

**Transcript of the Public Hearings of the Statutory Review Committee
on Access to Information and Protection of Privacy**

Date: Wednesday, June 25, 2014 (9:30 a.m.)

Presenter: Vaughn Hammond
Canadian Federation of Independent Business

ATIPPA Review Committee Members:
Clyde K. Wells, Chair
Doug Letto, Member
Jennifer Stoddart, Member

June 25, 2014

Vaughn Hammond

C. WELLS:

Good morning. I guess we're about ready to start.

Are you ready, Mr. Hammond?

V. HAMMOND:

Yes, sir.

C. WELLS:

Okay. I don't need to repeat the comments I made at the opening yesterday. There are not so many new people in the room as to make it a necessity and the new faces that I do see in the room I am quite confident would be familiar with normal protocol relating to conduct of a hearing of this nature. So I don't need to spend time to do that. And if you're ready, Mr. Hammond, we can proceed with you speaking on behalf of the Canadian Federation of Independent Business.

V. HAMMOND:

Sure, thank you. I will introduce myself first.

C. WELLS:

Please do.

V. HAMMOND:

My name is Vaughn Hammond. I'm Director of

Provincial Affairs for Newfoundland and Labrador for the Canadian Federation of Independent Business. An overview of what it is that I would like to discuss today will focus on mainly section 27, parts 5 and 6 of the legislation, as well the regulations related to the legislation. And then I'll discuss some implications for small business, as well as some issues around transparency and accountability. And then I will probably provide some recommendations for you to consider as you go forward.

As it relates to section 27, there is a number of issues around how the changes that were made in 2012 have made it easier to refuse the information and with no reason to provide why that refusal was made. Because it seems that there's a focus on the exemptions and how pre-Bill 29, the exemptions within section 27 allowed for, it sort of said well, you can just meet the test of one of these three exemptions. However, post-Bill 29 it became clear that in order to refuse information it was an either or. So it is any of those three exemptions.

C. WELLS:

Prior to, it required all three. I think you said

(inaudible).

V. HAMMOND:

Exactly.

C. WELLS:

Prior to, it required all three, yes.

V. HAMMOND:

Yes. But in the current legislation it says that you can either meet any one of the three exemptions and that's the basis for refusal. I think when it comes down to it, the head of a public body, there is a lot of questions around whether that person can actually determine what's a trade secret, what kind of information is provided by a third party that could be harmful to them. And oftentimes, I think there is a tendency for the head of the public body to actually rely upon the third party to determine what information should or should not be released.

Because you have to think about how much information can reasonably be released before, for instance, significant financial loss or gain can be realized.

And I think a third party will probably state that no information should be released and oftentimes like I said, the head of the public body is likely to go along with that.

A different test does have to be met, I think, and I think the Commissioner, in a report that he released last year, identified that a different test does have to be met. In terms of the standard of proof, however, he concluded that whichever legislation you look at, whether it is the pre-Bill 29 or the post-Bill 29 there is still that standard of proof that has to be identified. So you have to have clear and detailed and compelling evidence to suggest that there will be some sort of reasonable expectation of possible harm.

When it comes to parts 5 and 6 of the legislation it seems that it is a lengthy process that may actually hinder pursuit of information. So take, for instance, a small business owner who wants to determine whether they can learn about what happened in terms of a tender and they want to find out how much was spent on that tender, what the result was, and just determine where their bid fit in.

If a small business owner is told by a head of a public body that they are not going to get that information, many small business owners will just

simply say okay, fine, and they will move on. They don't necessarily have the resources, the financial or human, to undertake the process that's identified in part 5 and 6.

And I want to give you an example, actually. It is a member that we have and it will give you an idea of the scope and just put it in perspective. In August of 2012, one of our members had actually sought information based upon a bid that they had submitted. The winning bid went to a different service provider. So our member actually asked for information related to that bid. How much did the public body spend on the winning bid, where did the money go, that kind of thing, right.

In November of 2012 our member was told by the head of the public body that that information was not going to be released to them. So that was two months later, give or take. Almost immediately, our member said we will go to the Office of the Information and Privacy Commissioner and seek his advice on as to whether we can get this information or not. Through the informal process that the office undertakes, it

wasn't until January that they determined there was no way that the third party nor the public body was going to release that information. So the office then had to undertake a process to figure out what they were going to do. It wasn't until June, actually, until the Commissioner actually released his report, June 2013. That said okay, our member could actually get the information that they requested and that was just based upon what they've seen.

D. LETTO:

Ten months later?

V. HAMMOND:

It was ten months later, yes. So, that was fine. The member thought that they were going to get the information that they were required; however, part 6 of the legislation allows for appeals. So within a certain time period, I think it is 60 days, the third party can actually determine whether they want to appeal to the Trial Division or not. So in this case the third party said yes, we're going to appeal, and that wasn't until, I want to say, early fall, late summer, early fall.

We're in a process now where the member advised last week that they actually have gone through their affidavits, the judges heard all the arguments and so on and so forth. The member advised me that, however, it may take two more months before they can actually get a decision from that Trial Division judge as to whether they are going to get their information or not.

C. WELLS:

Well, assuming that it takes that long, what's the overall length of time? What would be the overall length? You had ten months up to the Commissioner.

V. HAMMOND:

Well, from the time that a request was made to the access for information to the time that the member thinks that they are going to get a decision, you are look at almost two years. So the member also advised as well that they really haven't added up the amount of money so far that they have put into it, but I understand that it is substantial. And they're actually scared to look at how much time they've put into it individually, just to determine what it is that they needed to do to going forward.

So this is somebody, this is a company that actually felt on principle that the information that they were getting before Bill 29 came into effect, they simply went and asked for that same information but because of Bill 29 and the provision, specifically section 27, that information is no longer available to them. So they kind of questioned well, 20 years before Bill 29 they could get whatever information they wanted or this information that they wanted, but now they can't get it.

So, I think the things that you have to consider is there is not that many small business owners in this province that are actually going to take two years of their time, a substantial portion of their income and actually try to seek this information, whether it is on principle or not. So I think when you go forward you might want to consider how you can shorten that process; be it the review and complaint process and the appeal process. Because the way I would look at it is that when somebody requests information and they're denied that information, well that person's appeal process, if you will, is to go to the Office of the Privacy Commissioner. However,

when the Privacy Commissioner brings down his or her judgment, in this case it was a him, the appeals process allows for a third party to bring the courts into it now, and then you are just dragging it out that much longer. Because ideally, if you didn't necessarily have that second appeal process, our member could have had that information back in June, July or August of last year, and they could have gone on and do the things that they needed to do. So I just wondered, I guess the question I have for you guys is why is there a kind of two appeals processes for access to information requests?

C. WELLS:

So would you suggest, then, that the Commissioner should have order-making power to order it?

V. HAMMOND:

I think so.

C. WELLS:

With no review or no appeal, no right of appeal for anybody. Suppose the Commissioner said you can't to the member, you can't have it. Would the member like the right of review by appeal? It cuts both ways.

V. HAMMOND:

Absolutely, I understand that. But I think if it's a

clear process in that the applicant and the third party can work with the Commissioner to determine what the best avenue is and where to go, and I mean the Commissioner, based upon a report that I saw from last year, he looked at case law. He looked at a lot of different areas where he could draw upon to make his decision. So I think if he's looking at the case law, I don't know, I kind of question why you would have to go through a yearlong process through the courts in order to get that information released.

C. WELLS:

Having had some connection over considerable number of years with the courts, I will try and pose an answer for you to consider.

V. HAMMOND:

I understand that. Sure.

C. WELLS:

The courts have for hundreds and hundreds of years been recognized as the ultimate source of determination of rights and providing a means of enforcing rights of people, whatever it is. Rights of governments, rights of citizens, rights of corporations, whatever it may be. So ultimately courts, particularly the appeal court, the Court of

Appeal ultimately do a discussion and definition of the law and the Court of Appeal in this province defines the law in perhaps 98 percent of the matters that come before it. The other two percent gets appealed on to the Supreme Court of Canada and they are the ultimate authority in Canada.

So the Court of Appeal plays a fairly important role in this province, but the Trial Division deals with a specific set of circumstances. They don't have to go into this detailed analysis of what the law should or should not be. That really is an appellate function. Still less (phonetic), does a non-legally trained commissioner have to do all that. So there is a way of doing it, but it's not the ultimate courts jurisdiction to do it that might be constrained.

You said the Commissioner went through all of this detail. So if he did it, why did the court have to do it? Well, the simple answer to that is, there is an appeal from his decision to the court. And in order to say whether the Commissioner did it right or not, the court may have to look at some of this or it

may not. It might be superficially very, very obvious. That's one possibility. But I understand your assertion that the whole process should be collapsed into a much more reasonable time.

V. HAMMOND:

I think so.

C. WELLS:

Wherever it could be shortened, it should be shortened. I take it, that that's your assertion.

V. HAMMOND:

Absolutely.

C. WELLS:

Would you tell me just one thing for information.

V. HAMMOND:

Sure.

C. WELLS:

How much information was involved in this? What was that member of yours looking for that took such a long time to assess?

V. HAMMOND:

Essentially, the tender was put out for contract list items.

C. WELLS:

For the supply of?

V. HAMMOND:

For the supply of certain, for office supplies.

C. WELLS:

For office supplies.

V. HAMMOND:

Yes. So when it came down to it, the bid contained a list of contract items. So it could be anything in terms of just a specific list of this is what would be purchased by the public body. So the information they were looking for was a list of the contract items that were purchased by the public body but, also, a list of noncontract items that were purchased by the public body, so, because there is overlap in terms of how those items could be purchased. So the information that they were seeking was essentially the list of noncontract items that would have been purchased by a public body.

C. WELLS:

And how many pages would it take to provide that list?

V. HAMMOND:

I'm uncertain.

C. WELLS:

A thousand, one, or something in between?

V. HAMMOND:

No. Would have been much more closer to one. No, probably would have been 50 to a hundred pages, maybe.

C. WELLS:

I am trying to get at how much work was involved in ferreting out the information. Would it be all together in a single document that could be produced as a single lot?

V. HAMMOND:

It would have been, yes. And my understand is it was easily available prior to Bill 29, according to what I was told. So, I guess that's part and parcel of where their concern is coming from, is we got this information before so now we're wondering why we can't get this information.

C. WELLS:

And what year, what month did you say that started?

V. HAMMOND:

August of 2012.

C. WELLS:

August of 2012. And you're still awaiting, now, a decision this time from the courts?

V. HAMMOND:

Yes. Well, it is the whole process. To your point, it's the whole process that it's taking two years to get where we are. Or where the member is. So if there is consideration to be given to how to cut down that timeline. If it's determined that the court system is still an appropriate avenue in order to determine what to do going forward with access to information, then that's your determination. But I think fundamentally there needs to be something shorter than a two-year period.

C. WELLS:

Your basic, is it the totality of it should be collapsed into something reasonable?

V. HAMMOND:

Yes. And from our perspective, the time and the cost that goes into dealing with government is something that the Canadian Federation of Independent Business calls "red tape". So for this process I think our member clearly has gotten wrapped up in red tape, when it came to trying to find out what kind of information they wanted.

D. LETTO:

So are you saying as well that if the member had

requested this information, let's say pre-Bill 29, it was readily available?

V. HAMMOND:

Yes, it was.

D. LETTO:

So Bill 29 put this stuff off limits?

V. HAMMOND:

It seemed. That's their assertion, absolutely. And it seemed that depending upon how the test was applied based upon section 27, because now you can have this exemption, this exemption or this exemption. The public body decided that they didn't need to release that information any longer.

C. WELLS:

Now, if you follow the news on the Commissioner's submission to us yesterday, he presented, essentially, the same thing. He was critical of Bill 29 dismantling the three-part test that had existed prior and having any individual component be a means by a basis on which the release could be refused. So he shares your --

V. HAMMOND:

Or I share his view.

C. WELLS:

Or you share his view. Anyway, you have the same view on it. But let me just pose another question for you. I presume that your organization represents independent, small businesses primarily, as I remember it.

V. HAMMOND:

Absolutely.

C. WELLS:

Okay. Might your members not be one of the third parties on occasion that's asserting that it shouldn't be released?

V. HAMMOND:

And that's where the balance comes in. I've consulted with our members over the past two to three weeks and what I have noted, it will be further in the presentation but I can address it now if you like.

C. WELLS:

Oh, but no, no, if you got it.

V. HAMMOND:

No, that's okay.

C. WELLS:

You cover it when you're ready. I don't want to

distract you.

V. HAMMOND:

Well, I'll answer it then. No, not at all.

C. WELLS:

You know I have a concern.

V. HAMMOND:

Okay, I will answer it as we go along.

C. WELLS:

Okay.

V. HAMMOND:

Related to the regulations that are associated to the legislation, I think there's a need for greater clarity in terms of particularly from a small business owner's perspective because our members are in every sector of the economy. And when I went through the regulations I noticed that there were at least two dozen exceptions to the ATIPPA legislation. And those acts treat confidentiality somewhat differently. So some acts say that if it's deemed confidential for commercial reason or whatever the case may be then it's not released, or if there is information released then there is a number of steps that one has to take in order to get that information, and in the end it may not even be

released. So I think what some of our members may be concerned about is that they recognize there is an ATIPP legislation but they may not necessarily realize that there is confidentiality clauses and other legislation they may affect them in terms of getting that information. So, again, they go forward looking for information and they figure that they can get that information. But then they're told no, you can't get that information. Many of them will just go okay, that's fine, I will deal with it and move on. But they don't necessarily understand why.

C. WELLS:

In our system of laws that we have inherited we have a funny absolute provision. Everybody - everybody - is presumed to know the law. So it has always been taken there is no excuse. Ignorance of the law is no excuse is a phrase that describes it.

What I am saying, these regulations are on four pages if I read them, not very complex or difficult. And there is a list of the 24 statutes that you're talking about. Would it be a major educational challenge for your organization to inform its members as to what these are?

V. HAMMOND:

No, we do have resources that we have that if a member does call our office and say I have this problem, can you help us, then we can. But somebody like me or the other person in our office can actually help guide them through the legislation.

C. WELLS:

Right.

V. HAMMOND:

But oftentimes they just doesn't say

C. WELLS:

My question was: is it beyond your organization's capacity to have initiated an educational program of your members?

V. HAMMOND:

Oh no, absolutely not. Yes, sure.

C. WELLS:

That might be helpful. It is just a thought. The principle of law that ignorance of the law is no excuse, no matter where it is, hidden in some deep dark regulation is a bit harsh but it's been with us for many centuries. And I don't foresee a likelihood of it changing soon, so we may have to live with it and find other solutions, like in your case an

educational program to help your members, to inform your members.

V. HAMMOND:

Yeah. No, fair enough. And I think part of this is, and I have been talking to government members and government ministers and whatnot about the very fact that information sharing within government, when it comes from a small business perspective it is a concern and they recognize this. So this is probably part and parcel of that information sharing that needs to be done in terms of when you do go forward then maybe there is resources there that can help you get through.

I think when you think about ATIPP legislation for access to information and this legislation in particular being an umbrella, oftentimes people think, well, I got the legislation but now why did these nuances happen. So I take your point that nobody should have less knowledge or lack knowledge of the legal system, but I think the reality becomes that not everybody focuses on nor do they have the time when they have customers to serve and all this kind of stuff to focus on that. And that's why I

notice that you're smiling but this why we're here,
so.

C. WELLS:

No, I'm smiling because you've misstated my point.

V. HAMMOND:

Okay.

C. WELLS:

It is not my point that everybody should have knowledge. My point is unfortunately that's the harsh principle of law that we've inherited for hundreds of years and I don't foresee any reasonable prospect of it changing. So we've got to live with it and adapt. An organization such as yours that are concerned that their members may not be aware of these 24 statutes, that's why I ask is it a major undertaking to proactively bring it to the attention of your members?

V. HAMMOND:

No, I could probably have something done within a few days.

C. WELLS:

Yes. And that's just a suggestion.

V. HAMMOND:

Yes. No, absolutely. It was just one of those

things that just me from our member's perspective in terms of, because of the lens that I looked through it, in terms of information sharing and the ability to get information, I looked at this as one of those information kind of ideas that government could communicate as well. But I take your point, absolutely.

C. WELLS:

Ms. Stoddart has a question.

J. STODDART:

Thank you. Thank you for coming and giving your presentation. Mr. Hammond, doubtless, you know that throughout Canada many Information and Privacy Commissioners, if their resources allow it, I guess that is if they are sufficient size, produce specialized information for business and, particularly, for small business, given the difficulty for small business people of understanding what is often complex legislation. Would your members be in favor of giving a particular education mandate to the Office of the Information and Privacy Commissioner which, of course, would have to be accompanied by the resources so that that office that has the knowledge could produce, for example,

detailed information to allow your members to win their way through section 27, whatever it's eventual content will be? Is that something that the CFIB would be in favor of?

V. HAMMOND:

I think that would be helpful, actually, because if it is a point within government, like it is okay for us to try to interpret the legislation and provide as much information as we can, but oftentimes what we need to do is actually direct our members to the appropriate person within government. So if the office has somebody that's a point person that can answer those kinds of questions, then absolutely that would be of definite benefit.

J. STODDART:

Thank you.

C. WELLS:

Okay, Mr. Hammond.

V. HAMMOND:

On a transparency and accountability aspect of it, I think within government there are certainly internal procedures and rules that exist but I think from an outside view assurances are needed that those rules and procedures are followed. And I think that's part

and parcel of what our member tried to get to is that there is some things that go on within a public body and we just need to make sure that everything is being done as everybody assumes that it should be done. Of course, government bodies have a responsibility to disclose what they spend on particularly goods and services, and we feel that through the current legislation that may not necessarily be accomplished.

C. WELLS:

Would you take the position that that's an absolute? Government bodies have a responsibility to disclose that, even though some third party may assert well, that's going to affect my competitive position in future bids? I just want to make sure that that, because we have to sort of account for what you're saying to us and I want to be certain that that's what you're saying.

V. HAMMOND:

But that goes to the third point on the slide. That I mean when you deal with the public body everybody has to assume that the stuff that you're providing to them, there is a potential that it could be released publicly.

C. WELLS:

Yes. Don't mistake me.

V. HAMMOND:

No, no.

C. WELLS:

I'm not being critical of you. I just ask you to affirm for me that that's your position, so that when we prepare our summary of the submissions that have been made we can say with confidence that the Canadian Federation of Independent Business takes the position that government bodies have a responsibility to disclose what they spend on goods and services, and in respect of the interest of third parties dealing with the public sector that's the cost of doing business.

V. HAMMOND:

Absolutely.

C. WELLS:

Okay.

V. HAMMOND:

Because ultimately the fundamental thing that our members are concerned about when it comes down to it is the accountability factor.

C. WELLS:

See that's an important point from this committee's point of view.

V. HAMMOND:

Absolutely.

C. WELLS:

And I'm glad to have your clarification on it.

V. HAMMOND:

No, that's an important principle that we uphold. We value the fact that governments are held accountable. And you have to consider, as well, that many of our members, the public sector, public procurement that they're engaged in is not a large portion of their business. I mean, it is a good portion but if they had to rely upon government procurement for their health, they wouldn't necessarily exist, would they? So to your point, yes, absolutely. Accountability is one of those things. Transparency and accountability is one of those things that has to be upheld, and if there are any members of ours that need to engage in those kinds of procedures and processes then they have to realize what the consequences will be or what the intended consequences will be. And it goes to the point that Ms. Stoddart made.

C. WELLS:

So, bidding for government bids and this carries with it the certainty that your information may well be disclosed?

V. HAMMOND:

Potentially. Yes, absolutely.

C. WELLS:

Yes, okay. And that's fine with your organization?

V. HAMMOND:

The members that I spoke with, they are pleased with the idea and I guess I will go on to it in the next slide.

D. LETTO:

Could I ask you, though, before you move on, a question about the first point under transparency and accountability? You talk about internal procedures exist and I guess you need assurances that they're being followed. Do you feel sometimes that there is an inconsistent application of some of those procedures? Is that what you're suggesting?

V. HAMMOND:

Well, in a way. Yes, in a way it is, because when you think about it, when it comes to public procurement, which is mostly what our members are

engaged in, there is a central person that would be engaged in a tender, the design of the tender, the sending out of the tender and so on and so forth, but when the tender is awarded and the contract is awarded there is certain provisions within the contract that may not be necessarily communicated to an administrator. I'm thinking, again, about these goods and services that are, for instance, office supplies. I mean an administrator knows that the person who won the bid is X, Y, Z company. I have that company's catalog. So I can go through the catalog and just order whatever it is that I feel that I want, or that I need. But yet, at the same time and it comes down this information that was requested in August of 2012, well, how is the administrator to know what list of items are available in the contract and what list of items are not available in the contract? They are just going to see a catalog and say I can order whatever it is that I want, without knowing that I'll get a cheaper price if I order this item as opposed to this item, notwithstanding what the color is or what the size of it is and so on. So that's where it comes down to. It may even be communication within the public body

itself in terms of well, here is what the contract is and here is what your obligations are under that contract.

C. WELLS:

Yes, so that's a internal management within government, that problem seems to be, is it not?

V. HAMMOND:

But it still ties to accountability.

C. WELLS:

Oh, yes.

V. HAMMOND:

Because ultimately if that public body reports on what it is they spent on goods and services, if there is any discrepancies or anything like that, then that could be noted.

C. WELLS:

Somebody can look and see that they paid 50 percent more than the contract bid offered it.

V. HAMMOND:

Exactly. And that's part and parcel where the transparency comes in and that's where I think our members would fall down, notwithstanding that they are dealing with government.

C. WELLS:

And competitive bidders can't maintain or require transparency and accountability without getting that information.

V. HAMMOND:

Exactly.

C. WELLS:

I understand your point, yes.

D. LETTO:

So is it possible, then, under this kind of system, that even though we have a public tendering system we may not in the end get the best price?

V. HAMMOND:

Absolutely, that's true. And that's why you need that accountability. That's why public bodies need to report what they spend on their goods and services. So, and I want to address it now. I now that you raised the point 20 minutes ago and I want to address it now because it ties in.

The members I spoke to over the last two or three weeks, I noticed that there was a difference between what they identified as a lower value contract and a higher value contract. And the lower value contract

are the goods and services that are purchased by government on a daily basis. They just can't do without them and they need them and they can't go forward without them. The higher value contracts are those that you would identify as infrastructure projects. Those kinds of huge contracts, multimillion-dollar contracts, ultimately.

On the higher value contract, our members are pleased with the way that information is being released on that, because when a bidder looks at the winning bid and compares it to their bid and they see well, okay, we're out by X hundred thousands of dollars, they really don't know the factors that go into the other bid but they know what factors went into their bid and they can do that post-bid analysis and look at well, they may have done a bit more with the subcontractor that we couldn't do. They will do that kind of stuff. They are pleased with the number. What they want, ideally, is to see well, what were the bids that were submitted and were there any outliers and was the winning bid an outlier.

C. WELLS:

Define outlier. Define that.

V. HAMMOND:

So, say, for instance, you have a \$1.5 million bid that wins but everybody else did a \$2.75 million, or in that range. Well, why was it \$1.5 as opposed to \$2.75? So you kind of get that information and they can kind of question that if they need to. Even though there is a bunch of factors that go into it, they can still identify well, that doesn't sound right and then they can raise a red flag if they want to.

When it comes to the lower value contracts, I mean obviously there is a bunch of goods and services that are purchased on a daily basis and it is that nickel and it is that lower valued stuff that \$200, \$500 there, that kind of stuff, that all adds up, right? And but, if there is accountability there and if there is transparency then people like our members and even our organization could have a look at it and say well, that much money for that good? Does that sound right? And that's kind of where we're coming from with that. Because when it comes down to it, if you go back to the pre-Bill 29 many of our members said that they were okay with how that worked. They

were content with the information they were getting the. They had no concerns with getting the information that they wanted, and but now it seems, particularly for the lower valued contracts, it might be an issue that you might want to look into, pending what happens with the court case.

J. STODDART:

Yes. Could you explain this just in greater detail? Is the information not released or is it partially released when you apply for it or what makes this distinction?

V. HAMMOND:

Between the lower value?

J. STODDART:

Yes.

V. HAMMOND:

Well, it is the fact that lower value contracts are now being treated as higher value contracts. So the itemized information that was provided in the bid, for the higher valued contracts that's not released, it is just simply the value of the contract or the tender.

C. WELLS:

That's a policy decision. It got nothing to do with

ATIPPA. ATIPPA doesn't differentiate.

V. HAMMOND:

No, fair enough.

C. WELLS:

Yes.

V. HAMMOND:

But prior to that, though, the itemized contract listing or what was purchased, whether it was a contract listed item or noncontract listed item, that was all itemized for the person who asked for it, but now post-Bill 29 that itemized listing is no longer available. Or the public body says it's no longer available. So our member in particular says, well, you gave us to us before. There is no reason why we shouldn't have it now.

D. LETTO:

And if it were available presumably that person could sharpen their pencil and see where they could maybe next time.

V. HAMMOND:

Right. So who knows? I mean, yes, there just may be a different way. And it might be that a public body is spending more on a certain good, because noncontract listed items are competitive items.

Those are items that they can purchase those anywhere. So our small business member, for instance, on a noncontract item they have every right to have that item purchased from them as opposed to the contract item. But what's happening is that people just recognize oh, X, Y, Z company has this. I can purchase it. I have a catalog. And yet, they may purchase the contract list item or they may purchase the noncontract list item which may be more expensive. So it all comes down to transparency and accountability.

C. WELLS:

I apologize to you that I may not have expressed my question correctly and you missed the thrust of it.

V. HAMMOND:

Maybe I misunderstood it.

C. WELLS:

You haven't answered it.

V. HAMMOND:

That's fine.

C. WELLS:

The distinction I see between the conflicting position, or potential conflicting position of your members is this: they bid on a contract for the

supply of office supplies and bidder A wins. Bidder B, C, D, E, and F looking for the information and so on because they have an interest in it. Bidder A doesn't want that information disclosed. Next time there is a bid, bidder A loses. Now bidder A wants that information because bidder C got the contract and he wants it. So, the small business person has a different point of view on entitlement to transparency and disclosure, depending on whether he's a successful bidder or the unsuccessful competitive bidder in the next round.

V. HAMMOND:

I think the member would disagree on that though.

C. WELLS:

Pardon me?

V. HAMMOND:

I think the member would accept that if they had won that bid they would agree to have that information released.

C. WELLS:

This is the point. That is what I wanted to ask. What you are saying to me now is your members are not asserting there ought not to be disclosure because it affects their competitive position when they are

successful?

V. HAMMOND:

No.

C. WELLS:

Their position is it should be open, period.

V. HAMMOND:

It needs to be a fair process, everybody treated equally, and they understand implications of it. They recognize what their business is. I mean those who are involved in small business understand what it is that they need to do. So, yes, in all fairness our members want accountability, equal treatment and fairness.

C. WELLS:

All right. And it doesn't whether they are the successful or the unsuccessful bidder, they take that? This is the point I wanted to get from you.

V. HAMMOND:

Yes. No, I apologize, I may have misunderstood your question.

C. WELLS:

No, that's fine. You have cleared it for me now.

J. STODDART:

Does that mean that your members consider that

independent business, which is taken to be synonymous with smaller business perhaps, not organized into chains or multi-nationals, take a different position on transparency than what we might call big business? I mean, if all your members agree, as Mr. Wells just concluded, that everybody should be treated equally and if you are the one who got the bid, you won the bid, you would then not object to this information being made public. So are we looking at, and forgive me for my ignorance of these matters here, but are we looking, then, at a difference in position between big international business and small Newfoundland independent business?

V. HAMMOND:

There may be, yes. Our small business owners want a fair system that they can actually compete in. I think they understand when they go forward with it to deal with public sector bodies that there is going to be requirement that some information is going to be released. Not all of it but some of it. When it comes to infrastructure projects, for instance, they recognize that their tender item dollar amount is going to be released. When it comes to smaller businesses that deal with goods and services, I think

there is a recognition amongst our members that the information, if they win or lose, they are going to be all treated the same. So it is to your point.

C. WELLS:

And it is always going to be released is their preference?

V. HAMMOND:

It's always going to be released. This itemized list is going to be released, this itemized list is going to be released, and you go forward. And everybody, then, can look at it and understand where the bid is, where the money went, and then they can learn five years down the road when the tender comes up again that this is what we may have to do or not do.

D. LETTO:

Can I ask you this question? This relates to the list, not the itemized and the component parts, but let's say Company A is in office supplies and Company B and they make a bid. Can you retrieve any of that information from the government? Can you find out what the winning bid was in total?

V. HAMMOND:

The total value?

D. LETTO:

Yes.

V. HAMMOND:

Yes, absolutely.

D. LETTO:

You can find out that, if you would, that global number?

V. HAMMOND:

Yes, because this is part and parcel of why questions were raised, right, is because I remember, went and said, what were the bids? What was the winning bid? Well, they knew that they went in at a certain number. And then when they saw the bid of the winning bid, they saw it and they said no, there is no way that that could be right because we know what we bid. We know what we did in order to get that contract. What did they do? What are they doing in order to value it that low? And that was where their questions were raised.

And again, it comes back to, if they didn't have access to that information then they wouldn't be able to raise the questions that are being raised now. And so that was why in August of 2012 they went

forward and say well, now that we know the value of it, give us a list of this and a list of this, stuff that we've had before anyway, and let's go forward and have a look at it. And they were rejected.

D. LETTO:

So there was such a gap between the numbers that it led to the questions?

V. HAMMOND:

And that just raised red flags for them. What are they doing that we're not doing?

C. WELLS:

They were looking for an explanation.

V. HAMMOND:

Yes. And I think ultimately they have in their own heads, and I don't want to speak for them, but I think they have in their own heads how that winning bid was approached. And so they had to raise questions on it.

D. LETTO:

What does it do, then, in terms of people's faith in the system that's about providing access to information?

V. HAMMOND:

Well, I think if you were to ask people that go

through this process, and they have gone through it for almost two years now, they kind of wonder why they have to go through the process, quite frankly. Particularly when, again, you go back to the whole idea that that information was easily available prior to 2012.

D. LETTO:

So if I read, then, in summary what you're saying, if there was more transparency on the system and if the appeal process was much more restricted in terms of time, it would start to level the playing field between all the players in providing these services?

V. HAMMOND:

Yes. Because I mean you have to consider that it took a year. From the time that the tender was issued till the time that our member got some sense that there was an issue, the contract was already gone through a year. And then now we're looking at, it was a contract, to be honest, that was a three-year, renewable for two years. So it is kind of hard now, after three years, to say well, you pretty much lost out on two more years when you could have had that information last year. Right?

So it kind of just raises the opportunity for members who want to do so, or small business owners that want to do so, to raise those questions and find out why did we not get what it was that we put in when we know that we're competitive and we thought that we had a good bid. So that's where it comes from, so.

But I guess we've already talked about most of the stuff that's in that slide. So the recommendations that I would present to you are: revisit section 27 exemptions, maybe even go back to say that you go back to the post-Bill 29 era where you used the three-part step.

D. LETTO:

The pre.

V. HAMMOND:

Yes, the pre-Bill 29 era, in order to ensure that the test is used appropriately. You may want to reconsider the number of legislative exceptions that are provided in the regulations. I recognize that everybody that has 24, which is only a small fraction of all the legislation that's available, but I think it might be appropriate to consider what actually

should or should not be exempted from the ATIPPA legislation. And I think ultimately your work should hopefully ensure appropriate balance between government accountability and business practice, and I think we have had that discussion today. So hopefully it was informed (inaudible) that you might be able to come forward later.

So, I thank you for your time today and I thank you for your patience.

C. WELLS:

Mr. Hammond, the Board thanks you very much for your thorough and thoughtful presentation and for your clear explanation of the basis for the views you've expressed here today. They will be helpful to the Committee.

V. HAMMOND:

Well, I'm thankful for your time and if there is any questions after, like as you do your work, I'm more than available, so.

C. WELLS:

Thank you again. We do appreciate it.

V. HAMMOND:

Thank you very much. I wish you a great day.

C. WELLS:

Thank you.

J. STODDART:

Thank you.

C E R T I F I C A T E

I, Beverly Guest, of Elite Transcription, of
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