hydro from that perspective, and the nature of those two sectors and the different policy objectives of government. I understand what they're trying to get at in that regard and I'm not going to take a big issue if that's their ultimate policy intent.

CHAIR D. ORSBORN: Any views on the application of a public interest override?

M. HARVEY: Generally speaking, as it relates to Hydro, if Hydro is then going to become, in a meaningful way, within the scope of oversight of the office – if that is the effect – then essentially the exceptions that would apply would be sections 35 and 39. We've said 35 is subject to the public interest override and we've argued that section 39 should be subject to the public interest override, so I think the answer is yes.

CHAIR D. ORSBORN: Yes.

Help me out with my understanding about the situation of Hydro, if you can. Looking at the submission of Nalcor, it said that Hydro is currently subject to ATIPPA in its regulated activities, but not with its non-regulated activities. Can you help me with that?

M. HARVEY: Sean, can you answer that?

S. MURRAY: Hydro is a public body.

CHAIR D. ORSBORN: It's owned by Nalcor.

S. MURRAY: Yes. So I –

CHAIR D. ORSBORN: A subsidiary of Nalcor.

S. MURRAY: Yeah, I don't see any differentiation there. What we're talking about is

certain activities may be subject to the *Energy Corporation Act* and some may not be.

CHAIR D. ORSBORN: Or to the Public Utilities Board.

S. MURRAY: It depends on what we're talking about.

M. HARVEY: Are you okay if we move on from 5.4?

CHAIR D. ORSBORN: Yeah.

M. HARVEY: I just want to make a very brief comment on the submission of the Department of Fisheries, Forestry and Agriculture related to their proposal for section 36. This is not something that we deal with a lot.

CHAIR D. ORSBORN: That's the conservation one, was it?

M. HARVEY: Yes, that's right. We understand their intent, the only issue we take with their proposal is that they suggest being able to withhold information upon a recommendation to the department by the director of Wildlife. In general, we don't like the idea of one individual person being able to make this –

CHAIR D. ORSBORN: As opposed to the head of the public body, you mean?

M. HARVEY: Well, no, the head of the public body is accountable for all the decisions of the public body, but to identify – it would be, I think, the only place in an act where you'd carve out one person who gets to make this one decision and that's, we feel, inconsistent.

CHAIR D. ORSBORN: If it were to say head of the public body or …?

S. MURRAY: No, because I think what they proposed is that the exception should apply upon recommendation of the director of Wildlife. Basically, the director of Wildlife just gets to decide, on their own opinion, whether information should be withheld or not. That is actually the threshold in the exception, not the decision that's made about whether the exception applies. I don't know if you know what I mean.

We proposed language that would, I think, accomplish their purpose, which you'll see in our written submission.

M. HARVEY: That's great.

So I'll move now to talking a little bit – or on the subject of veterinary records, just briefly to respond to the submission made by Dr. Dawe yesterday.

CHAIR D. ORSBORN: Yeah, I had a question about that. The question essentially is – and I gather the situation here is different from other provinces. If you have a government-employed veterinarian who is providing a private service, I gather, for a fee, not part of any kind of regulatory scheme, should the records from that interaction be accessible or not?

M. HARVEY: We absolutely understand that concept. To a certain extent, it's not dissimilar from the position made by the department of – CNA, or the college. Here, the department is acting as a service provider as opposed to a public body per se; they're providing a private service. Just the circumstances of the province are that this is – they're the only ones who can provide this service because of the population density and geographics of the province. We understand that principle.

When I was listening to Dr. Dawe's hypothetical case, however, it really occurred to me that all of the information that she was talking about that should be protected, would already, I would imagine, be protected under section 40. The identity of the horse owner is personal information of the horse owner. That would already be protected.

I'm not sure that a special protection is required for these kind of services, other than what is already in the act. Again, I appreciate what she was getting at but it might not actually be a real problem, as noted by the fact that there wasn't any real – she only came up with a hypothetical case as opposed to a real one. If this was a real one, then I think the department could easily identify appropriate other protections that are already in the act and use them.

CHAIR D. ORSBORN: So from your understanding, if I own a dog and I have a

record that gives the medical history of the dog, that is my personal information.

M. HARVEY: I would think so, yeah. If someone made an access request to the department for all records related to dog care, your name would be redacted as under section 40.

CHAIR D. ORSBORN: It might redact my name but it wouldn't redact the information about the dog, the owner.

M. HARVEY: Well, it would redact not just your name, but also information that could identify you. If, for example, we're dealing with this horse owner and they were the only horse in Coley's Point, then there would be a case to redact all that information, as it would potentially identify that individual.

CHAIR D. ORSBORN: Just in principle – and just take the hypothetical example where you go out on a call, government is paid for the call, you deal with the horse and records are created. Is there any public interest in disclosure of any of that record?

M. HARVEY: There certainly might be. I think it's in the interest of the taxpayer to know what their government is up to. In general, if public resources are being spent, even if they're cost recovered, there's a consequence to the government providing this service. So I think it's a public interest to be able to know about the fact that our government does this. I think that entitlement to know about that stops short of knowing the personal information of individual Newfoundlanders and Labradorians.

Does that get at your question?

CHAIR D. ORSBORN: Yes. Thank you.

M. HARVEY: Section 8.1 of the *Evidence Act* came up.

CHAIR D. ORSBORN: Please explain it to me.

M. HARVEY: Well, I'll try, but you also wanted a straight answer. So I can explain it to you –

CHAIR D. ORSBORN: Sorry?

M. HARVEY: You also wanted a straight answer, so I'll –

CHAIR D. ORSBORN: Do you mean 101?

M. HARVEY: Here's what I'll say about it, because I know that you really wanted to note kind of what our bottom line is.

When we looked at section 8.1 – when you raised it with us at the very beginning of this process, it's not something we had given a lot of thought. This reference to section 8.1 of the *Evidence Act* predates PHIA. Most of the information that would be related, would now, under the current legislative structure, be protected under PHIA to the extent that it is personal health information.

CHAIR D. ORSBORN: And the *Patient Safety Act* as well, I think.

M. HARVEY: Yeah. I guess our position is to the extent that all that information is already protected, you probably don't need this section. But we're not experts in this area and there may be some information that is not personal health information but still requires protection. We can't say for sure that if you removed it, then we might not regret it.

We don't see any harm in it being there. There has been no demonstrable harm in it being there. We wouldn't want to find ourselves in a situation in five years' time where we've poked something and wish we hadn't. So if you're looking for our bottom line, we say keep it in, just in case.

CHAIR D. ORSBORN: What I'll write in the report is I don't know what this means; nobody else knows what it means, but it's better to keep it in than take it out.

M. HARVEY: No, I think you can say we know what it means. What it means is that it protects against the potential that information that's not already protected by the *Patient Safety Act* or by PHIA, is given an extra level of protection here under ATIPPA, and that this category of information is personal information that is not personal health information.

CHAIR D. ORSBORN: Yeah, but the whole import of 8.1 is simply inadmissibility in a legal proceeding; nothing to do with accessibility.

M. HARVEY: Yes.

S. MURRAY: It was sort of a backdoor way of referring to those kinds of records. I mean, it could be constructed in a different way, maybe with reference to the *Patient Safety Act*, if you wanted to tinker with it. But I think the purpose is accomplished and it's basically one of these out of an abundance of caution; it's not hurting us, kind of a situation.

M. HARVEY: Yeah.

CHAIR D. ORSBORN: Okay.

M. HARVEY: It's like that little piece that you don't know at the bottom of your foundation, you don't want to pull it out and everything else falls down.

S. MURRAY: Yeah.

M. HARVEY: I want to talk a little bit now about the subject of the independence of the OIPC and the nature of our advocacy role versus really our – or what we might call our quasi-judicial role that we have with respect to investigations.

It has been presented by some presenters during the review, in both written and oral submissions, that the OIPC is not impartial or independent and this impedes the ability of the office to conduct reviews involving section 30, in particular. That assertion is presumably based –

CHAIR D. ORSBORN: Involving section …?

M. HARVEY: Section 30 in particular.

CHAIR D. ORSBORN: Thirty.

M. HARVEY: Yeah.

CHAIR D. ORSBORN: Okay.

M. HARVEY: That assertion is presumably based on, in our view, a misunderstanding of section 3(2)(f)(i) which says that the OIPC "is an advocate for access to information and protection of privacy."

The oral and written components of our participation in this review are examples of our advocacy in this regard, and our advocacy mandate is quite broad, but it encompasses activities, just like you're seeing here today. It's a similar type of advocacy role that every single one of my counterparts plays across the country. You're not going to find any commissioner who doesn't do exactly the kind of things that we're doing here today. When we speak in the media about evolving access to information and privacy issues by reference to well-established principles that underpin those rights, that's another form of advocacy.

Section 3(2)(f)(ii) requires the OIPC to facilitate timely and user-friendly application of the act. Much of our communication with the public, public bodies and other stakeholders has this goal as its heart.

One of the primary ways that we do this facilitation is informal resolution. Informal resolution process is a fundamental element of our oversight role and that facilitation necessarily involves adopting a position of maximizing the rights under the act without going beyond them. This may appear to public bodies as the OIPC attempting to take the side of the complainant when, in fact, it's the OIPC interpreting the statute and attempting to ensure that the rights granted under it are as fully realized, as they can be, without going beyond that statutory framework or impacting the limitations on those rights that are a necessary part of it.

While I understand that public bodies may feel that during this process we're advocates, I would say that if you were to ask many complainants, they would feel exactly the opposite way. In fact, very often what happens during the informal resolution process is a complainant will come forward with a complaint because they feel that they were refused records and they feel that they really want them, and the analyst spend time talking through exactly the way that the act works. At this stage, five years, going on to six years in, the public bodies know how the act operates pretty well and that's why we have only

a small fraction of access request results in complaints.

For the most part, they get it right. They know how to use the act. Often the informal process involves convincing complainants that: Do you know what? The public body got it right. They're right in how the act works. Here's why really, if this goes to a formal complaint, you're still not going to get those records. If you were to ask all those people I think they would say that – they certainly wouldn't say that we're advocates for access and privacy. Many of them would say that we're on the sides of the public body.

I think that we need to take a really balanced view there. Our view – we regularly have these conversations in the act – that it is critical that we be right, that we be correct in our interpretation of the act. If we have feelings about access and privacy that we, when it comes to formal investigation, need to be right about the way that the act works.

Oftentimes, this may even involve situations where we have problems with the way that the act is written. I've talked about section 33 and I've written in a number of reports how it's a problem. I would say it's a problem for me that section 33 overrides section 37, but that's the way the act is written and I am bound to interpret it in that way.

I feel that I and my predecessors and our office in general, when we write our reports and on a day-to-day basis, we are faithful to the way that the act is written and that we do not have a significant challenge in co-managing that advocacy role on the principal standpoint.

On the other hand, when it comes to the interpretation of the act in the course of an investigation, we have no difficulty in being able to actually apply it. When I say no difficulty, I don't mean that that doesn't necessarily create uncomfortable situations, but we do it anyway.

CHAIR D. ORSBORN: Is there any segregation of responsibilities in your office between the two roles?

M. HARVEY: There is, yes, and we do have a separation that's necessary. The advocacy role is not involved in the quasi-judicial process. We have investigation analysts and we have analysts that work on advocacy. I will say that they're cross-trained.

CHAIR D. ORSBORN: Yes, your office is not that big to have (inaudible).

M. HARVEY: They're not two entirely separate purposes. Our analysts who work on advocacy and compliance can, and sometimes do, work on investigations, but not normally. Normally, the investigative analysts work on investigations, and vice versa. This has not caused a significant challenge on a day-to-day basis.

We feel the statistics speak for themselves. If we were somehow setting aside our role of impartial adjudicator in favour of simply advocating for access to information applicants, it's unlikely that we would see these kind of results, which are that we agree or partially agree with the public body 75 per cent of time over the past five years.

CHAIR D. ORSBORN: May I suggest that we just take a few minutes to stretch our legs.

M. HARVEY: Certainly.

CHAIR D. ORSBORN: It's 11 o'clock; take 10 minutes, probably.

M. HARVEY: Okay.

Recess

CHAIR D. ORSBORN: Mr. Harvey, thank you.

M. HARVEY: Thank you, Sir.

Before we broke, we were talking about the role of the Commissioner as an advocate, but also alongside the quasi-judicial role that I have. I did want to finish the thought by saying that I'd be remiss if I didn't reference that notions of bias and partiality levelled at the OIPC essentially are taken by our staff as impugning their professional ethics.

They and I – we all take the mandate of the office extremely seriously. My staff, without exception, have discharged their role in

investigation of access to information complaints with professionalism and impartiality. We sign a code of conduct annually committing that to carry out our duties. Most of our access and privacy analysts practised law prior to joining our office, and the others brought deep professional experience and qualifications in the application of access to information and protection of privacy statutes. I understand that in preparing their submissions, people make bold statements to illustrate points, but I do wish to say that I do take it as a serious matter, notions to suggest that we have failed to act with independence and impartiality in discharging our duty.

I'll talk now, if you're okay with it, about the notion of direct appeals. You did ask questions about whether the right of direct appeal is necessary. Certainly, some complainants that may have had past experiences with our office, who have disagreed with the outcomes of the complaints, have chosen to go to court the next time they have a new complaint to make. It is possible that these parties believe that they have a good sense of what the outcome of a complaint to our office might be and they're already determined then they want to go to court anyway.

In such circumstances, it's arguably a waste of time and OIPC resources to require the complainant to go through our process as a preliminary step if ultimately they want to get before a judge anyway. This doesn't happen very often. Since 2015, there were 17 matters involving direct appeals to the Supreme Court of Newfoundland and Labrador. Seven of them are related and were discontinued when the Supreme Court of Canada denied leave to appeal, related to Newfoundland and Labrador versus the NLTA. These are the sunshine list cases.

Six additional ones involved telecommunication companies that were notified as third parties about a request. Five of them were ultimately discontinued and one is still ongoing. There were three other recent matters involving a complainant who has been to our office very many times in the past. He currently has many ongoing matters that are part of a case-management process. We're assuming that he was going to go to the court anyway. On these particular matters, he decided he wanted to go directly to court and just bypass us. We understood that. He was going to do that and it's probably not a bad idea.

The one remaining matter involves the Beverage Industry Association, which I've already talked about. The direct right of appeal there was related to the fact that the BIA was not notified as a third party under section 19, but filed an injunction to prevent the release of records followed by an application under section 53. There's a rationale about why they would want to go directly to court because they weren't notified under section 19. I guess our view is they don't have a right to be notified under section 19. That matter is under appeal and we expect the court to bring clarity to that.

In contrast to the 17 matters that were direct appeals to the court during the same period, we received and processed several hundred access to information complaints, most of them being resolved informally, as I've mentioned a number of times. Direct appeals are exceptions to the normal process, but we see no pressing need to remove that option from applicants who wish to choose us or who wish to choose it. We will normally intervene to provide our perspective on statutory interpretation of the court in such matters.

I'll turn now to the authority of the OIPC to review records where solicitor-client privilege is claimed. The Law Society, the City of Corner Brook, the Canadian Bar Association, NL branch, and the Department of Justice and Public Safety made submissions regarding the authority of the Commissioner to review claims of solicitor-client privilege in the course of investigating a complaint about a refusal to provide access to information. While the OIPC's written initial submission adequately addresses the issues for the most part, a few additional comments are warranted.

In addition to the above noted submissions, Memorial has also indicated that it wishes ATIPPA to be amended so that the Commissioner cannot require the production of records where there was a claim of solicitor-client privilege. Memorial specifically recommends – and just quote from them – "that a revision or clarification of s.100 of the

legislation reflect the current unofficial process in which the OIPC accepts a listing of solicitor-client and/or litigation privileged information and/or records with submission, in lieu of the privileged records themselves and, therefore, is unable to compel production of solicitor-client and litigation privileged information and/or records."

Unfortunately, Memorial has made an assumption about what is occurring. Subsequent to JPS's refusal to provide records to this office for review, where there is a claim of solicitor-client privilege, and the matter becoming subject to an application for a declaration by JPS, Memorial has now changed its tactic. Previously, Memorial would not deny us those records, but now Memorial has decided to refuse to provide us records in the same circumstance. It's now going on two years, and there have been a number of such instances.

In each time, where Memorial has refused to provide those records to us in the context of an investigation of a complaint, it's provided information about those records in the form of a list. In each case, we have accepted that as sufficient for Memorial to discharge its burden of proof.

I have to point out that these assessments are being made on a case-by-case basis, and just because the last group we've deemed were sufficient to meet the burden of proof, then the very next one we could think otherwise and we could say, as we would normally do – progressing through steps, the next thing we would normally do is ask for an affidavit. If that was not sufficient, then at that point we would ask for the records.

CHAIR D. ORSBORN: In essence, you would follow the direction of the Supreme Court of Canada in that you would require production of the records themselves to you only when you considered it absolutely necessary to assess the claim for privilege? In short of that, if you could get information: a listing, an affidavit and a general description.

M. HARVEY: Right.

The way it currently works in practice – again, it has not really been very problematic except in a very small number of cases – is at the beginning of the investigation process we ask for the records. We don't ask for some of the records; we just ask for all the records. It's at that point when a public body – in this case, Memorial – will say: Here are the records, except for these records, the solicitor-client records. At that point, we would go through that process of lists.

The first time around, we don't say: Please give us all the records except for the solicitor-client records, in which case, why don't you try this process first? If that's the case, it would add an additional level of process to the case. For the most part, the solicitor-client records are mixed in with all the other records and the public body just hands over the whole works of them and we work through them and it's not a problem.

If Memorial or another public body was to say, no, we're holding back the section 30. Then, yes, we would go through those steps. But first let's try a list, then the affidavit, then if that's not sufficient we would compel production. The outcome of that is, if the public body believes that it does not want to share those documents, then, yeah, we would only compel production if it was necessary to do so.

So, that said, the key here, though, is we need to be satisfied that the burden of proof is being discharged. That's the essence of the oversight role and that's the essence of the burden of proof under the law. If it's left to them to make that determination, then the oversight role is negated.

That said, in its submission, Memorial has raised an extraordinary circumstance which could justify some limitation on the Commissioner in relation to the review of the claims of solicitor-client privilege. Memorial references the fact that records containing legal advice provided by its counsel regarding court appeals, to which the Commissioner is a party, could themselves be subject to an access to information request, which could then be subject to complaints to the OIPC.

So, again, this is a hypothetical scenario, but one which could apply. I'm not surprised that Memorial is thinking about such a thing because we're involved now in so much litigation – that we're involved as an intervenor in so much

litigation that they're also involved in as a respondent.

So, yeah, I can see that there might be some records that might show up in such access requests. In 15 years, we haven't reviewed any kind of records of this nature, and we can't think of it actually happening, but it's a legitimate concern. Because of its rarity such a concern does not, in our view, justify a blanket prohibition against review of records by the Commissioner where there has been a claim of solicitor-client privilege. But it may, however, justify inclusion of a very specific exception and alternate procedures in such an unlikely event.

We propose that such an exception to the Commissioner's authority to compel production of and to review claims of solicitor-client privilege should be limited to circumstances where the record at issue in the complaint relate directly to a matter in which the Commissioner is or has been a party in a proceeding, as well as a public body's legal advice about responding to complaints that are or have been before the Commissioner.

In such circumstances, a statutory provision could establish that the public body may attempt to discharge its burden of proof by way of detailed affidavit satisfactory to the Commissioner. If we're not still satisfied that the burden has been discharged as a result of the affidavit, the public body would be required to apply to court to demonstrate the records relate directly to a proceeding in which the Commissioner is or has been a party, and if this is established, to require the court to review the records and make a determination.

Again, that's a narrow circumstance. We're arguing that you wouldn't want to just jump from that unlikely thing to change the entire scheme that's in the act.

Before addressing the other aspects of this issue with solicitor-client privilege –

CHAIR D. ORSBORN: Just let me understand the situation. Why would an exception be needed? Because if a public body is giving you information upfront as to why a particular record should not be produced, generally speaking, why would they need to go beyond that in cases where the Commissioner is a party?

M. HARVEY: We would imagine that in practicality this is how it would unfold, the public body would say: We have these records that are protected by solicitor-client privilege. We don't want to give them to you. You, in fact, are implicated in them. We would ask: Okay, tell us a little bit about them as records. Most of the time that would be sufficient, but if it wasn't, again, we would suggest an affidavit might be sufficient.

Again, in the very unlikely scenario that none of it was sufficient, then we would admit that it's not appropriate for us to review records in which we ourselves are implicated, that would create a conflict. In that case, a direct route to court would be necessary. That's probably how it would play out anyway – I mean, likely if we really were that unsatisfied with an affidavit and tried to compel production, then I would except that they would end up going to court anyway.

CHAIR D. ORSBORN: Yes. So that option is there through the normal process. Do you need the exception?

M. HARVEY: I don't know that we strictly need it. Again, we've survived for this long without it, but we acknowledge Memorial's point and we don't think that there would be a whole lot of harm in introducing it. It would make an already lengthy act a little bit more unwieldly, but we do want to acknowledge valid points where they are made, for sure.

CHAIR D. ORSBORN: Add it into section 101.

M. HARVEY: Sorry, in …?

CHAIR D. ORSBORN: I'm being facetious. We could add it to section 101 with the *Evidence Act* provision.

M. HARVEY: Oh yeah, I see. I was a bit confused because they were talking about section 100.

CHAIR D. ORSBORN: I'm sorry.

M. HARVEY: They're adjacent.

CHAIR D. ORSBORN: Yeah.

M. HARVEY: I'll just return now to the broader issue of solicitor-client privilege. I think we need to talk about it a little bit more, but I also want to make the point that we're talking about a pretty small number of records really. The proportion of records that are subject to access requests, over which solicitor-client is claimed, are pretty small. The number of those records that end up subject to an investigation and potentially subject to review by the Commissioner is, again, pretty small.

We are talking about quite a small fraction of public body records here. I think that's important to understand for context, but broad enough that it can gum up the works, because, particularly when dealing with government departments, there are solicitor-client records, little bits of it that are sprinkled throughout many public records. In the positions that have been put forward by public bodies, in general so far, in our view there's been a failure to appreciate the context within which access to information law operates. Even some of the case law that's been cited focuses on the principle of solicitor-client privilege without fully considering the context.

Access to information does not occur in a courtroom scenario where two opposing parties represented by officers of the court are litigating in dispute. In that context, if a party wishes to dispute a claim of solicitor-client privilege, it is the party asserting the challenge to the claim of privilege who must bear the burden of proof, and that is as it should be. But in an access to information scenario, we have an applicant who has a statutory right of access to information with exceptions. That applicant is not equal in status to the public body. In most cases, a public body wields power over citizens, including the applicant, through statutory or regulatory authority. The public body has administrative expertise that is not available to the applicants.

Access rights have been recognized by the courts and by former chief justice of the Supreme Court, Beverley McLachlin, as quasi-constitutional in nature. Certainly, the particular status of solicitor-client privilege has been understood to be as well, quasi-constitutional, but we should also not fail to appreciate that the access rights themselves have also been recognized as quasi-constitutional.

It's important to understand in this context that the public body, who is wielding power over citizens – solicitor-client privilege in general, in our view, is a principle of the law that is necessary to protect the powerless from the powerful. It's a protection for clients. In access to information, it is the applicant now who is the one in a less powerful situation. I think when understanding, at an intellectual level, the principles of solicitor-client alongside access to information, it's not the same type of conversation that you would normally be having about solicitor-client privilege almost philosophically.

I think the other thing to realize is that when we're talking about the specific relationships, what solicitors and what clients are we talking about? The clients here are not individuals; they are public bodies, democratically accountable public bodies. I think that bears some consideration as well. We're not protecting a vulnerable individual here who is entering a legal forum to which they are not well equipped and their protection is their lawyer, the officer of the court. We're talking about a well-resourced public body with legal authority. That's who the client is here. Those are philosophical points, if you will.

The parties who oppose the Commissioner's ability to review claims of solicitor-client privilege do not typically acknowledge that most complaints to the OIPC are resolved informally. Informal resolution helps ensure that the right of access is meaningful by ensuring that the review process can have a speedy and efficient result. If we do not have access to the records, it is often impossible to fulfill this aspect of our role.

Unless we can say to the applicant that we have reviewed the record and confirmed that it is privileged, it's difficult for us to tell the applicant to just take our word for it when we don't have the evidence ourselves. Even if we have an affidavit from the public body, to many applicants that's just another way of saying no, in the context within which very little trust may exist between the applicant and the public body. Their confidence in us and agreeability to informal resolution stems from our ability to

assure them that we have actually seen the records.

I'd also point out here that the Department of Justice on Monday noted that expediency is not a sufficient reason to challenge the principle of solicitor-client privilege. First of all, our point we would immediately make is that as per section 102, ATIPPA does not pierce – production to the Commissioner does not pierce solicitor-client privilege. That's clearly stated by the statute; nevertheless, I don't think we should dispense with the value of informal resolution as a simple matter of expediency. It's one of the purposes of the act in section 3, to bring a timely resolution to this matter. That's more than just administrative expediency, so I don't think we should –

CHAIR D. ORSBORN: If you had information from a public body that satisfied you that a particular record was indeed privileged and an applicant was perturbed with that and said, well, that's just a way of saying no –

M. HARVEY: Yes.

CHAIR D. ORSBORN: – that wouldn't give you then a reason to go back and demand production, would it?

M. HARVEY: No, absolutely not. Indeed, we have – I've signed reports in which the applicant is not satisfied and we say no, but I still don't need to see the record to know.

S. MURRAY: Public bodies, even since the Department of Justice has decided that they're not going to provide these records to us, some larger public bodies, particularly within government and Memorial, have adopted that approach as well; however, other smaller public bodies have continued to provide those records to us. I think the issue is that it's important that they have that option to do so, which can facilitate informal resolution if they want to provide them to us. They may not be in a position to hire legal counsel to prepare statements for our review and things of that nature. They might find it just as easy to provide the records to us and they should be able to do so.

CHAIR D. ORSBORN: Yeah, no question. I was just reacting to Mr. Harvey's comment that on occasion an applicant might not be satisfied with just an affidavit –

S. MURRAY: Yeah.

CHAIR D. ORSBORN: – and they'd say well it's just a way of hiding it. But that wouldn't influence your decision on whether or not production was necessary to you or not.

M. HARVEY: That itself, no.

CHAIR D. ORSBORN: Okay.

M. HARVEY: If we've decided that the burden of proof is discharged by however it's discharged, then that's what we've decided.

CHAIR D. ORSBORN: Yeah. Okay.

M. HARVEY: So when the Commissioner's oversight is removed, there can be impacts on applicants dealing with the full spectrum of public bodies. During the period leading up to the Court of Appeal ruling, one town manager – when I say the Court of Appeal ruling, I'm going back to 2009. This is really the narrative that Mr. Osborne talked about; he talked about the one case.

That one case was very instructive for us, but I should point out it wasn't only one case. In any case, in preparation for that case, the town manager of one specific town admitted to the office that he claimed solicitor-client privilege over records because he knew that he could, and if he did, then we couldn't see them.

If he was willing to say that to us, how many other people were doing that and not saying it? There are other practices that you would have heard about in government departments such as making sure that your lawyer was at a meeting so that the – what was discussed at that meeting was covered, including your lawyer on an email list to try and get the protection in that way.

I can't substantiate, I'm not going to try to do this with specific examples, but these are the kind of things that you'd heard about. I should also note that these kind of approaches are not unique to this government. There was an

investigation done at the federal level about the overclaiming of solicitor-client privilege and these exact same kind of stories are what you'd hear.

Other things like the federal Department of Justice claiming that all of their documents were subject to solicitor-client privilege simply because they came from the Department of Justice. This is the approach that was taken. My understanding of that court that went to the Court of Appeal, that the records that were in a box in the Department of Justice were assumed to be solicitor-client privilege and, indeed, the department didn't even review the records prior to the court. This came out in questioning in court that actually nobody, the litigator and nobody else had even reviewed the records. They simply assumed that because the records were from the Department of Justice that they were therefore solicitor-client privilege. That does not meet the test of determining solicitor-client privilege.

But it's not only that one incident. Mr. Osborne suggested that we're basing our fears of overbroad claiming of solicitor-client privilege on that one incident, but that's not indeed the case. In fact, after that ruling, there were 14 files that had been held in advance waiting the outcome of that ruling. So these 14 files were cases where access to information applicants had requested that we review the claims of solicitor-client privilege.

In the period after the ruling – this was before Bill 29 – we received the response of records for those files. The majority of them, so over half of the claims of solicitor-client privilege, turned out to be unfounded. I mean, that to us was clear evidence that during that period there was overclaiming of the solicitor-client privilege.

S. MURRAY: If I could add, Michael, those files were all resolved informally, which means that the public body agreed. Once we had an opportunity to review the records, in some cases we could look at the claims and say, obviously, this is privileged and no issue. In other cases, once we have the records then we could simply ask the question: How is this privileged? They essentially withdrew their claims. So the 14th file was the one that went to the Court of Appeal, the other 13, in over half of those cases there were claims that were just withdrawn basically once we had an opportunity to review the records.

These were all decisions that were signed by a senior executive within government and, in some cases, legal counsel. So if they were prepared to sign those letters refusing access on that basis, that's why I think we need the ability to probe when we receive a list of records with statements; we need the ability to probe that and, if necessary, to obtain the records to review, but only if necessary.

CHAIR D. ORSBORN: If I understand correctly, in terms of the Wells committee's conclusion on that, the conclusion was that you should be able to review the records –

M. HARVEY: Absolutely.

S. MURRAY: With no limit.

CHAIR D. ORSBORN: – and it was only the interpretation of the University of Calgary decision that led to the change in practice. Is that fair?

S. MURRAY: Yes, yeah.

M. HARVEY: Again, that matter is before the courts because of a declaration being sought by the Department of Justice and Public Safety. We don't have a date yet for that. But our view and our recommendation is there's an easy clarification that can be made to achieve the public purpose that was stated back in 2015. So we think it's a simple fix.

S. MURRAY: We should add that the matters are before the court. We don't have a statement or a description of the records from the public bodies, we just have the claim and nothing else. So they would not provide those to us.

M. HARVEY: I'm just reviewing my notes to find out if we've essentially covered all of this. I think we have. I think you understand our position and we've talked about it at some great length.

Maybe I'll finalize by saying we would not object if the statute were amended to allow public bodies to attempt to discharge the burden

of proof involving a claim of solicitor-client privilege through the production of a detailed affidavit. As discussed, we've accepted such affidavits in the past. The key is that we must be in a position to demand production of the records if the affidavit isn't sufficient to discharge the burden of proof. That's really the key in those cases as described by Mr. Murray. There may well have been affidavits, but the burden of proof still needs to rest on the public body.

I'm going to now change gears, if that's okay, and talk about the OIPC review process. It has been suggested by TCAR – Tourism, Culture, Arts and Recreation – that 10 business days to provide submissions and records to the OIPC when a complaint has been received about an access request is a difficult time frame within which to work. We understand that it is a short period of time; however, we are also of the view that a 65-business-day time frame from receipt of complaint to issuance of a report, if informal resolution is not successful, has been a very positive aspect of the establishment of an efficient, effective first-level review of complaints, as envisioned by the ATIPPA review. Keeping those time frames as short as they are is very much in the public interest.

We have been asked by our colleagues in other jurisdictions – first of all, we're often asked: How's your backlog going? And our answer is we really don't have a backlog. How do you not have a backlog? Well, there are two answers: One, we have an appropriately resourced office. But the second is: We have time frames and those time frames keep our feet to the fire. We don't miss them. That's my response to my colleagues that say how do you deal with your backlog, is you need legislative strict time frames.

How we can meet those time frames is because we do have those time frames that apply to public bodies. That's how we all keep it going. Like I said before, as it relates to the access system in general, it also relates to the investigations process. It's hard, but it works. I think any service in government, and our colleagues across the country, are jealous of our metrics.

That said, we have been amenable to granting short extension to 10-business-day deadlines where extenuating circumstances exist that's within the context of investigation. We do that on an as-needed basis. It's not a challenge.

CHAIR D. ORSBORN: That's not informally, is it? It's not provided for in the …

M. HARVEY: I don't believe so, but we manage it.

CHAIR D. ORSBORN: Yeah.

M. HARVEY: IET recommends a change to the OIPC interpretation of the term "non-responsive" in the context of access requests. This was discussed somewhat on Monday, this notion of non-responsive records.

We have a guidance on this issue and you can find it online. We believe that it strikes the appropriate balance. Ultimately, our view is that communication with the applicant can generally resolve confusion about whether an entire record or simply a section of it is being requested by an applicant.

The duty to assist requires an open, accurate and complete response. We believe that if there's any lack of clarity in a request, the coordinator should reach out to the applicant to ensure that the request is understood, including what is intended to be inside or outside the scope of their request. When there is doubt, bear in mind that the courts have said statutes should receive a liberal interpretation in line with their purposes.

CHAIR D. ORSBORN: Yeah, the issue there, I take it, is if it were limited to responsive information than an overzealous application of what was responsive. Is that the concern?

M. HARVEY: We think it would be challenging and confusing for the applicant and challenging to enforce, if departments could have greater latitude to striking out portions of records. That's what we're talking about is information within records as non-responsive. This would lead to confusion where you had things redacted without specific exceptions claimed and confusion about what they were.

CHAIR D. ORSBORN: Where would clarification from the applicant come in here?

M. HARVEY: Well, I think that the clarification from the applicant would, I think, just make it clearer about the record-level responsiveness of documents. Is that – but within documents itself.

CHAIR D. ORSBORN: Yeah, it wouldn't change what was –

M. HARVEY: No, it wouldn't. Not within –

CHAIR D. ORSBORN: Not, within the record.

M. HARVEY: Not at the information level within the record. No, it wouldn't.

S. MURRAY: I mean an applicant can always say I don't want this; I do want that. They're just clarifying their request, that's all.

CHAIR D. ORSBORN: I understand that in terms of clarifying what response is, but if you have a record and there are 20 items on the record, one of which is responsive, and the applicant says, yeah, that's what I want, then they send the whole record.

M. HARVEY: If they get the whole record, subject to any other redactions that may apply.

CHAIR D. ORSBORN: Yeah.

M. HARVEY: If there's personal information or if there's a harm related to the release of that non-responsive information for some other reason, then that would be redacted.

CHAIR D. ORSBORN: A different issue, yes.

M. HARVEY: Otherwise, this is information that would have been released if someone were looking for it, so where is the harm in releasing it?

CHAIR D. ORSBORN: Yeah. Okay.

M. HARVEY: The RNC in its submission stated the following regarding its concerns about perceived lack of accountability at the OIPC. It said, "it is felt by the RNC that *ATIPPA*, 2015 does not hold the OIPC accountable to the general public or public bodies the same way that it holds the aforementioned accountable." I should say, Sir, that you can read between the lines of about what I'm about to say. There's some offence taken by the office at this notion.

Continuing to quote from the RNC: "Throughout the administering of an access request and a potential applicant complaint to a response the public body is held to strict timelines in responding to the applicant and to the OIPC during the course of their investigation. The applicant too is limited to a 15 business day timeframe to make a complaint regarding an access request. However, there does not seem to be any requirements on timelines within the *Act* for the OIPC to respond or to conduct their investigations. Currently the RNC is aware of one investigation involving the RNC ongoing by the OIPC that has been ongoing since 2017."

This characterization is categorically incorrect. Section 46(1) requires the Commissioner to complete an investigation and make a report on complaints about access to or correction to information within 65 business days. Section 46(2) allows the Commissioner to extend that time limit in extraordinary circumstances if the court approves an application to do so.

To date, we have availed of this option only three times: the outset of the COVID public health emergency; during the 2020 Snowmageddon state of emergency, when our office was closed and we could not issue reports that were due during that period; and also in relation to some files, the outcome of which hinged on awaiting a decision of the Supreme Court of Canada as to whether it would hear an appeal of a Court of Appeal ruling that directly impacted the outcome of a file. Those were three truly exceptional circumstances on the access side.

Section 74(3) requires a Commissioner to complete a privacy investigation as expeditiously as possible under the circumstances. It's a lighter standard. We believe though that we've done that. In 2019-20, other than those complaints which were withdrawn by the complainant or for which we determined that we had no jurisdiction, privacy complaints were closed in an average of 60

business days, with the longest being 106 business days.

When it comes to a timely completion of investigations of access to information and privacy complaints, we believe that no other access and privacy oversight body in Canada is likely to have a better record. We also do our best to accommodate public bodies during difficult times. As public bodies will be aware, the Commissioner adopted a very flexible standard to approve ample time extensions for public bodies who face difficultly during the state of emergency in early 2020 and the initial months of the COVID pandemic.

The 2017 matter, referred to by the RNC, likely refers to a privacy complaint that was filed with this office that resulted in a prosecution. All matters in relation to the prosecution have not yet concluded and, therefore, our complaint file has not formally been closed, although our investigation is not currently active. That's a rare and exceptional circumstance, but as the matter is with the Crown, it's not within the control of the OIPC to address it in a more timely manner. The short of it is we feel that was an unfair and unfounded criticism. We adhere to our timelines – we do have timelines, we hold ourselves to them, we report on them annually to the House of Assembly and we feel we do better than any of our counterparts anywhere in the country.

I'll speak now on the appointment of an interim Commissioner. There was some discussion about this on Monday. JPS spoke on the submissions of the Speaker and noted that they agreed with the Speaker's submission. We had no concern with the submission of the Speaker on this matter either, on the appointment of – not on the appointment of an interim Commissioner. We had no concerns with the – the Speaker made a submission on the appointment of a Commissioner and we had no concerns with that.

CHAIR D. ORSBORN: Right. Essentially taking out the selection committee process and just like the other statutory offices, on resolution of the House of Assembly.

M. HARVEY: Well, my understanding of the submission is it had to do with the ranking at the end that there be a clear process. I can't remember the details of their submission, but –

CHAIR D. ORSBORN: No, I think the concern of the Speaker was that there is sort of no direction from the Speaker there if the committee didn't agree on somebody and whatnot. As I understood the submission of the government, they suggested that the appointment of the Commissioner be statutorily the same as, say, the Auditor General and whatnot, and simply two lines on resolution of the –

M. HARVEY: If my understanding is correct – and I'm working from memory here, so please forgive me – the Speaker had a specific recommendation about one aspect that would be brought in line, but the appointments of the statutory officers, the six of them, vary in a number of ways across the board. It would require changes to all of the acts, to bring them all in line.

CHAIR D. ORSBORN: I think they're all similar but for yours. The other ones have a two line there: appointed by the Lieutenant-Governor in Council on a resolution of the House of Assembly. The other five or six are that and yours, I think, the end product is the same that it's the responsibility of the Speaker to put the resolution following deliberations of the committee, et cetera.

M. HARVEY: I have no concerns with that aspect.

Though I did want to comment on the proposal made by JPS on Monday, which was that the LGIC be given the authority to appoint an interim Commissioner in the case of vacancy of the office. We have a recommendation on vacancy of the office and I think we –

CHAIR D. ORSBORN: Interoffice delegation.

M. HARVEY: Interoffice delegation was one notion.

The reason why I would have some concern with LGIC being given that authority has to do with the balance between the Executive Branch and the Legislative Branch. The Commissioner is an officer of the House of Assembly of the

Legislative Branch of the government and, of course, LGIC is the Executive Branch.

In the case of a vacancy of an office, which could last for six months because of the rest of the act having to do with the sections of the House of Assembly. If the Executive Branch wanted to give favour to a particular candidate, then appointing by LGIC that person into the role on an interim basis would give them a very significant leg-up in the interview process. This move to give the LGIC that ability to appoint an interim Commissioner shifts the balance in my view between the Executive and Legislative Branches when it comes to the appointment of the Commissioner over what is currently in the act.

Our intention was to provide a more neutral resolution. Likely speaking, under the delegation option, the person that would be delegated to is likely to be a person who already exists within the office. That person, by working in the office, is already going to have whatever leg-up they're going to get in the competition. I'm just thinking back to my own competition. Obviously, had I spent six months actually participating in the office and fulfilling the duties of Commissioner that would have changed the way that I performed in the interview, I'm sure. It would have been a significant advantage. A person who already works in that office already knows and would be able to speak to the intimate details of that office.

In our view, we think that the delegation model is better and more neutral. As it relates to the appointment of an interim Commissioner, it's the neutrality, really, that we would see would be the policy aim here; as opposed to putting that responsibility with LGIC that would shift the balance to the Executive Branch.

I'll speak now about prosecutions. So JPS has proposed to eliminate section 99, which makes evidence given during an investigation inadmissible in court or they propose, alternatively, to amend it to require staff of the OIPC to testify in prosecutions.

We have a fair amount of detail in the written submission to come on this matter, but the long and the short of it is that we feel that exposing our staff to potentially testifying could chill the investigative process, particularly the informal investigative process that they currently use, because the concern is that applicants, complainants and public bodies may be less likely to be forthcoming over the course of an investigation if that felt that the analyst could be compelled to provide testimony.

CHAIR D. ORSBORN: What about the situation if it's a prosecution under the act or a charge of perjury?

M. HARVEY: Sean (inaudible)?

S. MURRAY: We're only talking about prosecutions under the act.

CHAIR D. ORSBORN: Pardon?

S. MURRAY: We're only talking about prosecutions under the act, we hadn't contemplated perjury. But we're talking about situations where we have brought charges twice under the ATIPPA where there's been a serious privacy breach at a public body, where it's basically a rogue employee scenario.

We conduct the investigation, we hand that material over to the Crown and the Crown proceeds with the prosecution. The witnesses they call would be the people who are the directors and managers within that organization who can speak to what the scope of duties of the individual are; what the scope is and what information they are supposed to have access to, to do their job and not have access to. There are information management professionals who can speak to the audits that they would have run themselves, that the public body would run to determine what information was accessed, when it was accessed and by whom. These are all things that the officials in the public body can speak to.

CHAIR D. ORSBORN: I understand that. Is there a legitimate reason why, when you're dealing with either a prosecution under the act or a perjury claim, the Commissioner or staff should not be compellable witnesses?

S. MURRAY: I think what Commissioner Harvey is talking about is if we had that authority, anyone who's participating in any investigation conducted by our office would

come into it with the knowledge that anything they say to us, we could potentially testify about it in a prosecution, should that ever occur, and it could place a chill on all of those communications.

What constitutes an investigation under the statute? People may have different perceptions of that. Many times we will pick up the phone and call a public body or a custodian under PHIA and say that we see in the media that you have this program going; can we ask you a few questions about the privacy protections and things like that. Will they perceive that as being an investigation and not want to talk to us? An enormous amount of our oversight is conducted through these types of informal contacts that do not become formal complaints that are investigated, but could it place a chill over our oversight operations in general?

Furthermore, the whole point is, I think, that everything that we glean in our investigations that we turn over, we are telling the Crown: This is what these various officials can say about this matter. This official can speak to the scope of work of the employee; this official can speak to the audit that was conducted about access to the records that occurred. Everything we have to say is sort of secondary and really is second-hand, as opposed to a wildlife official who is out tramping around the woods and they're taking pictures of the nets across the rivers. They have the only evidence. They are collecting the first-hand evidence of what the offence is, whereas the evidence of what the offence is exists within the public body.

In the prosecutions that have occurred to date under both PHIA and ATIPPA, all of those prosecutions have been carried out using that type of approach: the testimony of the officials of the public bodies and not second-hand –

CHAIR D. ORSBORN: Are there many prosecutions under ATIPPA?

S. MURRAY: Yes, there have been two under ATIPPA.

CHAIR D. ORSBORN: Privacy-related?

S. MURRAY: Yes, the RNC was the public body involved and there were actually three individuals prosecuted: one of them was sort of two individuals that were connected and one of those three is a matter that's under appeal right now. Under PHIA, we have completed three. There have been three successful prosecutions, convictions.

CHAIR D. ORSBORN: I should know this, but is there the same provision in the *Personal Health Information Act*?

S. MURRAY: The offence provisions are different.

CHAIR D. ORSBORN: This one simply says you're not compellable. It doesn't say you're not competent.

S. MURRAY: True. There's –

CHAIR D. ORSBORN: So (inaudible) if you felt it was appropriate to give evidence you could.

S. MURRAY: Exactly. If the Crown came to us and said you guys have some information on this that we can't get anywhere else, there's nothing to stop the Commissioner from deciding that in this circumstance I'm going to waive that –

M. HARVEY: We should note that JPS's submissions on this were done with some jurisdictional scan in saying that the provision, which protects us from being compelled to testify, is not found in other jurisdictions. It should also be noted that other jurisdictions have not had prosecutions under their acts, with some limited exceptions, but each one of those exceptions itself is an exception.

The fact that we've had all these prosecutions is distinct in the way that our act operates. So we feel that this other aspect of distinctiveness in section 99 needs to be preserved as well.

S. MURRAY: We're not running off and initiating prosecutions willy-nilly; this is not something we want to be doing. But as Commissioner Harvey mentioned, Nova Scotia and British Columbia are the two jurisdictions that have had a prosecution under their public sector access to information statute – access and privacy statute.

Under the personal health information statutes in Canada, that's occurred a little bit more frequently. I know Alberta has done quite a number of them; I think there may be a few in some of the other provinces as well. Over a period of years, we've had three since PHIA came in in 2011, so it's not something that's (inaudible.)

CHAIR D. ORSBORN: You've had two under ATIPPA?

S. MURRAY: Two under ATIPPA that are – well, there are three individuals, so we'll have to say there are three. Three under ATIPPA but one is ongoing.

CHAIR D. ORSBORN: Three prosecutions?

S. MURRAY: Three prosecutions but one is ongoing.

CHAIR D. ORSBORN: And three under PHIA

S. MURRAY: Three under PHIA and one is also ongoing, including the three. So one of the three is ongoing.

M. HARVEY: I'll very quickly deal with some proposals that Memorial made about the appeals process. So much of this appears to stem from Memorial's recent experience in the courts and we can certainly understand that; we're there with them. Memorial has proposed that legislation be amended to clarify that a de novo hearing shall proceed as an expedited hearing on the basis of affidavit evidence, subject to further application to the court for additional steps under rule 17A.09. We don't object to that. That's fine with us.

They propose that the first appearance date shall proceed as a case management meeting at which the parties are to discuss any applications contemplated. We don't agree with this. Some appeals are straightforward and case management is unnecessary. We think they should be left to the discretion of the judge.

They propose that further recourse to the *Rules of the Supreme Court, 1986* be prohibited, absent an order of the court under rule 17A.09. We agree with this. They propose that all ATIPPA appeals be case managed, with the first date serving as the first case management meeting. For the same reason, I disagree with that. The matter should be at the discretion of the judge.

Finally, that the public body be required to file an audit copy of the records under seal with the court without the necessity of a sealing application. We don't agree with that. The sealing application is an important step to obtain certainty regarding the understanding of the court and all parties before the court about the status of the records. Not all lawyers who appear on ATIPPA matters are familiar with the statute and the statutory requirement to file records could be missed. The OIPC is required to be notified of appeals and will continue to ensure the parties are aware of that step if there's any uncertainty.

I'll now move to talking about extension and disregard approval requests. Again, the broad narrative here is the system is broadly working, from our perspective. An important fact to remember when it comes to the current 20-business day timeline is that in the vast majority of cases, public bodies successfully respond to access requests within that period. The most recent statistics published by the ATIPP Office for '18-'19 indicate that for all public bodies receiving requests that year, 93 per cent responded without needing an extension, an additional 4 per cent responded within the approved extension period and only 3 per cent failed to respond within either the original or extended deadline. As I said, any system would be jealous of those metrics.

The ATIPP Office has also suggested amending the statute to provide a period longer than 20 business days for small municipalities to respond to ATIPP access requests. Some access requests are quite straightforward; others may be more difficult. While the context means that the spectrum from simple to complex is different for small public bodies, it remains true. Any public body, including a small municipality, can apply to the OIPC for an extension, and the capacity of a public body to respond is and certainly will be considered. Again, we don't see that there's a problem here.

It was proposed by the OCIO that the 20-business-day clock should be paused for two to

three days during the preparation of an application to extend the time limit for a response to an access request. The OCIO expressed that it takes two to three days to prepare such a request. This does not align with the typical time extension request we receive.

IET is closer to the mark, saying that making an extension request can take over an hour. For lengthy, complex requests, that might be correct; however, based on the many forms we receive, we believe the process would usually take even less time than an hour. It's a simple form. An ATIPP coordinator responding to a request regarding requiring a short extension, in the range of five to 20 business days, should be able to complete the application in minutes with the information that would normally be at his or her fingertips.

The longer an extension request, the more detailed the rationale would tend to be required to justify it. Much of the work to prepare such an extension request involves work that needs to be done in any case, such as communicating with third parties, conducting searches, reviewing records and communicating with other public bodies who may need to be consulted and so on. Such investments of time are not lost to the coordinator, as they are necessary in order to respond to the request. We don't support the recommendation to stop the clock; we don't think it's justified.

It has also been proposed by IET that the 15-day deadline for submitting an extension request to the OIPC be eliminated. The extension request process is not onerous. It involves providing basic information about the status of the request that coordinators should, as mentioned, have readily in hand. For the vast majority of access requests, coordinators can readily determine at day 15 whether they are likely to need an extension. In the few circumstances where it is difficult to assess, coordinators can submit an extension request at day 15 and avail of any extension granted if needed. Section 24 is also available should extraordinary circumstances arise past day 15 to warrant an extension. We don't support this amendment because we don't think that there is a problem.

The ATIPP Office has suggested amending section 23 to explicitly allow the Commissioner to extend the time for a response if the public body has had difficulty getting in touch with the applicant to clarify the request. Section 23, however, already allows the Commissioner to approve extensions where it is necessary and reasonable to do so. We don't see there is any need to prescribe specific considerations in the statute.

Several public bodies have called for a return of the ability to extend their own deadlines. In its submission, the Department of Environment, Climate Change and Municipalities also supported the idea of allowing public bodies to extend their own deadlines, citing the ability of public bodies subject to the federal *Access to Information Act* to extend their own deadlines as a guiding example.

While the statutory language may look appealing, the department may not realize that the federal access to information regime is infamous for the length of time it takes public bodies to respond to access to information requests. The ability of federal public bodies to extend their own deadlines is certainly a major contributing factor. Information Commissioner Caroline Maynard recently issued a special report on the failings of the RCMP in this regard; however, other reports and statements by past federal commissioners underscore that this is hardly unique to the RCMP.

While applying for an extension may be an inconvenience for public bodies in this province, it has provided a touchpoint for effective oversight and helped to ensure that deadlines are being adhered to, which ultimately protects the rights of citizens who use the act.

The ATIPP Office also proposes that public bodies be able to assign themselves a short extension of 10 business days. It acknowledges past abuse by public bodies and asserts that great strides were made to improve this prior to the 2014 statutory review. Some of the improvements, which may have been noticed in the lead up to that review, may be the result of a 2014 news release issued by former Commissioner Ed Ring in which it was noted that deemed refusals had become common, whereby public bodies were simply blowing by their statutory deadline to respond to requests for access. That news release followed from an

earlier one in 2013 in which the issue was identified as a significant concern as well. The 2014 release was followed by high-level meetings, and any positive impact from that effort may be attributed, at least in part, to the political climate at that time as well in the lead up to 2014 review.

The Department of Digital Government and Service NL proposes that public bodies be able to grant time extensions to themselves of up to 30 business days. Based on our past experience and the experience of jurisdictions such as the federal jurisdiction and Manitoba, we do not believe that a return to that model would be a positive move. We have every reason to believe that the habits of the old, which we addressed in news release during the Bill 29 era, would return once again. To state it simply: our view is that if departments had the ability to give themselves an extension of up to 30 business days, then 30 business days would become the new standard.

In the earliest version of ATIPPA, public bodies were able to extend their own time limits at their own discretion. In our view this was the subject of substantial abuse which significantly impacted the right of applicants. This remains the case in some other jurisdictions where public bodies have this discretion. For example, the Manitoba Ombudsman's office released an audit in June of this year into timelines of access to information responses. In our experience, and as demonstrated most recently in Manitoba, jurisdictions lacking clear time limits and jurisdictions where public bodies can extend their own time limits tend to see the develop of a lax culture around time lines or it tends to lead to the development of a lax culture around time lines of access to information requests. Despite the inconvenience to coordinators of having to apply for approval to extend the time limit, we believe that this best supports and protects the right of timely access to information.

The ATIPP Office have proposed that if public bodies are allowed to grant short extensions to themselves, the OIPC could conduct spot checks. If such a process were to be instituted, it is possible that we may gain some insight into whether these extensions are being applied unnecessarily, but, of course, that would be a retrospective view and it will not assist the applicants who've already experienced a delay. Given that the extensions would be permitted by the proposed statutory amendment, it's also unclear what leverage would exist for the Commissioner to rectify any concerns that would arise out of these kind of spot checks.

The ATIPP Office has also proposed that the act be amended to require the OIPC to give a detailed overview of how it arrived at its conclusions in a decision on an extension application. They raised this issue again on Monday, claiming that the OIPC does not provide enough detail when we deny or only partially grant an extension.

We must note that we do only have three business days to respond and while we feel that we provide adequate detail in our response, I will say that – and we disagree that a legislative amendment is required for this, we certainly will take an eye to – we heard the concerns that were raised on Monday.

CHAIR D. ORSBORN: Do you need a legislative amendment to do it?

M. HARVEY: My view is that we don't.

CHAIR D. ORSBORN: Okay.

M. HARVEY: I hear what Ms. El-Gohary said and her point that additional detail would allow coordinators to learn and improve, I hear that. We will have a conversation about can we provide any more detail. Most of these responses, they all flow across my desk and I see them all. Most of them are approvals, to be honest, so it's only the small ones that are refusals. We will give an eye to whether or not some additional detail –

CHAIR D. ORSBORN: Yes. Well, one understands the point, because even in the judicial context, a decision without any reasons at all runs the risk of being considered arbitrary.

M. HARVEY: Yes. Now, that's not – the decisions have reasons. I think her concern is that they don't have sufficient reasons. We will turn our attention to that, to try to find out if we can provide additional reasons.

CHAIR D. ORSBORN: You wouldn't suggest an amendment giving you 10 days to respond?

M. HARVEY: Well, we don't want to – the timelines that we have –

CHAIR D. ORSBORN: I wasn't being serious.

M. HARVEY: I know you're not, but I think it's important to make a point that we feel the timelines that are imposed upon us are as critical to the process as the timelines that are imposed upon public bodies. It's not just that we would fear being hypocritical if we recommend looser timelines for us. We actually think that our feet need to be held to the fire as well. I'll tell you that it's not always easy to make those three-day time limits. There's a fair amount of sweating sometimes that goes into it, but we make the deadlines and we think it's important to continue doing so.

I'm just trying to make sure where I am in my notes here.

It was proposed by the City of Corner Brook that the OIPC should issue guidelines regarding its interpretation of section 21 "that apply to all these requests to make their responses consistent to all public bodies and all requests." The reason section 21 is written as it is, is that different public bodies have different capacities. Furthermore, different circumstances may be in play at different times, such that a public body may be able to handle a large request within 20 business days without a problem, but a similar request six months later might arrive at the same time as five other requests with similar workload, or they could arrive at the busiest time of year for that public body or whatever.

While the OIPC does have guidelines for requesting a time extension, it's not feasible or advisable to make an overly prescriptive statutory provision because that would remove the ability of the Commissioner to allow for differences in public body capacity and changing circumstances. The long and the short of it is we take context into consideration. We really need to be able to do so and we feel that we do so fairly.

I'll turn to talking about disregards. Memorial has suggested in its submissions a return to the Bill 29 era, when public bodies were empowered to disregard a request for access on their own initiative without approval by the Commissioner. This was the subject of significant public discussion at the time and it is arguably one of the key features that resulted in broad condemnation of the bill. Memorial's view is that the applicant should be able to complain to the OIPC or the court about a disregarded request, which would again put the onus on the applicant.

While Memorial may see itself as a victim of abuse of the legislation at times by a minority of applicants, we have the benefit of a broader perspective on the act. Sometimes the requests that public bodies wish to regard may be challenging but do not deserve the extreme solution of being disregarded, which, again, I think we should view as an extreme solution to disregard an access request where access has been recognized as a quasi-constitutional right. Furthermore, on a number of occasions, we have found circumstances where some items in an applicant's request – some items; I'll get the emphasis right – may qualify to be disregarded, but others are legitimate. We are able to customize our response in that way, even when the public body decided to disregard the request for the entirety of the access request.

If we return to the Bill 29 process, we fear that public bodies wishing to delay access or spurn a requester for whom they are engaged in a disagreement of some sort, could easily disregard a request, thus delaying or deterring the applicant. We also fear that even the principle of saying that you have the right to make an access request, but the public body also has the ability to just disregard it on its own decision, is a pretty poison pill to be reintroducing into our act. We will very strongly recommend against that.

It typically does take longer to prepare a submission for approval to disregard the request. OCIO has proposed that the 20-business day clock should stop for the time during which a public body is preparing a request to disregard. The result of a request to disregard is usually either approval, in which case the clock is being stopped altogether, or it's rejected, in which case the public bodies would typically then move to apply for a long extension. The OIPC would consider all of the reasons that support additional time, including what the public body

has already been through with respect to its disregard application

OCIO has also proposed that an expedited application process be required to disregard requests from applicants who abuse the ATIPP process. Any time we are asked to consider abrogating a statutory right, the evidence must be able to justify such a significant step. We do not support an expedited application process. That being said, applicants who abuse the right of access typically have a track record. Our experience is that ATIPP coordinators who are dealing with such an applicant are able to retain and simply add new evidence to former applications for approval to disregard. In that sense, some applications of this nature are able to be expedited, but not in a formal way.

CHAIR D. ORSBORN: Yeah. Somewhere along the line, in terms of applications of that nature, repeated applications, one or other of the submissions suggested perhaps giving the Commissioner the authority to declare the applicant was a vexatious applicant and cut off applications for a period of time, or with the approval of the Commissioner or whatever.

M. HARVEY: Yeah, I'm reviewing my notes to find out where we deal with this.

CHAIR D. ORSBORN: For example, just hypothetically if somebody had a – the record indicated that they'd filed 20 requests over the last two years, all of which have been approvals, have been given to disregard, should they be stopped from filing?

M. HARVEY: We've certainly and, again – do we have notes on –?

S. MURRAY: I don't think we made a submission on this (inaudible).

CHAIR D. ORSBORN: No, I don't think.

M. HARVEY: We didn't.

CHAIR D. ORSBORN: I've read it in one or other of the submissions of the public bodies that –

S. MURRAY: Yeah.

M. HARVEY: Yeah.

CHAIR D. ORSBORN: – in a situation such as that, perhaps the Commissioner should have the authority to call a halt to it, subject to review or whatever.

S. MURRAY: (Inaudible) Commissioner –

M. HARVEY: Yeah.

S. MURRAY: – (inaudible) place limits on applicants.

M. HARVEY: We've certainly done quite a lot of thinking about this and when we've looked – and I've talked to my other colleagues about vexatious applicants. It's a common topic of discussion in access circles across the country. We did not want to bring forward a recommendation regarding the ability to declare an applicant vexatious. Part of our concern is that as a quasi-constitutional right, declaring someone to be a – and thus removing their right is an abrogation of their right.

Also, when we think about some of our clients who are, what I'll say, vexing, that's not to say that they don't often, in the midst of being vexing, have important points. If I'm going to say that a particular applicant has been vexing for the last 20 access requests, who am I to say that his next one is not going to be entirely legitimate. We did not feel, as the advocate for the purposes of the act, that was something we were comfortable bringing forward. That said, we did anticipate this coming forward from other public bodies.

When considering the facts, I'll say that none of the applicants yet have been compared to the threshold of vexatiousness that have triggered the outcome of some of the decisions in Alberta, which has been held to be very high. We think that should you choose to recommend something like that, it should establish a very high threshold for what is vexatious.

CHAIR D. ORSBORN: My understanding is, certainly in the court context – I mean that's the phrase that's used – it's obviously a very high threshold. Again, my understanding is that if someone is in fact declared to be a vexatious litigant, that would not cut off, in absolute sense,

the right to access the court, but they would need the court approval –

M. HARVEY: Yes.

CHAIR D. ORSBORN: – to bring another proceeding.

M. HARVEY: In Alberta, a relatively elaborate procedure was designed by the court that involves my counterpart in that province, in this situation. Again, we decided not to make any recommendations in that regard.

CHAIR D. ORSBORN: Sure.

M. HARVEY: I would say that with respect to the current context, I'm not sure that we're quite there yet to demonstrably need it, but opinions may vary.

I'm just trying to get back to my notes and making sure that we're not missing anything.

Back to some more of Memorial's proposals. Memorial has proposed that public bodies be able to deny access to information when there's evidence that the applicant already has the records. This circumstance has come up very rarely over the years in the context of our reviews; however, based on Memorial's submission, it must be a more common occurrence for them and, certainly, we've seen this as a part of some resent investigations. Although Memorial has not suggested that this amendment be established in the context of an application to the OIPC to disregard a request, that would seem to be the appropriate place for it, if it was included in the statute.

While Memorial appears to have had some frustrating experiences, the proposed amendment is not as clear-cut as it seems; there are several considerations. The applicant may have had the record at one point, but it may have been lost, damaged or they may no longer be able to access it. To us, this does not mean that they should not have the ability to ask for it again. It's typical where emails have been deleted or where the applicant is a former employee of a public body who receive the records in that capacity but no longer has any access to them.

Also there is the possibility that different versions or drafts of a record may exist and the difference could be a material one. Sometimes a record that has been distributed to different people may be annotated by one of the receiving parties and the annotation could be the information of interest. Even if the applicant definitely had the records at one point, say, five or 10 years ago, but lost them, can they never obtain them again? There may be other reasons why such a provision proposed by Memorial is not commonly found in access to information statutes, but unless a public body has received an access to information request and disclosed the records through that process, it can be difficult to establish that an applicant already has the records.

Again, I appreciate that in Memorial's case they have dealt with a number of resent applicants by the same applicant and it appears that the responsive records end up being the same records over and over again. If it did turn out that the second request, even if worded differently, captured exactly the same set of records as the first, I mean, that's something that we could consider in terms of a disregard. But I think we have the capacity to deal with that already.

Memorial has also asserted that the current disregard process features a lack of procedural fairness because the applicant does not receive a copy of the Commissioner's response to the public body's application for approval to disregard. This misunderstands, in our view, that it is a public body's decision to disregard a request. It is the public body that must establish the case for such a significant step. The Commissioner reviews the evidence, an argument presented by the public body, and if the application is approved, the public body is required under section 21(6) to provide the applicant with reasons for the refusal. These reasons should reflect the case presented by the public body to the Commissioner, less any information that would reveal information the public body would be entitled to withhold and the factors outlined by the commission in approving the application.

As noted in section 21(6)(c), it is a decision of the head of the public body that is to be appealed to the Trial Division, not the decision of the

Commissioner; therefore, it is the public body which owes a duty of procedural fairness to provide reasons to the applicant. Contrary to Memorial's assertion that the current statutory regime results in an increased propensity of disregard decisions to be appealed to court, there is certainly no stampede to contest public body decisions to disregard a request. Perhaps one or two appeals have been filed to our knowledge.

I'll turn now to talking about the 20-day timeline for making a request. As noted above, the 2018-2019 Annual Report of the ATIPP Office indicates that public bodies responded to access requests within statutory time frames 97 per cent of the time. To add a statutory provision pausing – in fact, extending – the 20-business-day time frame would not appear to be justified. In those small minority of circumstances where an extension is required, the current process, as I have said repeatedly, to seek an extension is available and working well.

It's been proposed by OCIO; the Department of Tourism, Culture, Arts and Recreation; and Children, Seniors and Social Development that the clock not run on a request where the public body needs to work with the applicant in order to clarify the request before responding. In our experience, many requests are able to be responded to within the established time period regardless of this need to clarify this request. For requests that cannot be responded to within the 20-day time period for a variety of reasons, again, the process of filing a request for extension to the OIPC is available.

It is not unusual to see extension requests cite difficulty in reaching an applicant to discuss and clarify a request as one of the factors to be considered, and we consider it. A stop-the-clock provision could also be subject to abuse whereby a public body wishing to delay a response could continue to send further clarifying questions in order to postpone the deadline for a response. We, therefore, do not support this recommendation.

OCIO has suggested that any public body that receives a request for access in which the subject matter of the request is the same as the subject matter of an ongoing public inquiry may put on hold any such requests until the inquiry is complete. JPS indicated on Monday that they were withdrawing this suggestion, but we felt it still required comment. While the inquiry itself could be listed in Schedule B, as the Muskrat Falls inquiry was, it must be observed that any matter that is subject to such an inquiry will be one of great public interest and be contrary to the purpose of ATIPPA, 2015 to enact the provision that is proposed. While such topics tend to attract a high volume of requests, that is to be expected, and such result is simply the fulfilment of the purpose of the act.

Other submissions have also proposed pausing the 20-business-day period for various reasons, such as filling an extension or to request a disregard. We are of the view that this would represent a regressive step for ATIPPA. Such requests could result in an increased number of extension and disregard requests for the purpose of obtaining an automatic extension, and other more subjective reasons for stopping the clock also open the process to abuse to create or unnecessary delay.

It has been proposed by IET that non-workdays that are not recognized as holidays in the *Interpretation Act* be subtracted from the 20-business-day time period. In our view, this could lead to confusion and unintended consequences. There are a few times a year when such holidays occur; however, there are variances among public bodies as to which ones are observed. For this reason, every year we send out a calendar with business days per ATIPPA indicated on it to all of the ATIPP coordinators so they can put them on their wall and everybody is clear what days they are talking about and what they need to plan for.

IET also references Throne closures. It is acknowledged that these events can shave a day or two off the 20-business-day period on occasion, it should be acknowledged that many requests are responded to in less than 20 full business days. Holidays are not unknown occasions so public bodies should be able to plan for a 19-day period rather than the 20-day one. If circumstances arise where the full 20 days are required and there has been an emergency closure for a storm or other valid reasons, the OIPC is very responsive to such concerns in granting time extensions.

Furthermore, if the event occurs after the15-business-day deadline to apply for a time extension, public bodies can support extension requests by referencing the extraordinary circumstances provision in section 24. Again, I need to highlight that in the case of the Snowmageddon experience, we gave them all extensions without them even asking for them just to demonstrate how flexible and reasonable we are for these reasons.

We have no interest in ending up with a deemed refusal situation where a public body literally cannot make it and for that reason we are very flexible. We grant almost all extension requests so public bodies meet the timelines.

IET has also proposed that public bodies be able to park or bank requests if the number of requests from a particular applicant exceeded a specified level. It was suggested that the particular number of requests that would trigger this would vary by public body. In our view, that would be difficult to administer across public bodies. An alternative that might be considered would be an amendment to section 21 allowing the Commissioner to approve a public body's decision to disregard a request or requests because of the number of other requests that have already been filed by the same applicant.

This would not be without its challenges, however. In our experience, some requesters list a number of different items on a single access to information request or file a broad request, while others make a number of separate requests. The latter group may simply adopt the practice of the former group; in other words, cram them all into the one in order to avoid being parked. Furthermore, applicants may learn over time to ask a friend or colleague to file a request on their behalf.

While we acknowledge the challenges, we do not support the particular solution proposed by IET. Even though there are other potential approaches, none of them are foolproof. We are sympathetic to the principle. If you were to come with a recommendation and design something, then we would do our best to work with it, but we are sympathetic to the principle.

IET has proposed a duty to co-operate – and there was, again, some discussion on Monday on this – on the part of applicants which would be rare and unique in Canada. CSSD proposed something similar and the ATIPP Office has put it forward as a suggestion. While we do have sympathy for coordinators in circumstances were applicants, as laypersons, do not understand the pressures faced by coordinators in carrying out their roles, it is unreasonable and unfair to expect that applicants can be expected to take on the statutory duty of the nature described.

CNA has also proposed that the act be amended to allow public bodies to declare a request abandoned if an applicant fails to respond to the coordinator. Section 11(2)(b) outlines the basic threshold for requests. A duty on applicants already exists, to the extent appropriate, is our view. Furthermore, if applicants fail to make their requests clear, the option to apply for approval to disregard a request because it is incomprehensible exists in section 21(1)(c)(iii). The OIPC'S formal submission acknowledges that the five-business day deadline to apply for approval to disregard should be extended to 10 business days so that situations like this can be addressed.

If these provisions do not effectively address a particular circumstance, delays caused by time spent communicating or attempting to communicate with an applicant to clarify a request can indeed be the basis for a request for a time extension to the Commissioner. For most routine requests, however, 20 business days is sufficient time to absorb minor communication delays caused by the applicant.

I'll talk a bit now about application fees. The Department of Education and TCAR have proposed a reintroduction of an access to information application fee, and Mr. Osborne spoke about this on Monday. Prior to ATIPPA, 2015 a $5 fee existed. In our experience, a nominal fee of $5 or $10 is simply another administrative burden for coordinators. We believe it is unlikely to deter the most determined, frequent requesters.

The means to accept such a fee would also need to be established, as fewer people are maintaining chequing accounts or carrying cash. Establishing such a requirement could also interfere with the ability to file requests

electronically; meaning applicants who live in rural areas would be disadvantaged because they may need to travel to the public body, while applicants in the St. John's area, where more public bodies are located, will be minimally impacted.

I note that you asked Mr. Osborne about this on Monday and he hadn't considered how such a thing would be introduced. Speaking as another employee of government broadly, I can understand why he might think that. The provincial government has introduced a way for us to pay for things, like driver's licences and so on. He's presumably thinking that OCIO could come up with a solution relatively easily. I'm sure they could, but that doesn't solve the problems faced by all the other public bodies, in particular all the municipalities, which would have to set up some form of payment system. They may not be easily able to do so.

Our view is that the administration related to the collection of a nominal fee would be more trouble than it's worth, to be honest. More than that, Mr. Osborne, I think, gave our same response to the suggestion in his own response, what is the intent? He clearly admitted that he didn't think it would and it was not intended to deter the vexatious and frivolous applicants, of which there is already a process to deal with them anyway.

He noted that he wanted to deter access requests by people who did not have some – I'll put some words in his mouth – skin in the game, some meaningful commitment to their access request. This seems to be a very subjective kind of notion. But then the example that he gave was a bit boggling to us because he gave the example of someone who submitted a request for COVID. If a public body received a request for COVID, they would surely ask us for a disregard and we would definitely grant it. Again, I'm not sure that we see the problem here.

From our perspective, yes, there is no question that the volume of ATIPP requests has increased since 2015; we think that's a good thing. Not only is it a good thing, but the public bodies are successful in responding to them. I won't quote the metrics again; I've quoted them so many times here this morning, but they are successfully responding to all of the access requests that are coming in. This is a healthy system.

One thing that's novel about Newfoundland and Labrador, unlike in other jurisdictions, is that more here than anywhere else do access to information complaints come in from normal citizens, normal people, as opposed to media, political parties and businesses. Here, this is something that's unusual about us. That's a good thing. That is consistent with the purposes of the act. That's not something that I think we should actively deter, and so for that reason we're opposed to the reintroduction of a nominal fee.

Some public bodies have requested that the scope of costs they can charge an applicant should be broadened. CNA, in particular, referenced the fact that it cannot charge for conducting a line-by-line review of the records, consulting about the content of the records and preparing the records for release. CNA's assessment, based on five specific requests it received in late 2019, is that on average each requested process costs the college $1,225 based on the amount of staff time spent and an estimated hourly wage. It's not clear whether the college is of the view that it could eliminate a position, and thus save those costs, if applicants were deterred by high fees, or whether it could fund the existing position through an imposition of increased fees.

In our view, high fees generally would be a deterrent to individuals attempting to use the right of access to information. Certainly, it must be noted that the number of requests, particularly from individuals, as I've said before, has increased substantially since fees were reduced, and our view is that this is a good thing. Our view is that ATIPPA, 2015 should continue to make access to information as accessible as possible. Public bodies have often shared the view with us that they would like to see fees reintroduced so as to discourage larger requests, or requests that they consider to be of a nuisance character. There may be room for discussion about charging further costs where a request is very large but not quite so large as to warrant approval to disregard. In our view, a reintroduction of costs across the board would be a mistake.

I'll draw your attention, again, to the 2014 statutory review of ATIPPA which contains a detailed analysis of this issue, which, in our view, still very much applies.

I'll talk now about the deadline to transfer a request.

CHAIR D. ORSBORN: What's your timing like, Mr. Harvey? We're getting close to 1 o'clock. I'm happy to continue if you think you'll clue up in a while, or we can …

M. HARVEY: Well, I'm on page 52 of 62. So I can –

CHAIR D. ORSBORN: You're on 52 of 52?

M. HARVEY: I'm on 52 of 62.

CHAIR D. ORSBORN: Oh, 62.

S. MURRAY: Another half an hour.

CHAIR D. ORSBORN: Yeah, because I've got a couple of questions here that I'd like to explore with you. We can probably take a break for lunch now and come back at 2 o'clock.

I wanted to ask you just to expand and explain a little more your position on biometric information and what you feel public bodies should be doing. I don't know a lot about biometric information, just a little bit of reading on it, but I don't know what programs or practices, for example, the health authorities would have that would go across that line there. That's one issue.

Just talk briefly about your request to have privacy complaints made anonymously and what that would mean to notification requirements. I suspect you'd probably want something where a notification that would be made to the public body, would be made to the Commissioner instead. Perhaps something like that, I don't know.

Your view on the 50-year sunset clause for archived records. Is there anything further you wanted to add about the difficult position you're in where you're both a public body and the OIPC. I don't know if that's in your next 10 pages or not.

I appreciate the comment that you made that you dropped the suggestion about the disregard going to court, but practically speaking you may be faced with that issue, even under the present cost estimate and waiver provision, you could be faced with that. So whether you have any suggestions for that or whether it's so infrequent we should just forget it, I don't know. Those are among the questions that I had.

Subject to you being called to the budget process, I understand that, but are we okay coming back at 2 o'clock?

M. HARVEY: Absolutely.

CHAIR D. ORSBORN: Okay, we'll see you then.

Thank you.

Recess

M. HARVEY: We're ready to get right back at it.

CHAIR D. ORSBORN: Thank you.

M. HARVEY: Okay.

Where we left off, I was about to start to talk about the deadline to transfer a request. In its submission, the Department of Education proposed that the five-day deadline to transfer a request to another public body be extended to 10 business days. Executive Council proposed extending it to 15 business days. In accordance with section 14, the receiving public body is then able to start the clock again at day one.

Our understanding is that transfers do not affect a high proportion of requests. The ATIPP Office may be able to shed further light on that, but we've seen no evidence in terms of the number of requests where a transfer would have been appropriate except that it was prevented by the five-day deadline. Without further evidence, we don't see this as a high priority for amendment as it would slow down the process, because it restarts the clock. We would prefer in that instance, without evidence of need to do it, to not do it.

We will turn now to discussing the subject that was discussed yesterday, which is the use of ATIPPA in lieu of or in addition to the discovery process.

Mr. Murray is going to speak to this.

S. MURRAY: These comments are not only related to the discovery process, but any other process that exists for access to information or records that could be an alternative to access to information, whether it's a pre-existing process or not. I guess we just want to put our views out there that we disagree that there should be any sort of restrictions on the use of access to information even if the information is available through another process, such as discovery.

Our written submission, which you will have by end of day on Friday, refers to several decisions from different jurisdictions which explain and discuss why it's important that access to information continue to apply to records even where there is another process available. Most, if not all, access to information statutes recognize that access to information laws exist alongside other processes and that these coexist and access to information is an option that can be utilized.

One reason for that is that some of these other processes may be very specific. You may want a certain group of records but maybe the other process may be really specific to a particular subset of those records. For example, in discovery the records would have to be relevant to the matter at hand, but there may be interest in getting a broader context, in terms of records, than what you would be entitled to through discovery.

Some of these other processes, as well, may place limitations on how the records are used, whereas access to information would not do that typically because it gives you access to information. If no exception applies, you have a right to receive that information and use it in any way you wish.

As you mentioned on Monday in one of your questions, there could be also a difficulty in even knowing when a request is meant to be in lieu of discovery or to see what you can get first before a discovery process might be attempted.

There are many challenges in trying to limit access to information in that way, whether it's, as I say, related to discovery process or another process that may exist parallel to ATIPPA, so we wouldn't have concerns with that.

M. HARVEY: The RNC at section 7.a of its submission proposes that public bodies be allowed to refuse disclosure of information deemed to be inaccurate. A record that is inaccurate may reflect the knowledge of or assessment at the time the record was created. The state of that knowledge at the time may be important information for a requester. If the public body's concern is that inaccurate information is in a record, which is being disclosed to the applicant, the public body can still communicate their views on that matter, an explanation in the letter of response. We wouldn't support that particular proposal.

The ATIPP Office has proposed that section 12(4) be amended to clarify that the privacy provision of the act continue to apply after the final response has been issued and we agree with this proposal.

The ATIPP Office has also proposed that section 64 be amended to reflect the notion that there may be circumstances where notifying someone about a breach could cause harm to the individual or another individual or group of individuals. We agree that such a provision is necessary; however, in our view, it is of sufficient substance and potentially prone to abuse by public bodies for avoidance of accountability and embarrassment that such a decision should be made only with the approval of the Commissioner. In short, we're okay with the proposal, but we propose further adding that the Commissioner's approval of such a thing be added there.

In its supplementary submission, Memorial University – this is its February 12 submission – proposed some additional statutory language customized for its unique position. We appreciate and support the suggestion that Memorial subject itself to a similar requirement which now exists under section 72(1) and (2). Instead of the role set down for the minister responsible for the act, as is found in 72(1) and (2), it is proposed that Memorial's own head

play that role, which makes sense to us given the independence of the university.

CHAIR D. ORSBORN: The number of that submission was what?

M. HARVEY: I don't have the number of their –

S. MURRAY: This is about the privacy impact assessments and common or integrated programs. It was dated February 12.

CHAIR D. ORSBORN: Okay.

M. HARVEY: We also appreciate and support the recommendation –

CHAIR D. ORSBORN: Sorry, I'll just ask you to repeat that again, I think I missed some of it.

M. HARVEY: Okay.

CHAIR D. ORSBORN: The position of the university was what?

M. HARVEY: The position of the university was that Memorial subject itself to the similar requirement that exists under 72(1) and (2).

CHAIR D. ORSBORN: Yeah, okay.

M. HARVEY: So the idea would be that 72(1) and (2) creates a role for the minister, but in reflection of the independence of the university, they feel that that role should be played by the head of the university, the president.

CHAIR D. ORSBORN: Yeah, okay.

M. HARVEY: And we agree with that proposal as it reflects the independence of the university.

We also appreciate and support the recommendation that the Commissioner be informed of a common or integrated program or service, which is an adaptation of section 72(3) and (4) that reflects Memorial's unique position. Memorial also notes that it wishes to carve out academic programs from this arrangement. In its discussion of the rationale for this section, it explains that there are numerous arrangements both within the university and with other external entities that it fears would be considered common or integrated programs or services.

Our view is that most collections, uses and disclosures of personal information, whether internally or externally, are not common or integrated programs or services. So a number of the examples provided may not, in fact, meet the definition. For example, we would not consider a job fair to be a common or integrated program or service.

In terms of the academic aspect, it must also be borne in mind that section 5(1)(g) already excludes records containing teaching or research information of an employee of a post-secondary institution from the scope of the act. So that may allay some concerns in that regard.

On May 10, so on Monday, in its presentation, JPS indicated that it did not support adding the BC definition of common or integrated programs to ATIPPA as we have proposed, because they feel that this would catch projects where the OCIO, or Communications or some other internal entity of the government that is providing a service to a single other department. They went on to state that if the BC definition was incorporated there should be a specific exception for service provider departments, like OCIO.

We agree with this position; this has, essentially, been our practice so far. We don't view the provision of services from OCIO to a single department to be a common or integrated program. We stand by our initial recommendation that the BC definition of a common or integrated program be adopted into the act, but we would support the notion of providing an exception for service provider departments, like the OCIO.

S. MURRAY: Although, that would be limited where the OCIO is the lead on a common or integrated program, such as the Digital Government initiative that OCIO leads.

M. HARVEY: Right. I mean, Digital by Design is an initiative that involves OCIO and numerous other government departments, and that's an excellent example of a common or integrated program; OCIO believes that it is and we think it is. There's no doubt. Those aren't the cases

we're talking about. You wouldn't carve out OCIO entirely, only where it is the service provider to a single other department.

CHAIR D. ORSBORN: Yeah.

M. HARVEY: It's not elegant.

CHAIR D. ORSBORN: One raises the concern about putting all of these little exceptions into the definitions, and whatnot.

M. HARVEY: Yeah.

CHAIR D. ORSBORN: What is the definition I understood the ATIPP Office was working on and that was developed from the Alberta guidance? Is there a difference between you on the content of the definition?

S. MURRAY: There is. We did address it in our initial submission, and I believe we provided reference to –

CHAIR D. ORSBORN: BC and Yukon and –

S. MURRAY: Yeah, and I do know that the Alberta definition is one that comes from policy and it's not in their statute.

CHAIR D. ORSBORN: Okay.

S. MURRAY: They would prefer to rely on that. I think we can –

CHAIR D. ORSBORN: If you were writing a definition, what would you say?

S. MURRAY: We decided that the British Columbia definition makes the most sense. I can find it here in a few minutes.

CHAIR D. ORSBORN: That definition, would that then encompass the issue with the OCIO that they –?

S. MURRAY: Well, basically, I think what's happened is that there's a fear that we would take the BC decision and adopt the broadest way of looking at it that you could possibly conceive. I think we would do what the BC commissioner's office is doing, so if there's any concern, I think if they look at how the BC commissioner's office has approached this, we would take the same approach.

CHAIR D. ORSBORN: This is an assessment that has been made by the public body in the first instance as to whether or not the program comes within the definition before it even gets to your office.

S. MURRAY: Right, because they need to notify us.

CHAIR D. ORSBORN: But they need to know first if it's a common or integrated program.

S. MURRAY: That's right, exactly. And you know what? They can call us and we can have a chat. If they want to bat it around, we can talk to them about that, about whether it meets the definition or not.

I guess the issue is that I think we've only seen two common or integrated programs based on – I think the definition that's been applied to date has not really yielded any kind of, really, oversight from our office that I think was contemplated by the act, because the ATIPP Office has taken this sort of more narrow approach based on the Alberta policy approach, and given that there is a lack of a definition in the act, the closest statutory comparison that we were able to resort to was the one in the British Columbia statute.

CHAIR D. ORSBORN: But what does the Alberta policy approach exclude that you think should be in there?

S. MURRAY: I can't speak to the specifics right now. We can make sure that we have something about it in the written submission. Ultimately, the upshot is that the ATIPP Office has really not been identifying anything as a common or integrated program. I know the exception has certainly been this Digital Government initiative. Other than that, nothing else is really caught by it.

CHAIR D. ORSBORN: Have you become aware of programs that should have been identified?

S. MURRAY: We have seen programs that we think should meet that definition.

CHAIR D. ORSBORN: Can you give an example?

S. MURRAY: I don't have any examples off the top of my head right now.

M. HARVEY: The other thing we've proposed doing with common and integrated programs is expanding its scope in terms of the number of public bodies that are covered. We are aware of common or integrated programs or programs that would fit that definition outside of core executive government that we feel should be captured; for example, things in government's eHealth model that are essentially common or integrated programs shared among NLCHI and the RHAs. But I can't come up with an example within core government.

Our submission does link to the Government of Alberta's bulletin, but we don't provide the analysis here. So on Friday, we will make sure that we (inaudible) –

CHAIR D. ORSBORN: Yes. It strikes me on an issue such as this where you're talking about sort of the preventive aspects of personal information that both the OIPC and the public bodies are going to be on the same objective, I would hope. It's a matter of providing the necessary clarity in the definition.

S. MURRAY: Well, one hopes. Certainly, our practice has always been to – and right now, we do have the one common or integrated program, the Digital Government initiative. I mean, we've taken a very collaborative approach with them and it's all about trying to make sure that the program has the best privacy protections that it can and that it's going to be in compliance with ATIPPA. That's the goal.

I think the fear that we might have to be notified of a few more programs is not that bad and, in fact, there's another program involving a public body that is outside of core government.

CHAIR D. ORSBORN: Yeah, I saw that in your submission.

S. MURRAY: Yeah. They weren't required to notify us, but they have and we've been working with them, and I think it's value added.

CHAIR D. ORSBORN: Both of us agree. I mean, it's the sort of thing where you would think that three or four reasonable people could sit around a table and come up with a definition.

S. MURRAY: Yeah.

CHAIR D. ORSBORN: Done.

S. MURRAY: Yeah.

CHAIR D. ORSBORN: Okay.

M. HARVEY: I'll move on now to talk about political parties.

I think what I'll say about political parties is that – we addressed this in our original submission. In its submission, the PC Party argued that they lack the appropriate resources and that their information management system and practices lack the institutional capacity necessary to ensure compliance with statutory privacy principles; this is exactly the problem. I appreciate the situation they're in, but, to me, if their response to it is you can't expect us to provide these privacy protections, then that's all the more reason why I think we need to have some level of oversight.

As we said, in our original submission, we have no burning desire to be the one to provide that oversight. I mean, in theory it could be provided by the Chief Electoral Officer. As I've been discussing, and my predecessors have been discussing this subject with our colleagues across the country, that notion has been one of the ideas that have been discussed: Where best does oversight live? In this instance, ATIPPA is the act that you're reviewing and so we're bound to bring it up in this context.

During the leadership contest for the Liberal leadership and during the election, people came to us with privacy concerns, and that's not surprising. People come to us with privacy concerns about all manner of things – all the time. I would say, hearing from our analysts that deal with inquires, a solid half of inquires that we get about privacy matters are related to the private sector, and what we do is we tell them that that's not our jurisdiction, it's a federal jurisdiction.

The problem that we face with political parties is when people come to us and say: I've got an issue with how a political party is collecting my personal information. We don't have anyone to send them to. We just have to say: Too bad, it's my jurisdiction; it's nobody's jurisdiction.

Again, I'm not trying to make more work for ourselves, and I understand the notion. I think it's a fair observation that political parties are not public bodies, they are private in some sense; although, they have an important – they exists at that critical intersection. Obviously, they are important institutions for the functioning of our democracy.

I'm not proposing that we regulate them, from a privacy perspective, like a public body, and I'm certainly not proposing that we make them subject to the access provisions of the act. I am simply proposing that a limited and focused form of oversight be provided on strictly how political parties handle personal information. Again, if you were to recommend that that is not a role best performed by me, but by the Chief Electoral Officer, then I would absolutely be respecting that kind of recommendation as well. But it has been identified as a gap, and that's why we raised it.

I'll just try to deal with this very briefly because we talked about it earlier. Memorial proposed changes to the definition of personal information, suggesting operating – using the Ontario definition. Just, again, we would recommend keeping the existing definition. So I don't know that I need to retread that.

There was some discussion on Monday about publication schemes and I just wanted to note we don't have anything to add other than what's in our original submission. I should add, though, that JPS asserted that – or when pressed by you about why the publication schemes have not been dealt with to date as required by the act, JPS asserted that if the government was made to comply then we should have to comply with our responsibilities under the act. I need to point out that we did this in January of 2016.

CHAIR D. ORSBORN: Yeah, I read that. It was the difference between what was done and what wasn't done. Okay.

M. HARVEY: Yeah. But for the record, we did our bit and we've been waiting.

CHAIR D. ORSBORN: Yeah, I understand.

Just so everything is clear to me, as I appreciate the term "publication scheme," this is essentially – and it may be covered now on some public bodies' websites – an inventory of what is there. Generally, what the public body does is mandate and perhaps names and stuff like that. It's a different animal than the stuff that should be disclosed proactively.

M. HARVEY: Yes.

CHAIR D. ORSBORN: The categories of what might be disclosed might be in the publication scheme, but there are two different concepts: A publication scheme tells an applicant really where he should look for it and this is type of stuff that we have if you want to look for it. The proactive stuff is, we will save you the trouble and we will put it out there. Do I have that right?

M. HARVEY: Yes.

CHAIR D. ORSBORN: Yes, okay.

M. HARVEY: I think it's good practice. Many government departments don't even know what records they have. It's just good practice to have one.

CHAIR D. ORSBORN: Yes.

M. HARVEY: I'll turn and talk a little bit about whistle-blower legislation. There was some discussion about this on Monday. JPS indicated that they would consider your recommendations regarding gaps in the current whistle-blower legislative regime, but they felt that no new oversight needed to be added to this office's duties.

The concern that we faced with the whistle-blower is that the whistle-blower legislation, first of all, as it currently stands, has a very high threshold for the things that are to be investigated. Here we're talking about a discrete whistle-blower protection as it specifically relates to ATIPPA and that the specific protections be here. We feel that oversight in that regard is appropriate for our office given

our other oversight responsibilities under the act. It may confuse the matter if oversight for those particular subjects of whistle-blowing were given to the Citizens' Representative and giving him authorities under our act.

CHAIR D. ORSBORN: He has authority now to the extent that something might be an offence under your act, but not a lower wrongdoing than that. Is that right?

M. HARVEY: I don't think any of the things under our act would meet the threshold for wrongdoing under his act. The threshold for wrongdoing under his act is very high.

CHAIR D. ORSBORN: Well, wrongdoing includes an offence under provincial legislation.

M. HARVEY: Is it that …?

CHAIR D. ORSBORN: In the list of wrongdoings –

S. MURRAY: Okay. Does it –?

CHAIR D. ORSBORN: – I believe it includes – I recognize it's a high threshold in the nature of an offence rather than just something you don't like.

S. MURRAY: Exactly.

CHAIR D. ORSBORN: But I understand that within that high threshold it would include offences under ATIPPA for the public bodies that it covers.

M. HARVEY: Yeah, I guess that's the issue, is that it would have to qualify as an offence.

CHAIR D. ORSBORN: Yes, that's the threshold that is dealt with there, yeah.

M. HARVEY: I guess in our proposal the whistle-blower protection would be broader than things that would just qualify as an offence.

CHAIR D. ORSBORN: And you would extend to all the public bodies. Because right now the whistle-blower act is limited.

M. HARVEY: Well, if it was under our act, it would apply to public bodies covered by our act. Yeah.

You had indicated, but I had some notes on this, the sunset clause. JPS spoke on Monday about a general sunset clause of 50 years. If we were to take from this that they were taking about all timelines under the act.

CHAIR D. ORSBORN: I don't think so, no. Maybe I misunderstood, but they raised it in the issue of the particular reference to the archival records that's 50 years. The other, I don't believe, correct me if I'm wrong, I don't think I've seen in their submissions the provisions of whatever is in it now for 15, 20, 25 years should be extended.

M. HARVEY: Right, so there's –

CHAIR D. ORSBORN: I raised the issue about the 50-year archival ones and they commented about copyright and some jurisdictions being 100 years.

M. HARVEY: Right. We found that a little puzzling. For one thing, we're kind of puzzled about the reference to archives in general. This relates to sections 38 and 39 where there are references to a 50-year time frame if the records are sent to the provincial archives or the archives of a public body.

The problem that we face, there are two problems there, from our perspective. First, we don't really know what the archives of a public body are. Is it a room with archive written on it? I don't know. There's no definition of what the archives of a public body are. With no definition does this mean that simply by putting them in this archive they are then protected for 50 years? Fifty years seems like an awfully long time. I think you recognized that yesterday.

CHAIR D. ORSBORN: I think Wells said exactly the same thing. Extraordinary was, I think, the word he used.

M. HARVEY: Right. So it's a very long time. The reference yesterday to copyright was a bit confusing to us because we don't know what that has to do with access to information at all and copyright would survive an access to

information request. If the government happened to be holding material that was copyrighted by some third party and I happened to get it through an access to information request, I wouldn't become the owner of that copyright. I wouldn't have that intellectual property and be able to publish it on my own.

I certainly have no legal expertise in this area, but I would assume that the copyright, having gotten it through the access request, doesn't give me the intellectual property over it. I'm not sure what the connection to copyright is.

CHAIR D. ORSBORN: As I appreciate it now, certainly dealing with the Provincial Archives, subject to limited exceptions imposed by law, the records in the archives are open to the public. That is as I understand the Rooms Act. If a head of a public body transfers records to the archives, the head can indicate that they want the ATIPPA provisions to apply to that if there's a request for it. If there was a request, presumably the exceptions would be looked at at the time. Does that reflect your understanding of the way things work?

S. MURRAY: We're a little bit puzzled as to the way things work on this, actually. I just want to review briefly – the language in 39 and the language in 38 is that the exception "does not apply" – or maybe, I guess, expires – "where the information is in a record that is in the custody or control of the Provincial Archives of Newfoundland and Labrador or the archives of a public body and that has been in existence for 50 years or more."

It sounds like if it goes to the archives, or if they put it in a little room that they put an archives sign on, then the exception expires after 50 years. But what if they don't send it to the archives or don't put it in a little room? Does the exception apply forever under 38 and 39?

CHAIR D. ORSBORN: Are you asking me for an opinion?

S. MURRAY: Well, that's what it looks like. I'm just sort of asking rhetorically, I guess. Maybe there's no expiry on these exceptions, unless they go to an archives of some sort. Also, we really do not know what to make of the phrase "the archives of a public body."

CHAIR D. ORSBORN: No.

S. MURRAY: We've never encountered a public body – well, that's not – Memorial, for example, has an archives, obviously. There might be a couple of public bodies. Municipalities, sometimes –

CHAIR D. ORSBORN: A small municipality with an archive.

S. MURRAY: – a little town might have an archive.

CHAIR D. ORSBORN: Well, maybe.

S. MURRAY: A lot of public bodies do not have archives. It's a turn of phrase. Also, like I said, the possibility that these exceptions might apply forever, it seems a bit extreme, I don't know.

CHAIR D. ORSBORN: Have you had occasion to consider this?

S. MURRAY: No.

CHAIR D. ORSBORN: No. Okay.

S. MURRAY: People are probably looking at it and saying: Well, it's 50 years. We're never going to get that anyway.

CHAIR D. ORSBORN: Yeah.

S. MURRAY: I'll tell my grandson to apply it someday.

CHAIR D. ORSBORN: Yes, it is strange. It says the exception doesn't apply, but that suggests that within the 50 years, the exception does apply.

S. MURRAY: It looks like within 50 years it does, and if you send it to one of these archives, then it doesn't. If you never send it to one of the archives, then it applies forever, I guess.

Like I said, I think we can appreciate the role of the Provincial Archives; I'm really puzzled about the other. There must be some sort of duly designated archive. How do you designate an archive for a public body? I don't know.

CHAIR D. ORSBORN: Let's say you've got a record that's been in the archives for 51 years.

S. MURRAY: Yes.

CHAIR D. ORSBORN: I take it from that then it is accessible without any reference to the exception.

S. MURRAY: That's what it looks like to me, yes.

CHAIR D. ORSBORN: But within the 50 years, the exception would apply?

S. MURRAY: The exception applies, yes.

CHAIR D. ORSBORN: So it could be released if the exception can't be established.

S. MURRAY: It could be, as long as it goes to an archive. If it doesn't go to an archive –

CHAIR D. ORSBORN: It would still be the same, wouldn't it? The exception would still have to be –

S. MURRAY: The exception has to apply, yes.

CHAIR D. ORSBORN: Yes.

S. MURRAY: What I'm saying is it looks like the exception survives indefinitely under 38 and 39.

CHAIR D. ORSBORN: Okay.

M. HARVEY: So that brings me to the end of the discrete issues that we brought up.

CHAIR D. ORSBORN: I'd just like you to help me a little bit understand the issue with biometric information. I gather that essentially the biometric information is information that will enable an individual to be identified, whether it is facial or otherwise. Is that fair? You're suggesting that where a program involves collection, use or disclosure of biometric information, that should be subject to a privacy impact assessment?

M. HARVEY: That's correct.

CHAIR D. ORSBORN: That's a little broader than just the plain disclosure of information. It's involving both the collection and the use.

M. HARVEY: Well, I would think collection, use or disclosure.

CHAIR D. ORSBORN: Or disclosure.

M. HARVEY: Yes, any of those things.

CHAIR D. ORSBORN: So that's a little broader than the general provisions in the act regarding personal information.

M. HARVEY: Yes.

CHAIR D. ORSBORN: Okay.

You're asking that that should include any changes to an existing program, as opposed to a new program.

S. MURRAY: Right, because that's often the way things go. Government programs are iterated over time and you add in this new element at some point.

CHAIR D. ORSBORN: Would the use of a surveillance camera come within this?

M. HARVEY: Maybe. And this is one of the things we're quite concerned about.

I guess, really the bête noire of biometrics is facial recognition. We're aware of a public body that was going to tender looking for video surveillance software and that as a part of their tender, one of the specs that they were looking for was the capacity to collect facial recognition or to do facial recognition. We just happened to become aware of that. It's not something that they would have been obliged to tell us about under the act. We talked to them about this. Had they implemented it, they would have doubled their video surveillance capacity as an institution and all of those cameras would have been able to collect facial recognition information.

The concern here is particular to the immutability of this personal information. When information is collected about you, about your – or let's say if a database containing your MCP number is breached, you can go get a new MCP

number. But if your facial characteristics are breached, that's it; you only have one face. It is immutable and very specific to you.

The other concern, particularly with facial recognition, is that the collection of that biometric data can be very passive. You could never know. You might never know whether your personal information was collected or not. For that reason, there have been calls in Europe to ban facial recognition altogether. We're not calling for that, necessarily.

CHAIR D. ORSBORN: All right. You find out that a public body is contemplating this, what do you do?

M. HARVEY: We reach out to them. We ask – well, what we would like to do is we would have the authority – they would have to have the responsibility to do a PIA and then they would have to consult us on it and then we would review it and go back to them with our concerns.

CHAIR D. ORSBORN: Okay. It's essentially a statutory requirement that you be advised, with the result that any decision they make can then be fully informed, I take it. Is that fair?

M. HARVEY: I think so, yes.

CHAIR D. ORSBORN: Okay.

Is there a potential for uncertainty within a public body as to whether a program involves the collection, use or disclosure of biometric information?

M. HARVEY: Well, we did recommend the inclusion of a specific definition of biometric information. Then, afterwards, if such an amendment was made to the act, we would do what we always do and we would assess what changes in the act would require additional training or guidance and so on. We would proceed to do that and communicate with public bodies, as we always do, to provide them support on our interpretation of that aspect.

CHAIR D. ORSBORN: Do I understand correctly that video cameras or surveillance cameras or whatever, in and of themselves would not in cases –

M. HARVEY: Not a video camera in and of itself.

CHAIR D. ORSBORN: It would be the addition of the software that engages the –

M. HARVEY: That's right. A great example – although from the private sector, although potentially could be used by the public sector – is the Clearview case. I'm not sure if you read much about that.

CHAIR D. ORSBORN: I read about that the last couple of days, I think.

M. HARVEY: Yeah. In the case of Clearview, it's an American company that was scraping existing pictures. It would go on to the Internet and scrape the data pictures that just existed out there anyway. It would scrape existing data to match those faces to identities and then it could be used by the private sector – or, it turns out, had been used by law enforcement agencies throughout the United States and Canada as part of their law enforcement activities.

Now, not here – the RNC says that it has not accessed those services and has no plans to do so. But if the RNC was to plan to use facial recognition technologies, then we would think that's the kind of thing they should do a privacy impact assessment about and we should talk to them about.

CHAIR D. ORSBORN: Would your definition catch any information that's collected by the health authorities in the course of medical treatment?

M. HARVEY: That would be personal health information and so it would be captured under PHIA. The health authorities could still use biometric information to collect, let's say, for how they act as an organization.

Let's say information that they collect about their own employees for employment purposes would fit under the definition, but biometric information that's collected as personal health information is not subject to ATIPPA. That wouldn't at all be our intent.

CHAIR D. ORSBORN: No, I understand that.

M. HARVEY: I don't think we'd be tripped up either. I think the act is clear enough that personal health information is not subject to ATIPPA. We wouldn't create a problem by introducing the definition that we've proposed.

CHAIR D. ORSBORN: One looks down the road to the next review; you have no idea what happens in the next five years with that technology.

M. HARVEY: No, but that's exactly why I think we are proposing just if you're going doing to do this – the same thing with AI – if you're going to do AI, then let us know. We've also become aware of a public body that was intending to use AI as part of a public program. They weren't keeping it a secret from us and, indeed, they told us about it.

CHAIR D. ORSBORN: Is that the health scheduling matter?

M. HARVEY: Yes, it is.

CHAIR D. ORSBORN: Okay.

M. HARVEY: There's AI baked into that, and potentially collection of biometric information; that may end up being a part of that. They've talked to us about it. They are open and collaborative and that's great. They didn't have to and then another public body might not have done so.

In five years, we're not going to be in any better position to give advice if we don't know what's out there. Once these genies are out of the bottle, particularly with AI because of its iterative nature, it may well be far too late by then.

CHAIR D. ORSBORN: (Inaudible) other sort of public body that has the expertise that's developed in your office on this stuff?

M. HARVEY: Not that we're aware. We have an interest in developing some capability, but we can't think of anyone else who would be better able to perform this function than us. In other jurisdictions, and at the federal level, for example, there has been an announcement that they're going to create a separate data commissioner.

If the government at some point in the future decides that it wants to create a data commissioner, then that would be great. I don't need to be a data commissioner; I'm not looking for extra work just for the sake of it. But the government will be in a position to create a data commissioner if, in five years' time or whenever, there has been someone looking at what's been happening during this period.

CHAIR D. ORSBORN: In terms of collection, use and disclosure of biometric information, is that something that would require an intentional decision by a public body to do that, or is it something that could happen by chance or accidentally?

M. HARVEY: It is the kind of thing – let's take the tender example. The procurement folks – the engineer is working in a specific department. Even a big public body like Memorial or Eastern or somewhere, you have a team of people working on procurement and working on tenders.

They're writing up the specs. In doing so, they look to the specs of the latest in video surveillance technology. They take the specs that they find of the latest – and it's included in there – and they just put it in their tender and off they go. It is not like the CEO of Eastern Health is pouring over every tender and trying to identify whether or not this is happening, it is not like it's an active decision at the executive level, but it could creep into a tender like that.

CHAIR D. ORSBORN: In a situation like that, at some point somebody is going to have to realize that included in the tender was the recognition software, wouldn't it?

M. HARVEY: Well, exactly. So I think what we want to do, in putting out our guidance, is we want to tell – this is how we communicate with public bodies is largely through the ATIPP coordinators, and want to create awareness of them. If you need to make it known within your organization that if there is any – when you're instituting new technologies that collect personal information, then you need to keep us in the loop. Then the ATIPP coordinators would be empowered to help train internally the organizations to look out for this kind of thing.

That's how we would presumably come to know about these kinds of initiatives.

There may be some other initiatives that are an entirely new information system that is AI based. That might be something that if OCIO was doing it, I'm sure that's the kind of thing that would be an executive-level decision. That's one thing but I think we're going to see – when it comes to biometrics and AI – the full range of things, between things that could creep in as part of a tender or a big new program. We just need to increase awareness about the whole works of it and really know what we're getting ourselves into.

We don't want to wake up in five years and there's AI everywhere, there's biometric information collected all over the place and nobody knows about it.

CHAIR D. ORSBORN: I had a small point on anonymity of people making a privacy complaint. A couple of sections you reference in the act where it's the obligation of the head to notify of a Commissioner's report or public body giving notice of a response of a complaint, and you say in some situations that we should have the ability to receive a complaint anonymously and that anonymity should be protected throughout. Where a public body is otherwise required to notify a complainant and you've been satisfied that the identity is not relevant to the complaint and it could be kept separate, in that case where the head is required to notify the individual, simply notify the Commissioner and let you do it. Is that the (inaudible)?

S. MURRAY: Yeah, that's our recommendation.

CHAIR D. ORSBORN: You end up being the buffer.

S. MURRAY: That's it, yeah.

CHAIR D. ORSBORN: Okay. I just wanted to make sure that I had that.

M. HARVEY: This isn't related, but it did remind me of a comment that was made yesterday that I did want to respond to about our recommendations about the privacy protections under PHIA and that we might look to them and that you might look to them as models for enhanced privacy protection under our act. It was observed that PHIA, personal health information is more sensitive and, therefore, it was an inappropriate place to look.

I just wanted to clarify that we're not mistaking PHIA for ATIPPA and we're not mistaking personal health information for personal information. We feel that the specific privacy enhancements that we recommended in that part of our submission were good enhancements, in and of themselves, and PHIA provided a helpful place for us to look for alignment. I think that those would be worthy amendments to make even if PHIA didn't exist, but PHIA does exist and it provides a model to look for and there's no reason not to look for it. So the idea that we should reject those recommendations out of hand just because they're in PHIA is one that doesn't make a lot of sense to me. I just wanted to make that point.

CHAIR D. ORSBORN: Reference was made on Monday and also this morning about the position of Newfoundland and Labrador Hydro. I just want to make sure I understand the position: Hydro is currently subject to ATIPPA.

S. MURRAY: Mm-hmm. (Inaudible.)

CHAIR D. ORSBORN: All right. There's no more to it than that, is there? I'm trying to understand why it was brought up on Monday and again –

S. MURRAY: Well, on Monday, I think they were saying that they would no longer seek to have section 5.4 of the *Energy Corporation Act* applied to the hydro operations of Nalcor or Hydro, and generally just reserve that for the oil initiatives. That was my understanding.

M. HARVEY: That was my understanding.

S. MURRAY: So not necessarily restricted to the corporation, the public body, Hydro, but also Nalcor, because I guess either one of them can use section 5.4.

CHAIR D. ORSBORN: Yeah, so carving off a business line out of 5.4.

S. MURRAY: A business line. It's more of a business line thing, yeah.

CHAIR D. ORSBORN: If it involves water.

S. MURRAY: Yeah, that's what I understand.

CHAIR D. ORSBORN: Okay. I misunderstood then, I was thinking of Newfoundland and Labrador Hydro in the corporate sense.

S. MURRAY: Okay. I understood it as hydro generally, just hydroelectric operations –

M. HARVEY: Yeah.

S. MURRAY: – in the province.

CHAIR D. ORSBORN: Yeah.

S. MURRAY: Yeah.

CHAIR D. ORSBORN: I'm not sure, because both Newfoundland and Labrador Hydro and CF(L)Co, I think, are outside of the 5.4 and –

S. MURRAY: Oh, Hydro is, okay, yeah. Well, it must be Nalcor, then, what they're talking about, anything to do with hydro.

CHAIR D. ORSBORN: Yeah, I'm just trying to –

S. MURRAY: Okay.

CHAIR D. ORSBORN: I'm not sure – I should know, I suppose – what hydro work is left within Nalcor, but I don't know.

S. MURRAY: And all of this could change in the near future, too, we don't, right? But I think I got the gist.

CHAIR D. ORSBORN: Did you want to buy Nalcor?

M. HARVEY: They used the word lines of business. Do you want to buy it?

CHAIR D. ORSBORN: Did they?

S. MURRAY: You'd have to pay me to take it.

M. HARVEY: That's my understanding, is they use the word lines of business. I understand the hydro line and the oil and gas line to be what they were talking about.

CHAIR D. ORSBORN: Yeah.

If I can just go back to a matter we discussed this morning in terms of the compellability of your office with respect to offences under the act or for perjury. I just took a quick look, not exhaustive by any means, but I looked at the Auditor General and the OCR and I didn't see anything similar in there. You may be more informed than I am. But should you be in a better position than the AG or the OCR with respect to your compellability to give evidence in that limited context of a prosecution or perjury?

S. MURRAY: I don't whether either one of those bodies is involved in prosecutions, or has been or whether it's a likely prospect.

CHAIR D. ORSBORN: The AG could be.

S. MURRAY: Okay. But I know the Office of the Citizens' Representative gave a news conference in the last year saying that basically he's encountered a situation where he'd like to be able to pursue that type of thing, but he doesn't feel that he has the ability in the statute because of timelines and other things and the language in the statute. It may be that we had the opportunity under ATIPPA, 2015, to propose an improved offence provision which broadened the time scope and broadened the scope of the potential offences. So it's more conceivable, perhaps, that – I guess that was what we proposed, essentially, is that we should be able to conduct investigations that could potentially lead to a prosecution. Again, these are very rare –

CHAIR D. ORSBORN: Yes. The provision has been in there, as I understand it, for a long time.

S. MURRAY: Well, not the same one. The ATIPPA, 2015, really changed the provision.

CHAIR D. ORSBORN: But the non-compellability provision has been –

S. MURRAY: Oh, that part. Yes, it has. Yeah.

CHAIR D. ORSBORN: That's the only part I'm talking about.

S. MURRAY: I don't know what the origin of that was.

CHAIR D. ORSBORN: It was back in 2002 or before.

S. MURRAY: Yeah. There may be other types of proceedings; I don't know. I couldn't tell you what was being considered back then.

CHAIR D. ORSBORN: Another question, just more curious than anything. I think that section refers to a "proceeding before the commissioner." What is that?

S. MURRAY: Which section?

CHAIR D. ORSBORN: It's section 99.

M. HARVEY: We've wondered about what a proceeding before the Commissioner is as well.

CHAIR D. ORSBORN: Yeah, there isn't any, as far as I can tell, is there?

S. MURRAY: I mean, we would have –

CHAIR D. ORSBORN: In terms of a formal, legal kind of proceeding.

S. MURRAY: Yeah. Whether what we do in any context constitutes a proceeding, I guess that's the kind of thing that if we needed to figure that out, we would have to research and –

M. HARVEY: Now, the only thing I can imagine it would be would be an investigation, but an "investigation" is also a term that's used in the act, and why would you use "proceeding" in one place and "investigation" –

S. MURRAY: A lot of these things, if they're in the act since 2005 – I mean, the act was 2002 and they were looking at, I think, BC and Ontario. Mainly BC was the model, but it was sort of a mishmash of two or three different acts, so some of these things, the turns of phrase, could be an artifact from quite a long time ago.

CHAIR D. ORSBORN: Yeah, I understand. I'm still trying to understand a little better why in principle you should not be compellable in those limited circumstances there. They're very limited. I mean, perjury or prosecution under the act is pretty limited. From what I can tell, the same non-compellability is not given, say, to the Auditor General.

S. MURRAY: Right. Well, like I said earlier, to me it's more about the message that it sends to all of the public bodies that interact with us and the fact that so much of what we do is carried out in that sort of informal sphere. The concern might be that if someone calls us to tell us about a really serious privacy case, all of a sudden everything that happens from then on – that analyst who takes the call is going to be testifying on the stand at some point and they may not be as willing to sort of be as forthcoming as would help us successfully oversee the statute.

CHAIR D. ORSBORN: Yeah. I mean, the section carves out admissibility of stuff that is told to you, other than for prosecutions.

S. MURRAY: Yes. My concern, though, would be eliminating that.

CHAIR D. ORSBORN: Yeah, I'm not – I was not focusing on the admissibility issue.

S. MURRAY: Okay.

CHAIR D. ORSBORN: Simply focusing on the last part of section 99(2) –

S. MURRAY: Right.

CHAIR D. ORSBORN: – which talks about the non-compellability of somebody in your office to hear evidence. I'm not talking about the admissibility of stuff that's said to you, but even the admissibility is hedged by prosecutions or (inaudible.)

S. MURRAY: The other thing is you might have a good sense of what admissibility encompasses, but every public body coordinator and official who calls us may not be. If they have the understanding that, wow, the Commissioner's office used to not be able to be called as witnesses in court but now they can. That maybe as far as their understanding goes. Now, they're concerned that maybe we just

better send our lawyer the next time we want to talk to the Commissioner's office. Maybe we will stop talking to them informally and we just talk to them formally and be very careful about what we say.

Not everybody is a lawyer.

CHAIR D. ORSBORN: Do you think that even crosses their mind that you can be compelled?

S. MURRAY: Well, if the act gets changed there's going to be a list of provisions that have changed in the act that all the coordinators will be made aware of. If this is one of them – I guess the point that we made earlier is that the practical goal of having us testify in court for an offence provision is met really through having the officials from the public body testify.

CHAIR D. ORSBORN: They maybe the ones to give the direct evidence, I would think.

S. MURRAY: Precisely.

You could say well, if you took out that provision and the Commissioner's staff can testify, what does that really change if the officials are the ones who have the main evidence? It could be just a perception, as I say, among public body officials that this is something that could happen now. Do we have to be a little bit more cautious in how we deal with the Commissioner's office? Not saying that they're right about what the threshold would be for admissibility or anything like that, it's more of a perception thing.

CHAIR D. ORSBORN: Can you give me any more help on the situation you might be in in your functioning as a public body? For example, it's not likely to happen, but somebody makes a request to you and you decide, for whatever reason, that you're going to give them a cost estimate, and then you have issues of the review the estimate and all of that kind of stuff.

M. HARVEY: Right. Our purpose here in making the original recommendation was that we don't negate, or we don't inadvertently remove rights that the applicant should have. By and large, to any other public body the applicant has a right to appeal a decision, then if we're a public body they should also have a right to appeal, just simply because, in that instance, where the public body should not negate the fact that they have an appeal right. So, for that reason, we recommended that appeals should – where appeals exist, they should go to the court. Although, you felt that there was some awkwardness there, and I guess we gave it some thought and felt that it might be the least awkward of the set of awkward options.

You raised yesterday the possibility of the Citizens' Rep, for example, providing that kind of thing. We'd be open to, I think, that suggestion as well. Our goal is to make sure that the applicant has rights no matter who the public body is and, also, the other thing that we keep saying over and over is that it is expedited as well. We feel it's the purpose of the act to provide for expedited review. In that respect –

CHAIR D. ORSBORN: I'm not disagreeing with your concern, I'm just looking for a workable way to address it, because there are a number of situations in the act where a public body looks to you for approval of something that is not necessarily subject to appeal.

M. HARVEY: That's right. Where such an appeal would normally exist, we feel the court could play that role. But we would also be open to another statutory officer – and I think the Citizens' Rep is a good example – playing that role.

CHAIR D. ORSBORN: Yeah.

M. HARVEY: Where decisions that would not normally be appealable, then that's that. The court is the court. I'm not sure if that helps you.

CHAIR D. ORSBORN: No, I think that's fair enough. It doesn't admit a simple solution, I don't think.

S. MURRAY: At the federal level they have, I believe, an ad hoc commissioner, but they get far more requests than we do. Those types of arrangements are more justifiable in much larger jurisdictions.

CHAIR D. ORSBORN: Yes, you don't want to put the trappings of an elephant on to it when it's not really needed.

S. MURRAY: No, exactly. Yes.

M. HARVEY: The other thing is that our records aren't so large. I would imagine we're not going to deal with many fee estimates because …

CHAIR D. ORSBORN: Yes.

M. HARVEY: Unless, of course, someone reintroduces a fee. You know what our feelings are about that.

S. MURRAY: Yes, that's right. We will charge the biggest kind of fees if we can. No, just kidding.

CHAIR D. ORSBORN: You should have a fee just for your place.

S. MURRAY: That's right.

I can certainly see, though, that on the time extension, we've certainly come very close to that situation and we just didn't have that option, as we mentioned on our original submission.

CHAIR D. ORSBORN: Yes.

S. MURRAY: That's very conceivable.

M. HARVEY: Yes. We were concerned about what to do in that circumstance and we would have gone to the court anyway. The court, I guess, would have just had to decide whether it had jurisdiction to rule on that in that instance.

CHAIR D. ORSBORN: As I gather from your position, if you ended up with a request where it would be appropriate in your view for a disregard, you would simply respond to it and see what happens.

S. MURRAY: We would just have to do our best.

CHAIR D. ORSBORN: Yes. Okay.

Anything else?

M. HARVEY: I just want to say as a closing statement that we're a pretty positive office when it comes to our act. The headline when it comes to this review is our act is in great shape on the access side. It's the envy of jurisdictions across the country. We are leaders in access to information in this country and internationally. It's something that we can really be proud of.

As we go into a period in time, a period of history of this province where our government will need to be making very difficult decisions, I think it's really critical that to have the legitimacy to make those decisions, the government must be seen to be making them transparently. I think it would be very regrettable if the government was to respond to the inherent challenges that come with access to information by retrenching the access rights that were achieved six years ago now in a period of considerable political turmoil and political costs to people.

If we were to retrench access rights from that, only for the government then to hamper or harm its own legitimacy in the eyes of Newfoundlanders and Labradorians. You haven't heard from many Newfoundlanders and Labradorians during this process, and I think it's largely because these matters are arcane and inside baseball. We do know, because we know from the Bill 29 period and the political controversy that followed, that Newfoundlanders and Labradorians care about these principles; I think that they feel that they've been dealt with.

There was a period of pain in 2015, a new act. The situation was resolved. I think that they now are not particularly compelled to come forward to talk about how good the current act is. That's not normally the kind of thing that brings people out of their daily lives to comment on. Please don't change this act: You don't normally hear that.

CHAIR D. ORSBORN: I understand what you're saying.

You use the phrase "retrenching access rights." I understand the differing point of view on section 39, but outside that particular section, what submissions have been made that you consider would be a retrenchment of access rights?

M. HARVEY: Most importantly if access delayed, you're lengthening timelines.

CHAIR D. ORSBORN: What you're certain of is that procedural adjustments would amount for retrenchment?

M. HARVEY: Yes.

CHAIR D. ORSBORN: Okay.

Leaving aside the procedural adjustments and time limits and all that kind of stuff, and leaving aside section 39, have there been other submissions made that you would consider to be a retrenchment of substantive access rights?

M. HARVEY: If we bring along fees in with the procedural ones – okay. Beyond that it would –

CHAIR D. ORSBORN: A bit more substantive than that.

S. MURRAY: The recommendations we've seen regarding our ability to review solicitor-client privilege records –

M. HARVEY: Yes, oversight.

S. MURRAY: If things were driven down through the court route as a matter of requirement in the statute, that would create a delay of a year or more, just to do a routine review. Section 3 in the act tells us that one of the purposes of the Commissioner is to ensure efficient and user-friendly, timely access to information. We think that that purpose of the act would be subverted if that sort of a route was a feature of the act.

M. HARVEY: Nips and tucks are one thing. A change to – as we ourselves have recommended. We have recommended an extension to the period for disregards. I would regard that as a nip or a tuck. We ourselves have recommended a tightening of the right to access related to section 33. Those came from us.

CHAIR D. ORSBORN: Oh, I understand, yes.

M. HARVEY: To a certain extent. We didn't do even those lightly, because we didn't want to be advocates for reduced access, but there's no question that there is room for improvements. The issue is that when you look at all of the recommendations that were made by public bodies – and you had recommendations for procedural changes, whether they be timelines, whether they be fees; you had recommendations for broadened exceptions, and you had recommendations for reduced oversight – in their aggregate, those are three categories of reductions of the right of access in our view.

First of all, we have problems with each one of them on their own that we've expressed today, but seen in their aggregate, we worry that that would be seen and perceived as a significant retrenchment in the right of access.

That's what we really wanted to guard against, because I really think that the last thing that Newfoundland and Labrador needs now is to take an act and an access system that – I'll reiterate just for one last time – are working very well, that have admirable metrics, that are performing quite well and to break them. It would be really regrettable.

Newfoundlanders and Labradorians sit around thinking about the services that are important to them: their health care, their roads, their schools. They think about the taxes that they pay; they worry about the fiscal circumstances of the province. That's what they should be worried about. They should be able to worry about that because of the foundation of democracy that ATIPPA provides for them, but in my view, they shouldn't have to think about this kind of inside baseball. But they will come to think about it if those rights are taken away from them. I think it would be regrettable if we were to head in that direction because of claims that the system is overburdened, whereas one of the words that was used – and, again, I said it this morning – was "untenable." I just don't think that the evidence bears out that that's true.

Again, I absolutely don't want to be seen to be not taking the concerns raised by ATIPP coordinators seriously. I think that they are hard-working officials. I've worked closely with ATIPP coordinators in a variety of government departments over more than a decade of senior management and executive experience in the provincial government. I think what frustrates them most, in my experience, is them waiting on people to get back to them, waiting for executive to get back to them, waiting for other officials in the department to get back to them, waiting for

third parties to get back to them, waiting for applicants to get back to them.

They want more time to be able to do all of that, not to mention, of course, wading through the records. Well, wading through the records is inevitable. They want more time; of course they do. I don't blame them on doing that, but the system that we have now works. They are getting their work done. It is hard work, but democracy is hard work. It is hard and important work. I want to applaud them for doing that work. I don't want to be seen not to be sympathetic to what they're doing but I think that stay the course is what I would say.

Instead, I would say that this is a great moment and I found it regrettable that we didn't see more of this from public bodies, but I think now is a great privacy moment. We've see quite a lot of this during the pandemic. Novel privacy issues emerged during the pandemic, but more what of we've seen are privacy issues that we were worried about during the pandemic or before the pandemic that have become even more acute during the pandemic.

Greater concerns about surveillance. People were very concerned about the exposure tracing app, the exposure notification app that was put on their phones or that we encouraged people to put on their phones. We did quite a lot of work on that over the course of the pandemic. People were very concerned about, well, hold on, does the government want to collect this new information about me. People are concerned about the information that public bodies are collecting about them, and rightly they should be. The public bodies are collecting more and more information about them than they ever were before – of course, as are private companies as well.

This is an opportunity now for us to turn our mind now to taking an act that is best in the country on the access side and now starting to push ahead on the privacy side and open the door. Our recommendations have been quite modest and preliminary, but they start us down a path to proportional but sophisticated regulation of public sector privacy. I think this is a great opportunity to move forward in a positive way with the act.

CHAIR D. ORSBORN: Thank you very much.

M. HARVEY: Thank you. I appreciate the opportunity.

CHAIR D. ORSBORN: I appreciate your assistance.

The public hearing is now finished. Thank you.