

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

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Presenter: Ed Ring, Information and Privacy Commissioner  
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Office of the Information and Privacy Commissioner

**ATIPPA Review Committee Members:**

Clyde K. Wells, Chair

Doug Letto, Member

Jennifer Stoddart, Member

Chairman Wells: Thank you very much for agreeing to have your own presentation split to allow the others that we had scheduled for the last day and a half to take place as scheduled. We appreciate your cooperation. Now if you would continue with a presentation as you see fit.

Mr. Ring: Just one point sir before we start I decided to come up at the table to be here now unless in case there's any specific questions that the panel may wish to put to me however I would like to rely on Mr. Murray to continue in the avenue with the presentation that he was providing to the committee.

Chairman Wells: That's just fine. We're delighted there Mr. Ring and if anything comes up that we want to ask you directly we can do. Thank you very much.

Mr. Ring: Thank you. Okay.

Mr. Murray: Alright so we're going to move on with part b of our submission as I was doing yesterday basically summarizing each part of our written submission and anyone who wishes to see a copy of it can visit our website at [www.oipc.ni.ca](http://www.oipc.ni.ca) and our submission is posted there and of course one of the themes of our submission really is that we want to I guess look at the

Canadian context: what exists out there in Canada right now in terms of best practices the best ways of structuring a piece of access to information and protection of privacy legislation and adopting the best pieces of all of those pieces of legislation. I think that's where we're coming from that the fact that there are processes and models that have been in use for 30-35 years across Canada for how to structure an access to information or protection of privacy piece of legislation. So what we've been trying to do throughout our submission and our presentation is to point out those towards examples some from each jurisdiction in some cases that we feel are the best ones that allow the best access to information while also allowing the best oversight of the act. Which brings me to this next part which is part b of our submission which is about restoring the commissioner's jurisdiction and power. And I know Mr. Ring touched on some of these things yesterday at the beginning but just going to again make sure that we've summarized the key points in our submission and either at the end of discussion discussing this part or at some point throughout you can certainly jump in there if you wish.

So as you know the current situation with subsequent to Bill 29 we have seen the removal of the ability of the commissioner to review information request denials based on sections 18 and

21 certainly a good chunk of sector 18, and 21 entirely, so that's cabinet confidences and solicitor-client privilege. And government challenged us initially in relation to our jurisdiction over our ability to review information request denials based on section 5 which is the application section of the Act and that one is finally heading to the court of appeal. Of course the ability of the commissioner to conduct reviews and have appropriate jurisdiction is one of the – is a fundamental part of the rationale for the existence of the ATIPPA. One purpose of the Act in section 3 is to provide independent oversight of decisions made by public bodies in relation to access to information. The courts can't replace the commissioner. The 2001 freedom of information report that was the report that led to the creation of the ATIPPA in the first place made that point clear. Their conclusion was that the courts were not serving the purpose of providing an appropriate review mechanism for the freedom of information Act as it existed at that time. And I guess looking across Canada in terms of context in all of the public sector access to information statutes in Canada only New Brunswick's commissioner can't review claims of solicitor-client privilege. Regarding cabinet confidences only the New Brunswick and federal commissioner are unable to review those things.

So what happens when a commissioner is removed from the process? Well we can't assume that public bodies will always do the right thing because if public bodies always did the right thing there'll be no need for commissioners. Just one example: between the time as I think has been explained that in terms of the issue with solicitor-client privilege there was a challenge to our jurisdiction it was brought to the trial division, a decision was made at the trial division that we did not have the jurisdiction under the ATIPPA as it existed at that time to conduct reviews of claims of solicitor-client privilege. That decision was appealed at the court of appeal and the lower decision was overturned and the court of appeal said: yes the ATIPPA is clear that we do have that jurisdiction and authority.

Chairman Wells: They were interpreting the law they were not commenting on whether you should or shouldn't have it. They were interpreting the law as it's stated.

Mr. Murray: Precisely and in between that time as was explained before we accumulated a number of cases because we couldn't review – we couldn't get access to the records to review those claims with solicitor-client privilege while we're waiting to see the outcome of the court of appeal decision. And during that time we had the occasion that somebody

came to us with a request for a review and as we normally do one of our analysts will contact the public body and say look we've got a request for review. I notice one of the exceptions you've claimed is solicitor-client privilege just mention that and the person said yes we thought we'd claim that because we just heard about this court decision and we heard that you can't review claims of solicitor-client privilege so we thought we'd claim it. That is – we were flabbergasted but it's a fact that a head of a public body actually admitted to us that the reason they claim that section of the Act solicitor-client privilege was because we couldn't review it.

Chairman Wells: Have you given any thought to first the proper rule of the court and proper rule of the commissioner vis-à-vis the commissioner? By that I mean in the ordinary course role of the court in reviewing by way of appeal or by way of judicial review, performance of public duties of officials under statutes is to ensure conformity with the law, not to substitute their discretion for the discretion of the person authorized the exercise under the law.

Mr. Murray: That's true, yeah.

Chairman Wells: So would it not be a basis for asserting that the commissioner should have the right to review matters of solicitor-client privilege. You the filed who ensure that solicitor-client privilege was properly claimed and make that decision, not the court, with the court having the right of supervision to ensure that in the course of making the decision the commissioner conformed with the law, didn't depart from the law. That should be the role of the court not to carry out and discharge de novo as it were what the commissioner has done.

Mr. Murray: Right I guess it depends on which model that you want to choose. the model that we have right now, as the Ombuds model, the court doesn't review our reports the findings in our reports because it's a de novo hearing and the court reviews – after we issue our report we make recommendations, the public body decides whether they're going to follow the recommendation or not but the appeal that needs to be filed is an appeal of the public body's decision in relation to the access request not of our findings.

Chairman Wells: Yeah so it's a review de novo.

Mr. Murray: Right, but if we had order power it would go the other way where we would make finding with an order and our order would be subject to judicial review.

Chairman Wells: That's the point of my question which of the two do you think is more appropriate to the stated purposes of access to information as stated in section 3 of the act?

Mr. Murray: It certainly has worked both ways in Canada. You can certainly chose one or the other option and both models have things to recommend them I think. if you have order power and you're issuing an order you're doing something that affects the rights of parties and I guess you could be into a process where for example, there's not right now, under order power I'd imagine there'd have to be an exchange of submissions that it perhaps me a little bit more formalized. The natural justice I think would come into it much more than it does right now because we're not making any orders that affect anyone's rights. So there is that side of it. And I suppose you have to look at the effects of going that route as well and whether it is the most effective approach to it. If you have order power certainly it's not going to speed up the review process because we're going to have to make sure that we write a report, issue a report with an order that provides all

the support and evidence and demonstrates that we've considered the arguments of all the parties that have come to us.

Chairman Wells: Set out the basis on which you made the decision so it's capable of review.

Mr. Murray: Exactly. Certainly it wouldn't make the process any quicker to go through order power. There's a lot of pros and cons to it. I guess we hadn't put it in our submission as a recommendation because really in our experience over the last couple of years particular since Bill 29 and since our jurisdiction has been challenged we're in a situation where we've got a house and the rain is pouring through the roof and we're missing windows and doors and someone's coming up to us now and saying would you like a garage added on to your house. It might be a great thing to have but we've not turned our minds to it because we felt like we've had so many other issues that are on our plate. We've heard certainly from the presenters so far that there seems to be lot of interest in pursuing order power. We think we've been pretty effective with recommendation power in the sense that I've just looked back over the last couple of our annual reports this morning and there's only been 3 or 4 cases each year where a public

body, after we issue our report, has not followed our recommendations and we or the applicant have the ability to go to court then if we wish to. So I guess when we look at there are 700 access to information requests filed each year let's say 650 or 700, 100 of them might come to our office for our review, 75 or 80 of them might be resolved informally. Of the remainder let's say 20-25 that we issue a report or they're withdrawn or something let's say we issue a report in the end – and some of those reports get turned around fairly quickly, others of them take months as we've discussed. But in the end if there are only a few situations where public bodies are not following our recommendations, and there is still an outlet to go to court with those if we had order power, I wonder if we'd be going to court any less. When we've got down to that point in those 3 or 4 cases the public body is still saying no after a report has report has been issued, they're pretty dug in and I think those are cases that even if we have order power I wonder whether those would be the cases that the public body would be seeing judicial review.

Chairman Wells: It's not judicial review it's appeal of the public body's decision.

Mr. Murray: Right, now it is but I'm saying if it went to order power.

Chairman Wells: Yeah even if it went to order power you could have judicial review of it and then it's reviewed on the basis of your report and your assessment in accordance with the law not substituting a judge's discretion for your discretion where your discretion might be involved but whether your assessment was done in accordance with the law.

Mr. Murray: That's right but in terms of the efficiency of the process what I'm saying is that whether you go with order power or recommendation power, in those kinds of circumstances you might end up in courts as justice frequently. So I just want to throw the point out that although I'm not saying and I don't think we haven't put in our submission that we don't want order power it's just that to us it did not rise at the surface as this is a crucial issue. Now if we're hearing from other people that it is then that's your call as to whether – maybe we should have it - and certainly maybe it will be a good idea. I don't know. We haven't given it sufficient thought I'd say to this point.

Chairman Wells: Only thing that brings it to mind now is in most other circumstances when courts get involved in looking at the performance of a statutory function by an official they do it in

the context of judicial review rather than in the context of an appeal de novo.

Mr. Murray: Fair enough.

Commissioner Stoddart: On that question which I think is a key question you've pointed out quite rightly that the definitive analysis of the merits of different administrative bodies has yet to be done and it's kind of a moving – it's not a target - but it's a moving question on the part of our society is how do you provide for the best administrative mechanisms for certain legal issues that concern the population. But do you consider it significant that the 4 provincial jurisdictions that have order making powers, you know they're very populous provinces, none of them have said we must go to an Ombudsman role because it'd be more efficiency whereas both the federal privacy commissioner and the information commissioner have called for order making powers to be given to them, in one case for the private sector law in the other case in certain access to information circumstances, because of I'd say compliance problems at the federal government.

Mr. Murray: Well I've certainly heard the discussion that perhaps the Ombuds role is a good entry level model for oversight and at a

certain point you might decide that order power is appropriate or necessary. I think --

Chairman Wells: The system has evolved to the point where order power is appropriate.

Mr. Murray: Yeah and I guess it's an open question as to whether that has occurred in this jurisdiction or not. I guess for us perhaps if we had not been faced with many of the challenges that came out of Bill 29 and the previous challenges to our jurisdiction maybe we would have been in different place and having a different conversation about order power. But as I said it did not rise to the top for us. We were kind of thinking that we have -- I guess it'd be -- I'll put it this way I think it'd be a disappointment -- I know that if you're going to make a series of recommendations I'll just guess for a moment that let's say one of them was order power and let's say there were some other ones if -- what we've recommended here is to focus on improving some of the exceptions to the right of access, improving privacy oversight and improving the jurisdictional or clarifying the jurisdictional issues for the commissioner's review of access to information. If the government received your report and said well we'll give the commissioner order power but the rest of that we'll leave alone I think it'd be not a

good outcome because I think some of the other issues are - they are the upfront issues regarding the exceptions to the right of access. If there are 700 access to information requests in a year those exceptions are going to be hauled out on a good few of those requests and only a very small proportion of them are going to come all the way through us and is it going to actually – it's got to go past our informal resolution process which we'd have with order power or not - before it'd make a difference whether we had order power or not. And I'm not saying that we wouldn't – that we couldn't work with it but I'm just saying that it just hasn't come to the top as of yet.

Chairman Wells: You'll have greater problem is --

Mr. Murray: That's basically it.

Commissioner Letto: I appreciate that but the thing I also see I'm not looking at it from a legal point of view but political thought develops over a period of time and political behavior develops and it changes over a period of time.

Mr. Murray: Yeah.

Commissioner Letto: It probably would not have been necessarily apparent that Bill 29 would have emerged in 2012 with reasonably forward thinking thoughts about access to information and open government being talked about and discussed.

Mr. Murray: Yeah.

Commissioner Letto: How, if you don't have the ability at some point to compel somebody to Act in accordance with the law because the law itself talks about access. Its objective is not lack of access. It's access to create a more accountable and open government.

Mr. Murray: Right.

Commissioner Letto: If behind that there's not something that says to people that if you don't comply with this philosophy there's going to be not so much a price to pay but somebody is going to compel you to do it so you don't have the option and the luxury of dragging your feet.

Mr. Murray: Yeah.

Commissioner Letto: And if the law reflects that and that kind of compulsion to comply if it doesn't do that maybe in 10 years from now maybe some other panel is dealing with the same issue with the commissioner which is that a new group of people in government will think that we have to restrict information again and we don't necessarily have to comply. It seems that if you'd count too much on people's good intentions and things have improved recently perhaps and we've been hearing that the week's time not as long I'm just wondering when you factor in --

Mr. Murray: Do we want to be ready in case things get bad in the future? Yeah that's a good point. These are all things that I think we could -- are worthy of discussion and consideration for sure.

Mr. Ring: I think I totally agree with what you're saying. The notion of order power is a tremendous tool for the commissioner to have in his or her toolbox but fundamentally we're not there yet because of Bill 29. With the significant loss of jurisdiction in the commissioner's office I think there's more fundamental questions. If Bill 29 had not occurred and we were in a different process let's say 10 -- this is the second review without having Bill 29 and everything was going along with

some minor changes made to the Act then I think you could very well have Sean and I in front of you saying we would recommend order power because we have a substantial, a strong, a consistent piece of legislation that we've been working with for 10 years with minor modifications based on the first review and I guess came into force in 2005. It's relatively young in the life of piece of legislation so to make the quantum leap I think from where we are now as a result of Bill 29 to order power when we're still lacking, or could be still lacking the jurisdiction of the commissioner to look at – even see the documents. So I think order power is a question that will come in future once we have a stable and consistent piece of legislation that the commissioner's office would have been working with for a number of years, work out protocols and procedures and now we're ready and I think it could very well be, I just don't think it's now.

Commissioner Letto: Some might say to you that there's no better time than the present to go for the whole package perhaps.

Mr. Ring: Yeah and there's truth to that but I'd rather take the – I guess again based on the significant changes at the first review that we need to get down a firmer footing. I think there's more

fundamental issues. And again I will say that the Ombuds model for this jurisdiction appears to work very well.

Chairman Wells: Something you just said highlights another concern for me. You talked about letting the legislation mature and having an opportunity to develop protocols and procedures and so on. All of that spells out for me expansion of time between request for the information and ultimate delivery of it and from what I've seen and what I've heard so far, if part of our function is to make recommendations that addresses the principle that people have a right to know and have reasonable access to government information. Surely if you look at the times that are involved and the delays that are involved, and the delays that are involved in the present system with the protocols and so on that are in place and doesn't the introduction and development of all of these protocols just greatly expand the time? The more things you have to do, more processes you have to go to the longer it's going to take to do it and isn't it already long enough? Too long.

Mr. Ring: Yeah I'll just follow-up with that one. I think that that wasn't the intent of what I was trying to say. What I'm trying to say is that if – the more you work with a piece of legislation

your policies and procedures can become slicker, they become more effective and efficient as you go but we've not had really good chance to develop that sort of system because of what is the huge step back. We're spending an awful lot of our time fighting for our – the commissioner's right actually to receive and review a document, time that could be spent on trying to adjudicate and to make the process that we do have in place more effective hopefully with the aim of reducing timelines and producing a product to the public body that will result in information being released to the applicant.

Chairman Wells: If we were to recommend and the legislature were to accept a recommendation that you be given access you have access to every single piece of information, no matter what its classification or category, for purposes of making a decision is whether or not an exception is properly claimed so that you come to a sensible and a well-informed decision as to recommend or not recommend release. If that were to take place why would it take all of the amount of time that it seems to take? I asked a question this morning of one of the witnesses I forgot who, if a minister asked for that same piece of information how long will it take to get it? I suspect 24, 48 hours maybe.

Mr. Ring: If that.

Chairman Wells: If that, okay. Then why does it take that long to get it to a commissioner? Why do we need 60 days or 30 days if it can be produced for the minister to look at in 2 days or 1 day or 6 hours? Why does it take 30 days or an extension to 60 days to get it for the commissioner to look at it and see whether or not a claimed exception – because these times are just --

Mr. Murray: It doesn't take 30 to 60 days to get it to the commissioner for review. Its 30 days for an applicant to get access. That's how the timeline for an applicant.

Chairman Wells: Well why should it be 30 days?

Mr. Murray: Well that's the maximum, that's supposed to be the maximum and with an extension as well.

Chairman Wells: Somebody provided me with information from your website as to the times and as I see these times when I look at them depending on the departments it varies from office to office some departments more than half of take the full time

whether it's 30 days or 60 days they take the full time to get it.  
If the minister can have it in 24 hours why can't the --

Mr. Murray: I think one of the things we've suggested is that the commissioner have the ability to conduct an audit of the access and privacy practices of a public body and I think if we had the ability to do that kind of audit that's the kind of thing we could get to the bottom of.

Chairman Wells: That would help.

Mr. Murray: Absolutely.

Chairman Wells: Because some departments appear to do it on a fairly timely basis on the summaries that I've seen.

Mr. Murray: Yeah absolutely. And there's also the allegation that was brought up this morning that if political applicants, applicants of representing political parties are getting information on the last day. Well again if we had the ability to audit the access and privacy practices of a public body we could certainly do a comparison of the timeliness of applicants receiving their access to information requests. So I think there are ways that we could certainly if we had the appropriate

powers and jurisdictions I think we could certainly inquire into these things and report on our findings and make recommendations or perhaps even order depending on how things pan out here I suppose.

Chairman Wells: Is there any logical basis for having a 30 day time limit to start with? Why wouldn't it be 15, 10?

Mr. Murray: I think you'll find that public bodies are going to represent a response on that issue quite firmly so I don't think we'll --

Chairman Wells: We'll going to from them. I'd just like to hear your point of view.

Mr. Murray: I have certainly encountered situations where I'm not surprised at all that it took 30 days but you got to remember that we get the cases before us that are the most difficult, the most complicated, with the largest volume of records and things like that. So if someone asked for a small document that's fairly straightforward perhaps there's no reason at all that it should take any more than a few days. It all depends -- because quite often what we've seen in our office, again, we don't see all the routine access requests, we just see the ones

that come to us for review. I've seen plenty of access to information requests which are worded something along the lines of I'd like to receive all the information about topic X within the control and custody of your public body. So if you're the access and privacy coordinator you're knocking on office doors up and down the hallway, "have you got anything on this subject", you're getting the IT people in to do a scan of everybody's computer to go through everyone's email records, to look at the backup logs, to look down in the basement where they keep the files from older than 3 years ago and they're pouring through that stuff. So there can be a big challenge for certain type of requests and I think the reason why the – and you'll find that 30 days is pretty standard across the country. So I think the reason why you find that is for those reasons. Now I know internationally you will some shorter time periods. I couldn't quote you any specific examples but I know there are shorter time periods than 30 days but I can tell you that I have seen a fair number of access to information requests that I'm not surprised at all that they took 30 days or longer.

Mr. Ring: An example I suppose that we could use for comparison purposes is that since Bill 29 the commissioner's office has the authority to extend time limits beyond 60 days the original 30

days extended by the head and now further and it's not uncommon for a public body with some good legitimate reasons to come in and say that because of this, that, and the other thing we need more time to do this, will you extend it another 3 weeks or another month. Now we will look at the circumstances look at the argumentation and say no, 5 working days is all that should believe necessary reasonably to deal with this issue. So we've not carte blanche said okay if there's time extension request we'll give it to you. It has to be very well substantiated and we do not routinely give extensions beyond what we feel is necessary and is not been problematic. So public bodies will some more than others take the line of least resistance and if they got 60 or 90 then that's what they're going to take.

Chairman Wells: Yeah well that's the problem. This is what I'm getting at. You cite this example and you say sometimes we look at it and say no, look at this all you need is 5 days to get this so you get 5 days but they've already had 60 by the time they get to it, right?

Male: That's the problem. I think you can look at that aspect of it and say maybe we should be involved at an earlier stage before extensions are granted maybe something like that off the top

of my head that might be something to look at. I'll give you another example of a public body that came to us for extension of time: during the blackout their pipes froze, they had a flood, they had to get contractors in to clear it all out. They just said look we can't even get at this stuff for another 3 weeks and those reasons are going to come up right?

Chairman Wells: Those are peculiar examples that warrant.

Mr. Ring: Yeah and that's why it's got to be in minority of situations where it is --

Commissioner Letto: So would they have come to you at the end of the 30 days or at 5 days and said

Mr. Murray: We've made it clear to public bodies that they should be coming to us not on day 29 or day 59 or whatever at the end of the period that they're working within. They should come to us as soon as they realize that there's a problem and explain to us exactly what situation they're facing and that the draft responses sitting on the deputy minister's desk is not good enough for us we don't extend the time for that.

Commissioner Letto: I think the concern that we've heard from at least 2 interveners and maybe more is that they feel that the public body waits until the very extreme end of the time before they provide anything or even provide an answer and I think that's something that's informed our concern about the length of time that's actually within the legislation and that it inculcates in people this sense that I don't have to do anything until 29 days or whenever it is.

Chairman Wells: Whereas if the time limit were 10 days which as you say Mr. Ring would be satisfy 75 or 80% of the routine thing for 10 days and they knew by day 7 or 8 that they couldn't get it within - they came to you for an extension and they got 5 or 10 or 15 days whatever you thought was appropriate then look at how much more efficient that would make it because just look at the news media and I guess the news media make an overwhelming number of these applications by the time they get it 2 or 3 or 4 months down the road, if it's a long delay process story's gone dead, they're interested in doing it anymore in most cases.

Mr. Ring: Yeah I agree that a more efficient system would cater to the individuals' right citizens' right under the law but even with the current system with 30 days when our analysts are going

back and forth with the coordinator and saying look – the Act calls for the head of the public body there is a duty to assist as quickly as possible. And the bottom-line that constantly comes back is we're inundated not just with ATIPPA request but with other work and we're moving as quickly as we can.

Chairman Wells: So do you need more staff? This is one of the things that we want to ask you about, do you have adequate resources to fulfill not the statutory duty as is presently defined because we had to make recommendations just to changes your – we had to listen to what you've recommended assuming for example that we made the change that you recommended. Are you satisfied that you have adequate staff and resources to fulfill those duties properly and efficiently if the changes were adopted by the legislature?

Mr. Ring: Well we've got two timeframes in which we can compare: prior to Bill 29 and it was a moving target if I could use the term because of the proclamation of the privacy provisions in 2008 and then personal health information coming on in 2011. There was a struggle to try to keep up with the anticipation of how much workload will be involved. We're at some sort of an equilibrium now. We have a significant backlog and every year there seems to be more and more files being carried over and

there are some good reason for that. For example the office took on the role of conducting our two investigations that eventually led to prosecutions, significant amount of time by 2 of our five analysts to do that and they were literally doing nothing else but that so there was – the workload for everybody increased. For those kinds of developments it's difficult at any point in time to say we have enough. I tell you what, you can never have too much and we can always use more.

Mr. Murray: So just getting back to the issue of commissioner's jurisdiction we've talked about section 21 and 18. just briefly to touch on the issue regarding section 5 there's very little case law on this issue of a commissioner's office being denied access to records or the ability to review denial of access to information based on section 5 which is the application section of the act. The only other jurisdiction where the commissioner has faced this challenge is Ontario and there was a very clear ruling by the lower court which was also agreed upon by the Court of Appeal in Ontario that the commissioner of course did have the ability and the jurisdiction to conduct those reviews. So when we've been to court on it it's been – we haven't had really much to work with in say case law establishing the commissioner's role elsewhere except Ontario. So the

situation we're in there I think we've explained on that and we've explained that in fact one of the presenters this morning, James McLeod mentioned the particular file that he had – a request that he had made which was we were not able to conduct the review for him because section 5 was involved. Now we do believe that the current ATIPPA language does grant us the authority to review a record as long as it's in control or custody of a public body which has been withheld on the basis of section 5 in order to determine whether or not it falls within our jurisdiction. So we believe that. We haven't been able to convince a judge of that as of that however we're heading to the court of appeal. The difficulty is and I guess the reason why we want to --

Chairman Wells: Are you suggesting you have a right to review a record in a court file a record of a judge with the trial division the court of appeal or provincial court?

Mr. Murray: Well as I believe we mentioned in our submission we don't believe that would ever come up because the courts are not a public body. They're explicitly removed from the Act as a public body, right. Yeah so we think that, just having that --

Chairman Wells: So why then would they have --

Mr. Murray: It's just the double assurance that people said someone may have felt it was necessary to just to protect the courts, make sure it's clear to everybody.

Chairman Wells: Courts don't fall within the definition of a public body but they have --

Mr. Murray: They do not, right. So there are no circumstances in which we would be reviewing anything that is in the control or custody of a court. We would not even initiate a request for review – if the court of appeal received an access to information request it's out of order. It doesn't exist under the ATIPPA layer – not as a public body - so there's nothing for us to review. If someone tried to send us a request for review form with a court of appeal on it we just have to call them up and say look we --

Chairman Wells: What triggered my question was you said we believe we can get access to courts in section 5.

Mr. Murray: Well it's not that we can get access to the records in section 5. it's that we can conduct a review of a decision of a public body. So if you're a public body and you've claimed that

you have – you're denying access to information because you claim that some of the records that are requested fall into the category in section 5 we believe we can review that decision. And we believe that the statutory language is there as I said unfortunately we've yet to convince a judge of that but we will have the opportunity to go before a court of appeal and try one more time I guess and see if we'll get it right that time. But the reason why we need to make this pitch to your committee is that of course we don't know that – us being convinced that we're right is not going to necessarily be sufficient at the court of appeal so we don't know how that's going to go and we don't know when the hearing is going to be when a decision would come out. Of course it's something we would recommend that you keep an eye out for and we'll certainly advise you I guess if we hear of it as well. But if no decision is rendered by the court of appeal by the time you go to complete your report we would obviously recommend – request that you make a recommendation that the ATIPPA be clarified, language be inserted so that it's clear that we can conduct a review of all information request denials that are made by public body even including the ones that fall under section 5.

Chairman Wells: So you could see any document no exception, cabinet solicitor-client anything you could make to place you in a position where you could make a determination as to whether or not the exception is properly founded in the law.

Mr. Murray: Yeah precisely as can almost every other commissioner in Canada. We'll be just back where we were before really when we started 2005.

Chairman Wells: And that's where you were prior to --

Mr. Murray: Prior to Bill 29 and prior to the court challenges that were initiated the challenge to our jurisdiction.

Chairman Wells: Was that so for cabinet documents prior to --

Mr. Murray: There was no court challenge regarding cabinet documents.

Chairman Wells: I know there wasn't a court challenge but was that -- was section 18 different than --

Mr. Murray: No we could review claims of cabinet confidence before and we did and we've issued a few couple of reports. It didn't

come up a lot but we did interpret that's where we did have our discussion of substance of deliberations in one of our reports and looked at the O'Conner decision and the Aquasource decision. So we looked at it and we did consider it and we reviewed records that were claimed under that exception. So I guess just to conclude on the jurisdictional issue as Commissioner Ring mentioned these jurisdictional issues have been the single greatest challenge for our office. In addition to the tens of thousands of dollars in legal fees we have spent a huge number of hours of staff time devoted to addressing and responding to these challenges to our jurisdiction. It's really hung us up. We need to put this behind us and focus on the ordinary work of the office of conducting reviews and investigating complaints.

Commissioner Letto: So the legal cost that involved there explained how that happens, do you hire outside counsel to --

Mr. Murray: We do, yeah we engage outside counsel on --

Mr. Ring: Yeah it relates to the question that Madam Stoddart posed on Tuesday about the financial difficulties it does present to our office in terms of trying to shift money around to cater to the requirements for court.

Chairman Wells: I remember your comment.

Mr. Murray: I'm going to move on now and speak about the part c of our submission which is about our privacy protection I guess and it's specifically oriented towards ensuring that the commissioner has adequate means to protect privacy as the privacy rights under the act. So as you may recall and if you've looked at our submission our recommendations are oriented towards trying to make this work within the Ombuds model. So I know we've had a discussion about order power versus Ombuds. Everything we've recommended could work just as well in the order context as it could in the Ombuds context I think. Our recommendation is to proceed through the Ombuds context. We did not anticipate all the interest in order power that we've seen so far in the review so just to make that note upfront.

Chairman Wells: But the recommendation will work equally work in either?

Mr. Murray: I think so, yeah. So just to start off I guess people may be surprised to find and they often are when they contact our office they're surprised to find how limited the commissioner's

authority is currently in relation to privacy. Our jurisdiction our authority comes from section 44 which says that we can “investigate and attempt to resolve” a privacy complaint. And that’s pretty well it. There is no provision for us to issue a commissioner’s report which mandates a response within a certain period of time which we have under the access provisions. There is no provision for subsequent to something like that occurring for us or anyone else to go to court to try to require a public body to comply with or adhere to the privacy laws set out in part 4 the of the act. Nothing at all. So it appears you might even say that the privacy part of our law appears to be voluntary in terms of any compliance measure which I think is entirely inappropriate in this day and age with electronic records and all of the how fast-moving the developments are in that area of oversight right now that there’s really no way we can do anything effective with our current regime. So it’s kind of like as we’ve mentioned the toolbox metaphor we have a hammer and that’s pretty well it. We don’t have a saw, we don’t have wrench, we don’t have anything else in the toolbox to build our house with. And you need different tools for different jobs. So some of the things I’m going to outline here are some of the different tools we think we could use to do some of the different jobs of effective privacy oversight.

Commissioner Stoddart: Before we go on to your additional tools if we look at the tools that you have notably section 44 (ii) do you think it's necessary to have reasonable grounds in that section if they believe on reasonable grounds? I think that's a more recent addition to the articulation of privacy rights and I'm just wondering for my own experience a lot of complainants who came forward would if contested have difficulty to show that they had reasonable grounds to worry about their privacy rights and in fact an investigation showed that they were correct but it would seem on the face of it to be an unreasonable belief if I had to try that test.

Mr. Murray: Yeah we generally looked at prima facie sort of approach, if what they've said has occurred had it actually occurred would it be a violation of the privacy provisions and if the answer is yes then we will investigate.

Commissioner Stoddart: Okay so you don't apply a strict objectively reasonable --

Mr. Murray: I guess not. Maybe we should, I don't know.

Chairman Wells: And the way it's worded it's the individual have reasonable grounds as I see it and somebody who just comes in and says I don't know, I haven't seen anything but I'm afraid they might be.

Mr. Murray: Right, well that's not good enough.

Chairman Wells: That's not good enough?

Mr. Murray: No that's not good enough. Another flaw with it though is that what if someone comes to us and says look here's a particular program that's being carried out by a public body which is collecting, using, disclosing personal information. This is how it's collecting, using, disclosing the personal information, look how it violates part 4 of the Act now my information is not in there but I'm just letting you know commissioner's office that this is going on and they walk away. They're not filing a complaint because it's not their personal information. They're just telling us that they're something going on that's contrary to the act. The way section 44 is worded right now it has to be a complaint from an individual, someone's got to want to put their name on this complaint and be the complainant. So if someone brings something to our attention but they don't want to be the complainant, their

personal information might not be involved, because it says here that has to be his or her personal information so I think that's a problem there that – and it does come up from time to time --

Chairman Wells: That'd be resolved if on information available you could initiate your own investigation?

Mr. Murray: It would and that's one of our recommendations.

Commissioner Stoddart: So it's part of your new toolbox?

Mr. Murray: Exactly yeah.

Mr. Ring: If I might add that we have done that in the past and we've only done it on the strength of the fact the commissioner has the authority to report on the operation of the act. There was a piece of machinery or electronic equipment that was held by a health custodian, large one, that was taken out of service, refurbished and ended up in a university down in New Jersey somewhere ultimately to find that the hard drive was in there with hundreds of patients' names and information in there. We didn't get any complaints but using our authority to report on the Act we undertook this investigation and I think was a

very successful one where the public body involved produced policies and procedures which they constantly were giving us drafts of to review to make sure that this could never happen again. So but it was a bit of a stretch, duty to report upon the Act but we went all the way with it and --

Mr. Murray: Yeah these are the kind of stretches we get into with the Ombuds model. Every now and again we'll color a little bit outside of lines because --

Chairman Wells: And that could be overcome with the right to initiate --

Mr. Ring: Precisely if it was more clear yeah.

Commissioner Letto: What about the example that Ms. Rogers mentioned here this morning where she calls a minister's office on behalf of a constituent and she doesn't get to talk to the expert in the department who can help her with her problem she's directed to the executive assistant to whom she has to download the constituent's personal information and I think she explained a particular difficulty for it with some constituents because they don't want that information shared which means their problem goes unattended or they just walk

away. Hearing about that practice that she says has happened with her I'm just wondering what your thought was hearing that because you were sitting in the room?

Mr. Murray: Ms. Rogers filed a complaint with our office on that and normally we don't discuss that except she put our letter of findings on their website so it's been published by her office so our findings were yes that we did find a problem with that however that's all we could do is write a letter saying yeah we think that's a concern. We don't think this should be a routine practice. there could be circumstances where it might be necessary to go through the minister's office for certain type of inquiries but on a routine basis should citizen's information be provided to political staff of the minister's office for a routine inquiry and we said no, we didn't think that the privacy provisions were consistent with that practice and that's all we could do is say that. And that's one of the reasons again why we're looking for additional powers in the privacy provisions to be able to do something effective.

Commissioner Letto: Do you have any sense though that the practice has been stopped?

Mr. Murray: No I don't believe it's been stopped, no.

Mr. Ring: Not at all.

Commissioner Letto: Which points to some of the issues that we're talking --

Mr. Ring: A significant problem in our view.

Commissioner Letto: with that you can put a report out there but --

Mr. Murray: Yeah.

Mr. Ring: Significant problem.

Mr. Murray: Just to carry on as I was discussing the best privacy oversight models in our view includes both a front end and a backend process so the backend process I would describe as the complaint investigation after the breach has occurred and that type of thing but the front end what we're looking at there is we want the ability to interact with public bodies through things like privacy impact assessments and audits to ensure that compliance with the ATIPPA is built in upfront as well as of course the having robust mechanisms at the backend. Once privacy breaches or incidents have occurred

there should be an investigation with the potential if needed to go to court and ask a judge to order compliance with the privacy provisions. And again that all feeds into which model you take whether we have the Ombuds role and at the end of the day when we make a recommendation if the recommendation is not followed then we would try to go to court if that was the model that we're proposing. Now if it wasn't in an order making context we wouldn't be going to court we'd just simply be making the order for compliance and it'll be up to the public body to resist then in some way through court action.

So going along with what Mr. Wells mentioned a minute ago we believe we needed to be able to do own-motion investigations now these are certainly common in some of the other jurisdictions across Canada as referenced in our submission it's common in Ombuds types of legislation, it's common in a various public sector privacy laws in Canada. You do have the situation of papers blowing down the street with identifiable information on it. It has actually happened and people dropped this stuff off of the commissioner's office and say I'm not sure where this is from but something about the government is on it, seems like it's from the government somewhere. You guys better sort this out. So there are

situations do arise where the commissioner discovers a privacy issue or incidence from some party who their information is not affected themselves personally and they just want to do --

Chairman Wells: So there's no complaint.

Mr. Murray: There's no complainant. So we're just being informed of it and there should be a way as Commissioner Ring mentioned we have taken it upon ourselves to investigate in a few instances where we found out through other means about a privacy issue but if we were to evolve to another model of privacy oversight where we could -- where our privacy investigations were more of a formalized process it would need to be spelled out that we can do an own-motion investigation. We will not longer be able to just count on the idea that we have general oversight of the act.

Commissioner Letto: Would that cover then the sort of situation that Mr. Rogers described this morning? Let's say that one of our constituents contacted you directly and they said look I don't want to be written up in a report. I don't want my name and everything else to be out in public for any of that information but you should be aware of it so --

Mr. Murray: Well, it certainly would because they could advise us – I don't think we'd want to take it in the case of a particular privacy breach of this person's information but we don't release the names of complainants either but still if someone were to tell us in situation like that that there is a program or policy underway which is collecting, using or disclosing personal information contrary to ATIPPA we would certainly want to be able to take that forward investigate it, make recommendations and again depending on the model either make recommendations or an order.

So the next tool in the toolbox I guess will be privacy impact assessments. Ms. Stoddart would certainly be very familiar with this. These are industry standard in government and business in the privacy world. What we're seeking here is a legislated commitment to privacy impact assessments because we believe that's the most effective way to build a culture of privacy because people are actually working with privacy impact assessments on a regular basis but also to ensure – the real purpose of a privacy impact assessment is to ensure that leaders and people working in public bodies have turned their minds to the issue of privacy when they're going forward or contemplating going forward with a program or policy or piece of legislation or what have you that will involve collection, use

or disclosure of personal information. And it's been very interesting when we've had a chance to go to conferences and seminars with our colleagues across the country when we've had a chance to talk with those who work under the privacy regimes that are in place for example in Alberta or British Columbia where privacy impact assessments are the norm and this is just the way of doing business in those provinces in the public bodies, the level of awareness and knowledge within the public service about privacy issues is at a much higher level than it is in this jurisdiction or I would suggest any jurisdiction that doesn't have this tool as mandated as part of their procedures.

Now our proposal was that similar to what they have in British Columbia whereby the public bodies should complete privacy impact assessments for all new programs and policies and provide them to the minister responsible for ATIPPA for their approval. However we've also suggested that in certain cases privacy impact assessments should be provided to our office for review as well and this is also something that occurs in British Columbia. In Alberta for example under the personal health information legislation they have there all of the custodians subject to that Act have to provide their privacy impact assessments to the commissioner. So it's something

that you do see more and more in the privacy legislation. But what we're suggesting here is that the circumstances where a public body decides that they're going to share personal information across public bodies and departments with another public body and department. So they've collected personal information for a certain purpose and sometime down the road another public body said gee I'd like to have that information too so this public body which has collected it under a certain set of expectations I guess from the public as to why it's been collected will now begin to share it with the other public body. And the provision is in ATIPPA right now to do that and it was added in Bill 29 but I think the companion provision that should be there is some effective means or independent oversight methodology of ensuring that that sharing is necessary because what you see sometimes in these cases is you can get into function creep and mission creep. So necessity too easily slides into "nice to have" because really those types of sharing of personal information shouldn't be occurring the other public body needs it to fulfill some sort of program or policy that is being carried out under their auspices but they shouldn't be able to just contact another public body and say hey can you give us access to that database because the more sharing the more access that you have to all these databases of personal information, number 1, you're sort of

muddying the waters of accountability. Who's responsible for this information, who's got to keep it safe. Number 2 when we talked about the offence provision the other day we talked about a situation where a person – lots of people have access to these databases of personal information. The more people who have access to it the more risks you're running about inappropriate access or certainly has been the case lots of time where it's on a laptop it's gotten stolen, it's on a flash drive, it's on some other portable device that's gotten stolen. The more you spread this information around the greater risk you run and so the kind of lens that we could put it through a disclosure or a sharing of personal information like that from one public body to the other is is it necessary, do you need it, and that – it sounds simple but believe me our experience is that it helps because in the case that we mentioned where that did occur where in the other public body – where one public body had access to the database of the other public body the individuals working in the second public body was accessing information inappropriately for an inappropriate purpose of one individual and it was a pretty significant event. As we mentioned regarding the offence provision there was no offence that person to be charged for but in looking into that we found that there were no protocols or policies in place about who should have access to the information, why it was

being shared, for what purpose. And so what we found is that some of the basic thought process is that you would get through conducting a privacy impact assessment had not occurred and we're into this area of gee it'd be nice to have if we could have that information we might use it for something at some point.

Chairman Wells: Does your office have resources to develop at present to the public bodies the appropriate protocols or carry out an educational program with regard to protection of privacy, you have the resources to do that?

Mr. Murray: I think that's something that we could do – certainly the ATIPPA office of government would have to play a role we couldn't be the only ones.

Chairman Wells: That's fine but you could take the initiative to get it going and do it jointly with the ATIPPA office of government.

Mr. Murray: And we'd have slightly different roles there. I think the ATIPPA office would be the one that – if the privacy impact assessment regime that we're proposing would come into place they would be the ones to ensure that all the public bodies were aware that they have to do these and they would

be their first point of contact for assistance in completing them. We would be there to review them in cases like where there was a plan to share them the information across departments. We would also be in a position to use privacy impact assessments that exist in the cases where there's an investigation. So there's been a privacy breach the first thing we'll want to see is have you done a privacy impact assessment on this subject. And yes here's the things we looked at and in fact we just missed the issue that caused the breach or we considered it we've proposed these mitigation measures and unfortunately they weren't effective and now we're going to recommend to them that they upgrade their privacy impact assessment to deal with the measures that they missed last time.

Chairman Wells: Is it a reasonable expectation that agency of government the ATIPPA office which is the agency of government that they're going to take this initiative to do this and --

Mr. Murray: They do do some of that work now. There are privacy impact assessments being completed from time to time on sort of an ad hoc basis I think. I don't know enough about the extent of it but it doesn't seem to be that it's that extensive

and I'm not sure what emphasis is being put on it and that's why I think that it really needs to be legislated because if it's simply a matter of policy sometimes policies outline the best of intentions but you have to – you could get to a point where there's a budget cut next year and they'll say yeah the person that usually looks after privacy impact assessments we don't need them right now we'll follow-up on that in a few years' time or something like that and it never gets revisited. I think the only way to ensure that this type of practice occurs, and again by proposing this we're in the business of preventing privacy breaches so we might be a little bit of work upfront but the idea is that there will be fewer privacy breaches to investigate down the road.

Chairman Wells: That's why I would think you might play a more direct role if you had the resources to do it. You need extra resources to do it.

Mr. Murray: Yeah we may. that's something that if the committee were to recommend it I'm sure that we'd have to look at that resources would be necessary but I think we could certainly accomplish it without – we wouldn't have to double the size of the office or anything – but I'm sure we can accomplish it with maybe a small addition of resources.

Mr. Ring: When you look at the educational mandate for the commissioner's office now it's basically to inform the public about the Act and when you look at the educational component of the ATIPPA is to basically to work with the public bodies to ensure that they have --

Mr. Murray: The ATIPPA office.

Chairman Wells: So primarily they're responsibility.

Mr. Murray: Yeah. So that's the way it's been -- it's there.

Mr. Ring: However ever since the creation of the office of public engagement who the ATIPPA office reports to there's been a significant increase in cooperation and collaboration and I think it'd be an easy step for us to work in conjunction with that office to create something like this that we could use as a general education component of it.

Mr. Murray: Well for example if they were going to develop a template for privacy impact assessments we could certainly consult with them on that and assist them on the development of tools in that regard.

Mr. Ring: Yeah we do get consulted from various public bodies asking us to review draft the PIAs and it's a good process and it's becoming a bit more frequent than it did in the past.

Commissioner Letto: But it's probably informal and there's no requirement.

Mr. Ring: Informal yeah not mandated much so ever. And if I could just state briefly one example where our office has worked in close cooperation with a significant public body concerning PIAs and subsequent roll out of the program it was with the Royal Newfoundland Constabulary when they were doing their work leading up to the initially controversial installation of the video surveillance camera on George Street. We worked, and in fact we used some material from the federal privacy commissioner's office at that time, I talked to both privacy and security and how to really go about the PIA development. So there was great collaboration and Sean and I and other members of our staff met with the deputy of police and their technical staff and it was hand in hand and we've not had any problems with the program even though there were some controversy oh my god our privacy is gone. They did it right and they're using it for the right reason. We talked about not

just the placement of the cameras but who's going to be responsible for actually viewing the documentation or if the film footage is going to be stored properly, what's the time limits on destruction and so on so forth so it was a really good process that we got a good bit of experience on it but the public body relied on us to provide enough good advice that they could proceed in a comfortable way and it's worked very well so it's good process.

Mr. Murray: Yeah.

Commissioner Letto: Could you give us a little more insight into what kind of specific decisions you made about who gets to see it and all that kind of stuff because that's kind of interesting?

Mr. Ring: Yeah well there's – the RNC had an awful lot of work done prior to it and in fact maybe a year before this whole process rolled out my office had word that this was likely to occur so early on maybe even the year before we actually got involved with the process. I and I think Sean you were we visited chief Joe Browne at the time and their in-house counsel and a couple of others that were looking at the program and we talked about all these issues and when they got closer to fruition they were thinking about getting the appropriate kinds

of equipment. So we engaged in more technical kinds of information and we were confident based on best practices across the country in other jurisdictions that they were procuring the right kind of equipment. They had the right protocols in terms of where the information was going to be stored, how long will it be kept, who could look at it and they were looking at certain exceptions because of the evidentiary purposes if there was a crime and it was evidence and so on so forth. But overall we were quite happy that – and that’s not to say that we didn’t think that there might be some problems like little speed bumps. After you put a new program in you may get some sort of challenges but I think overall it’s worked out very well.

Commissioner Letto: So it’s like a lot of other data you collect it’s what you do with it and how you handle it?

Mr. Murray: Yeah. That’s a part of it for sure.

Mr. Ring: It’s not just your image being taken here. It’s what happens to it. Where does it go. How long is it kept. Who’s going to see it. Those kinds of questions needed to be answered upfront.

Mr. Murray: So just carrying on we're also recommending that the commissioner be consulted on all new legislation or amendments to legislation which could impact or affect access or privacy. Now the commissioner currently has the authority to comment on that now. It's in section 51 of the act. Commissioner can comment on programs or legislative schemes that might affect access or privacy but the thing is we can only comment on it if we know about it. So there's certainly been situations where for example there was a – when they were going to be revising the Children And Youth Care And Protection Act a couple of years ago it was a news release went out from the department of Child, Youth and Family Services that they're going to be revising this Act and anyone who had anything to say about it could come forward. I noticed the news release and we looked at it and we had had some inquiries about the access to information provisions of that Act in the past because there's a provision of that Act which takes precedence over the ATIPPA in relation to access about information of children and youth in care. So we saw that this Act – that the access provisions were very outdated, predated the ATIPPA and were not very functional and so we contacted the department we had our meetings and we made series of recommendations and our recommendations can now be found in that legislation. So they were very happy to

get our input and they adopted our suggestions and we've had a few other circumstances like that and particularly off late we've actually been contacted by the government on a few occasions with regard to a few bills to seek our input, however others have slipped by where we said gee that's actually does relate to access and privacy, there's been an amendment and before we know it it's through the House and before we can really do anything about it or say anything to anyone. And all we're looking for here is an opportunity from our perspective as the oversight body responsible for access to information and protection of privacy to provide some input, to just say look this looks great or here's --

Chairman Wells: Is that every single piece of legislation or only one specifically involving privacy issue?

Mr. Murray: No, only legislation that impacts access or privacy. And it wouldn't necessarily have to be an amendment to the ATIPPA although those have slipped by without anyone telling us as well the ATIPPA has been amended without anyone mentioning to us but --

Chairman Wells: What I meant was who knows, who makes a decision as to whether or not there's a potential impact on access to privacy?

Mr. Murray: Well it's got to relate to --

Chairman Wells: Nothing spelled out --

Mr. Murray: Yeah it should be fairly explicit in the legislation.

Chairman Wells: Something that makes some provision that --

Mr. Murray: Someone has a right of access or that information that's collected under this Act is gathered and it must be kept confidential or something of that nature.

Chairman Wells: Yeah.

Mr. Murray: So we have seen it come up from time to time where a legislation like that has come through and we're kind of like gee I wish we could have made a really good suggestion there that would have made this Act better and it's slipped through and we didn't know better.

Chairman Wells: One should expect that that's a normal automatic reaction by government in any event. You think you need legislative --

Mr. Murray: Our experience is that we do because we have not been asked as a matter of course for input on legislation that impacts access and privacy and the provision is there in section 51 already that the commissioner may comment on it.

Chairman Wells: That's a power to do it.

Mr. Murray: Right.

Chairman Wells: A requirement that you've been invited is another question.

Mr. Murray: But if we don't know that legislation is going through and no one's telling us then the power is kind of meaningless. and as I say we've been lucky with how things have changed in the last few months that there's a greater interest in working with our office but we could easily find 6 months or a year, two years down the road that the government --

Chairman Wells: It's fallen by the wayside?

Mr. Murray: Exactly that the practice is gone and I think it's not that we are trying to stick our noses in everywhere it's just that if we do feel we have a certain expertise in access and privacy and we feel like there – sometimes an opportunity is lost that could protect access to information rights or privacy rights in more in the spirit of the ATIPPA.

Mr. Ring: Yeah as of late I think what we're seeing in our offices an opportunity to review proposal legislation but it's all occurring at the same time that the government is beginning to rollout its open government initiative and we were feeding into that in terms of advice and recommendations and some of this is just personality driven I think. It depends if you have a minister who's getting it in terms of individuals' rights under this legislation then there seems to be a whole lot more cooperation but I think with the open government initiative hopefully we're going to see more of that in the future.

Mr. Murray: I could not get into the specific legislation but I did have an experience where we saw a piece of – we realized that there was a piece of legislation that was already in second reading being debated in the House and when we looked at it I called the department, spoke to the senior lawyer in the

department who's responsible for it and pointed out what some issues with how the legislation was structured and the response was we never thought of that. When I said – and I pointed out here's some evolving case law in this area that shows you where things are going in relation to that type of legislation totally unaware of it.

Commissioner Letto: Was the legislation withdrawn or amended?

Mr. Murray: No, because at that point it was in second reading we are not – we were not in a position to impact at that stage and --

Chairman Wells: Well the minister in that department could impact at that stage and the second reading is only reading in principle and committee stage follows.

Mr. Murray: Well we notified who we thought was the appropriate person in the department of our concerns and perhaps we should have gone directly to the minister but at this point that's all we can do is tell them that – and it's not to say that – it's not a five alarm fire that your legislation is completely wrong and it can't work but it was just here's a significant

thing that could have improved it and we can see where this is going and here's some issues you could have in the future.

Mr. Ring: Simply if you can take the extra step now to make sure it'd done right why not do it than have to react after the fact amending or saying something.

Commissioner Stoddart: Commissioner Ring you mentioned that things are improving from your point of view since the announcement of open government a few months ago and I wondered how long-term you see your office's role in functions in relation to say a mature program of open government and specifically I wondered if you'd given any thought to a possible role for your office in defining the templates to make information public. Now this is an approach used in some jurisdiction which means it's not the public body and it's not even the government that decides what standard information you put up about yourself if you're a certain type of public body it's the information commissioner of the jurisdiction who does it and who reviews then what information is posted.

Mr. Ring: Yeah that's great question and again the open government initiative in Newfoundland and Labrador it's in its infancy and I

think Minister Kent when he rolled that piece of it out along with the premier said that this is just phase 1 of a series of phases. What they're trying to do now is develop the portal and try to populate it with as much information as possible. At this point I'm not even sure if users of that information can manipulate it but that's ultimately the aim. So it's work in progress as it relates to the Office Of Public Engagement and we have assurances from that office and we were consulted, we were briefed on the open government initiative. I attended briefings. Both Sean and I attended briefings as well and I believe that as more information is becoming available in terms of how they're going to progress to phases 2, 3 and 4 that we will be involved in that and hopefully in the manner in which you described it Ms. Stoddart.

Commissioner Stoddart: Thank you.

Chairman Wells: This might be a convenient time to take an afternoon break. Besides I have to make an urgent phone call. Thank you very much. We'll adjourn for 15 minutes.

Break

Chairman Wells: ...the fact that Mr. Letto walks in first, I walk in next and we leave Ms. Stoddart to last means that we are not courteous or chivalrous.

Mr. Murray: All right then.

Chairman Wells: It's the line of the seats it was – yeah.

Mr. Murray: That's the way it goes, all right.

Commissioner Letto: We don't want to be bumping into each other.

Mr. Murray: No.

Mr. Ring: On a similar vein, I am restraining myself on my seat here because of my military background, when I see the panel come in, I feel like jumping up.

Chairman Wells: That was not necessary but anyway, let's proceed now.

Mr. Murray: All right. I am going to carry on with the last few points of the privacy toolbox, items, I suppose and that's breach notification, which we discuss in our submission. This is the

idea that when there's been a privacy breach of your personal information, you should be notified of that breach if it's a significant breach at all. As we mentioned in the submission however, there are - it's an evolving I guess issue right now or an evolving area as to what the threshold should be for notification of breaches. That maybe things are starting to be standardized but I think - we didn't make specific recommendation as to the threshold but I would suggest that really what it should be any breach of significance, you should be notified about. How you word that or how you accomplish that, I guess would have to be determined.

Commissioner Stoddart: On that can I ask you to just make a bit clearer to us the issue of - as you said, it's an involving question of the standards, at what standard do you tell the - inform the affected individual or individuals, at what standard do you tell the commissioners - a commissioner who says that you have to notify the individual or does the public body take it upon themselves - upon their own determination of the threshold? Have you thought that through?

Mr. Murray: Well, I can say the breach notification is involves notifying affected individuals, breach reporting is notifying the commissioner which we are also recommending. We are

recommending that and I will answer your question just in one moment, we are recommending that the commissioner be – all breaches be reported to the commissioner as well and the rationale for that is that, we are the oversight body for personal health – sorry, the Access to Information and Protection of Privacy Act. So we need to know basically how things are going, with privacy protection among public bodies. We can't be flying blind, we need to know what is going on with privacy in order to oversee the Act effectively. If we know what is going on, we can spot trends, we can see types of problems that might be occurring over and over again and intervene. There may be situations which would call for us to initiate an investigation right away as soon as a breach is reported to us. Up to date there has been some degree of voluntary reporting by public bodies to our office when they've received a – they've experienced a privacy breach but it's been not particularly common and very inconsistent and in terms of Ms. Stoddart's question, I believe it was under what circumstances would we be – would a breach be reported to us and who would do the notification? If – I believe that a breach should be reported to us on any time that individuals are being notified of a breach. So if a breach is of the minimum threshold of significance to - so that the public, the people

whose information it is must be notified I think it would be appropriate to notify us as well and –

Chairman Wells: When the member who – the person whose rights were affected you mean?

Mr. Murray: Yes, the person whose rights were affected they should be notified and we should be – the breach should be reported to us as well. Now the person may wish to file a complaint with us and ask us to investigate the breach or it could be a situation if it's a very serious breach we may not even want to wait to receive the first complaint. We might want to say "This is – we need to jump in here and do an investigation" and that would be again tied to the idea of doing an own motion investigation as we suggested earlier. In terms of who should be notifying affected individuals about a breach of their personal information, we believe it should be the public body whose information – who held the information because they were – they would be the ones that have most likely that the contact information for the individuals, might have a relationship with the individuals already, would be more in a better position to describe what information has been breached and the circumstances of breach.

Chairman Wells: And the knowledge of the extent of the breach.

Mr. Murray: Exactly. So they would be the ones to do the notification. Now when a breach is reported to us, we would also be in a position to help them in terms of giving them feedback or suggestions or advice as to some issues that may come up regarding notifying affected individuals about a breach because there are situations where – you know, if you got a lost flash drive and there is – and it's like everybody in Newfoundland MCP number, you don't want to be phoning everybody okay? You don't want to be sending everybody a letter in the mail, you may as well just put some media – notices in the media, put out some news releases and have the Minister come out and say "Look, we've had a serious breach" that type of thing. So there is situations where individual notification by letter or phone call would be appropriate. There are other situations where the sensitivity of the information might – you might decide that – for example, in the personal health information world, there are situations where the sensitivity of the information might suggest that 'Well the breach is been contained, we know it's not going to get any worse and we've gotten the information back. So we are going to ask the person's physician to notify them on the next visit.' Something like that because it's – you know,

psychological testing or who knows, they want to have someone who the person trusts who is there on a face to face situation. There is all kinds of different ways you can approach it. You want to do it as quickly as possible but you might – you need to consider other factors as well about how to go about it. So, -

Commissioner Stoddart: Do you think that many of these details should be encompassed in future legislation? Details about breach reporting that you just mentioned. Do you think that any future legislation if it does approach the topic of breaches it should also give some specificities about remedies by the public body – we know if you've been following the – some quite large breaches at the federal level, the federal department offered I think credit monitoring for a year and perhaps something else. Do you think that there should be a statement that the public body should offer support in mitigating measures or something like that?

Mr. Murray: It might be appropriate – so I guess it's something that we haven't encountered yet ourselves, a situation where that might be necessary but of course we haven't had the legislation to go through to either. So it's been a bit of a chicken and egg thing or sort. I guess it hasn't come up for us

but it might very well be a good thing to do if we are going to build this into the legislation that sometimes there are measures that the public body could take to help mitigate the impact of the breach and perhaps there could be some provision in there to say that public bodies should take certain measures to mitigate the impact of the breach if possible but I couldn't – we haven't developed anything in detail on that.

Commissioner Stoddart: Okay, thanks.

Mr. Murray: You're welcome. Finally in the privacy area, so I mentioned earlier, we are also recommending that the commissioner be given the authority to conduct audits and this will be an audit not only of privacy practices but the privacy and access to information practice of a public body and this we – I would envision that we might – this is sort of off the top of my head that we might do something like a half a dozen random audits – you know – just pick a half a dozen public bodies per year to audit their privacy or access to information practices or we might in addition to that perhaps if issues have arisen such as we discussed earlier, if there is allegations that certain category of requestors are always getting their information on the last day, that might be something we might – and it's always coming from one public body. That might be

something that could be subject to – of an audit to say “Well, let’s look at all the different types of requestors that – how you categorize them at this public body and what are the time frames and we may be able to find out whether some people are being treated unfairly or singled out in some way.” So there is things like that that you could certainly catch in – which would help with our oversight of the Act and make it work better for everybody.

Chairman Wells: And presumably if you going to do an audit of a public body, you saw a reason to do an audit for protection of privacy reasons at the same time it would be convenient to carry out an access audit.

Mr. Murray: Yeah, you could do both.

Chairman Wells: You could do both at the same time, save money and time by that way. Also presumably that if you are going to have that power and responsibility, you would need additional resources I assume?

Mr. Murray: Yes. I don’t think it would be huge but – you know again, if the committee recommended that something like this was appropriate, we would have to –

Chairman Wells: Your office would have to be –

Mr. Murray: In discussion about that.

Chairman Wells: Meaning you couldn't have you running off doing 5 or 6 audits and that taking half the capacity of your office.

Mr. Murray: No, you wouldn't be able to do that, no.

Mr. Ring: That won't do much for timelines.

Mr. Murray: No, that's right.

Mr. Ring: Can I just mention one more point if I can just go back to breach reporting, it's just a very practical thing that – and but it's been the experience of our office that in the past, we have some public bodies under ATTIPA and some custodians under PHIA that are very, very good – one of the first things that would occur on the significant breach is, our phones would start ringing and we would be briefed on it and we would be able to have our staff engage with the public body staff to look at containment, mitigation, talk about notification and all the rest of it. And in a number of other occasions, the first

notification that we've had would be someone's like Mr. McLeod phoning my office and saying "Commissioner Ring, are you in a position and prepared to comment on the recent breach of public body such and such?" and I had to say "I am sorry, I have no idea what you are talking about." So, I think the requirement for reporting at least significant breaches to our office I think would go a long way in raising the confidence of the general public about the utility of the office and the purpose it can serve as well at – you know, there is been I think a couple of other occasions where there is been – you know – the press releases were 'The commissioner's office has been advised' but we only get a phone call 5 minutes before the press release telling us there is going to be a press release about a breach but no detail about – and so my concern about that was, that people that would have been affected by this breach would say – could say that the commissioner's office is been notified so therefore there is going to be an investigation therefore I have no requirement for me to make a complaint and miss out on their right because of the illusion that we were informed in fact we were not, we were informed that there was going to be a press release.

Commissioner Letto: Is that a real case that you are drawing on that?

Mr. Ring: Exactly.

Commissioner Letto: Yeah?

Mr. Ring: Yeah, significant case, yeah. And it basically ended up following day that our office put out a press release clarifying what is and what is not notification and in fact we welcomed complaints from the general public that were affected by this once they were notified. So, practical issue but it's a confidence issue as well.

Commissioner Stoddart: Thank you for these comments. I would like to ask a few questions about things that you haven't commented on. The definition of personal information in I believe it's Section 2 talks about recorded information. Elsewhere this phrase has called for – has elicited calls for reform because by limiting to information that is recorded, there is a fear now that in this technological age when information can exist by itself without it being technically recorded it just exists in some different scientific forms, that this definition may be too limitative. Have you considered that or ...?

Mr. Murray: It has not come up –

Commissioner Stoddart: Okay.

Mr. Murray: So, what type of information would you be thinking about?

Commissioner Stoddart: Perhaps - well, the usual one is we talk about –

Chairman Wells: In the cloud.

Commissioner Stoddart: Well, just – yes, Mr. Wells is fascinated by information in the cloud which may or may not be recorded but the usual classic example is genetic information, that you have a provision that looks like it could relate to genetic information in most cases but, the genetic information itself is not recorded I guess, a piece of skin, a genome in its physical manifestation. So, these are big questions I am just putting them out, if you would like to come back to it.

Mr. Murray: I would think the genetics piece on The Personal Health Information Act I would think would be the one that would come up in the genetics context. I would think it would be

probably custodians of personal health information that would

–

Commissioner Stoddart: Right. But let's say increasingly law enforcement, -

Mr. Murray: Okay.

Commissioner Stoddart: ...is using genetic information and may have some of your genomes from, I am not sure what the technical issue is but you know – residual skin deposit you've left on, yes.

Mr. Murray: It's a sample basically, it's a skin sample or a hair sample or something – is that information.

Commissioner Stoddart: I've left a hair in the bar and I am being wanted for murder, it is technically not recorded information and has nothing to do with the health authorities.

Mr. Murray: Okay, right. I wonder if the definition is there to – because of the typical access to information scenario – you know – you need to be able to request access to information that exists in some recorded format. So I suppose you could

look at some sort of tailoring that the definition to deal with those types of situations.

Commissioner Stoddart: Well, maybe you could give it some thought because – you know, these reviews don't come up very often and technology moves extremely quickly –

Mr. Murray: That is the thing. That is the whole thing, I agree.

Commissioner Stoddart: Another question is, I wondered if you thought the Act was clear enough to allow you to deal with group complaints either a group of people coming together with not identical but highly similar complaints or a mass of people increasingly in the age of internet and social media and so on will choose one person to go forward and then determining or settling, or taking their case to court would determine the fate of the other 50,000 let's say and as public bodies turn to the use of social media, they are largely present on the internet and so on. I just wondered if the law needed to say explicitly that you could for example take one complaint and then eventually your final determination or the determination by law would apply to the other 50,000 in the group or...?

Mr. Murray: Again that goes to what kind of format of oversight you would want to adopt because with the Ombuds model when we've done privacy investigations, we have received complaints from various parties and we have just done the one investigation because I think we've got the flexibility on how to do that type of thing. If we were given order power and it was more of a further down the spectrum or the – of quasi-judicial, maybe we would need more specific language like that.

Mr. Ring: For the – just the way I did that Sean, just under the Personal Health Information Act, but the principle is the same that for the breach that ended up in prosecution in Western Health, we got I believe 35 complaints and we were doing the one investigation but we've discussed that with each of the applicants and they are very happy to proceed in that matter. So, it would be one report, one investigation but 35, 36 different people will get copied in the report.

Chairman Wells: And will accept the result as a copy of their – as a resolution of their complaint?

Mr. Ring: To their - exactly.

Mr. Murray: Yeah. Well I mean, with PHIA, with ATIPPA, there is nothing further they can do with our report anyways, so it doesn't go to court, there is not no appeal or anything like that so, yeah.

Commissioner Stoddart: Okay. Thank you, I've got some more questions, I wonder if you'd given any thought to the usefulness of a clause which is appearing more frequently that allows you to cooperate with other jurisdictions either both in Canada and abroad and for that purpose to share information that otherwise would not be either accessible to the public or personal information. I am thinking of future joint investigations or examinations of cases that you might like to do with another province as we move to a world in which increasingly the jurisdictions we know through the digital networks are joined up, share information, can access each other's information certainly for law enforcement and again, it just takes one mistake, one rogue employee and it – I am just wondering if it would be useful for you to be able to let's say cooperate with let's say the Ontario commissioner and in that context share information although that you could not otherwise.

Mr. Murray: It's certainly – I've heard it come up in the context of discussions among the different oversight offices across the country and it's always thought of as a good suggestion that would assist with oversight of the legislation in each jurisdictions so, sounds like it would be a positive recommendation. I can see it coming up here in the personal health information context more quickly than probably in the ATTIPA context because you see more – you know, it's just the way it works with people going to other jurisdictions from here to receive medical treatment and things like that. You get health information going across provincial boundaries quite often. So – but it could be very helpful in ATTIPA as well if that type of information was also flying over provincial boundaries.

Commissioner Stoddart: Thank you.

Mr. Ring: We have had the experience of dealing with applicants that living outside the province and have been interacting with four or five commissioner's office including this one in Newfoundland looking for similar kinds of information and a particular applicant will say "I suggest you collaborate and get information from Commissioner Ring in Newfoundland and commissioner so and so in X jurisdiction." So, it's a real issue that you are bringing –

Mr. Murray: It's true, it has come up.

Mr. Ring: ...we've not had significant amount of experience with it and to date we have not had the opportunity to actually partner or share with other jurisdictions.

Chairman Wells: Okay Mr. Murray continue.

Mr. Murray: All right, okay. I would like to carry on now with part D of our report – our submission which is the other recommendations that didn't quite fit into any other categories and some of these recommendations would not necessarily require amendment to the ATTIPA. Some might require some legislative action if they were to be followed but some of them are just a way of practice, how things are done. The first one is 'Duty to document' and this is a concept that has since to have come to the fore in the access to information world in the last few years. Hearing more and more about it from other jurisdictions and we've listed a few examples of reports that have been done by commissioners from British, Colombia, Ontario and Alberta who have dealt with this problem and I guess we haven't encountered specific examples of it to any great degree here although we did –

James McLeod did mention this morning about filling an access to information request and finding that no emails had been sent or received and just wondering about that and I guess the idea is that, is it possible that a duty to document might actually support the aims and objectives of the ATTIPA. In a sense, the duty to the document idea lays a ground work for accountability and transparency. It says to public bodies that you have to document your decisions. So if the purpose of the ATTIPA is to make public bodies more accountable but if that purpose could be circumvented either just intentionally or just by a failure to implement such a duty and if the decision making process was verbal and therefore no record of a decision, then the ATTIPA is useless then in fulfilling its accountability purpose and in 2013, all of the commissioners – Access and Privacy commissioners in Canada agreed as part of their resolution that this was - an element of that would be a good idea to implement.

Chairman Wells: And you would confine it to decisions of course?

The duty to document decisions.

Mr. Murray: Precisely.

Chairman Wells: Yeah.

Mr. Murray: So, and I suppose whether that would include – you now, there are some backgrounds to this the decision – I mean, it depends on how the provision was structured but I guess –

Chairman Wells: It's difficult to police and enforce that but if there is a decision going to be acted upon, the validity could be question on this, unless it was documented.

Mr. Murray: I think it's really important, yeah.

Chairman Wells: Yeah.

Mr. Murray: And what – I mean, I am not sure – I can't say that I am an expert in this duty to document at all but I would say that you would want to include decisions of any – of a certain level of significance, you are not going to include a decision to refill a water cooler but it's going to have to be something that is a decision of policy or legislative impact or some significant decision, any significant decision would have to be documented and again –

Chairman Wells: Positive or negative.

Mr. Murray: Positive or negative and –

Chairman Wells: And the decision to refuse to do something.

Mr. Murray: Yeah and I would like to throw it to the committee to consider whether such a provision might be included within legislations such as the ATTIPA or whether it should be in its stand-alone legislation or some type or records management type of legislation, -

Chairman Wells: So, it would seem to be a more appropriate place?

Mr. Murray: Perhaps but I do think that it would support the underpinnings of the ATTIPA if it's the existence why the ATTIPA exists and so that is why we included it here.

Chairman Wells: Okay.

Mr. Murray: Carry on there and the next concept we discussed was trying to fulfill the purpose of Section 69 of the ATTIPA which – that is the provision that establishes the creation I guess of the directory of information for each public body. So, it's the idea that each public body must indicate what information holdings

they have and where they are located and it should say things I think as well like who you would have to contact to get them and all that kind of stuff. I think it's very much in harmony with the open government-open data plan that was announced by government and it's just a practical measure that I think helps fulfill the purpose of the ATTIPA and it dovetails nicely with the open government concept and we just – we are just including it here with the idea that perhaps the committee could consider recommending to government that this particular provision actually be put into force and implement it because to date, there has been no directory of information established by any public bodies.

The next Section I would like to discuss just a couple of recommendations regarding fee complaints. So, we do say in our submission that the fee schedule, the fee – the amount of the fees being charged for access to information it's pretty much in line with what you will see in other jurisdictions and in fact you will see that in – to some – in some respects, it's a little bit less and in terms of the amount of fees that have been charged in some other jurisdiction. Now, there is a – which we haven't addressed in our submission – I mean, sometimes at conferences you do see discussions about whether there should - may be there should be no fee at all and you do see

that tossed around from time to time. We are not – we haven't engaged in that discussion with our recommendation here, what we are looking at here is a couple of things relating to how the fees actually work. One is that, we think that the reference to fee complaint in Section 44 and Section 44 is that provision again which says that we can investigate and attempt to resolve. So we can attempt – investigate and attempt to resolve a privacy complaint or a fee complaint and - but really, you can't do anything else. So, we are concerned about situations where someone could be faced by a very hefty fee of thousands of dollars or even several hundred dollars and it's – they can come to us if we investigate, perhaps we attempt to resolve but if we can't resolve it and the public body is not willing to change their fee even if we think it's totally out of whack, there is nothing we can do under Section 44. So, we think removing it from Section 44 and allowing it – the fee complaint to be included among our review powers in Section 43. We could still resolve the vast majority of fee complaints as we do now but the option would be there for us to issue a commissioner's report again even presuming we didn't have order powers we just have recommendation power, we could issue a commissioner's report and it would at least give either ourselves or the applicant the ability to go to court and have a judge look at this fee and see whether it

meets the – it's reasonable under the ATTIPA. So, we think having it under the review powers instead of this sort of very vague piece in Section 44 where we can't do anything more than investigate it.

Chairman Wells: You really want a judge to be looking into whether fee is reasonable?

Mr. Murray: Well not ideally, no– I mean, I think – that almost never, it would probably never happen, it would probably never happen but if you have it in 43 at least we can issue a report – if we issue a published report that a \$10,000 fee should have been a \$200 fee, I think it will help a lot. So, -

Chairman Wells: There is nothing to stop you from issuing it in that report, is there?

Mr. Murray: But there is nothing – but if you interpret – if you look at Section 44, it says we can investigate and attempt to resolve. Fee complaint being included in that section –

Chairman Wells: You issue a report and say you investigated, you found this, you couldn't resolve but it's unfortunate, it was a

hundred times what it ought to have been. That can't have an impact?

Mr. Murray: What if the applicant – no, because what if the – well it might but what if the applicant says “Look, I really need that information and I’ve got no way to get it now, I am totally out of options. The commissioner has said that this fee is outrageous and period and it’s over.” But I think – even though it might never go to a judge, there is got to be a way that an individual for example can say “Look, I think this fee is actually not a reasonable fee and it’s been charged to me as a way of denying me access to information .”

Chairman Wells: All the judge is going to want to do unless he is given a specific responsibility to do it, he is going to say “This fee is – conforms to the requirements of the Act or does not.”

Mr. Murray: Right and I think that is fine because if it conforms to the requirements of the Act – if someone can come in from the public body and testify that “Look, it took this many hours to collect these information together and to go through the process of preparing it and providing it to the applicant.” If the fee is legitimate in that respect, then yes, a judge could confirm that but if a judge – if someone – if the public body

cannot provide any evidence that it took this long, they can't – no one can testify that it took this long to put these information together or that it couldn't have been done cheaper may be the individual can say “Well, you could have given it to me in a CD instead you printed off 10,000 pages and charged me for it.

Chairman Wells: Even if you didn't have other order making power, what's wrong with giving the commissioner that order making power?

Mr. Murray: That would be fine.

Mr. Ring: Nothing.

Mr. Murray: We will be all right with that.

Commissioner Letto: Mr. McLeod from the telegram pointed out a problem with fees this morning. He was talking about a particular request and the fee would have been I think \$400 and they decided that because the information is disclosed to everybody online within 72 hours that it wasn't worth the Telegram paying the money so that everybody else could get access to it and it would seem that the Act in other places

deals with people let's say who make repeated requests for pretty much the same information that they're denied access to. At the same time the Act is about access to information. I am just wondering if not the \$5 nominal fee which is the price of getting in the door and we've been talking about that separately but if fees at all for looking for these information are just a frustrating bureaucratic nuisance – because when I look at the chart set ATTIPA provides in their reports, the actual fees they collect per year amount to like \$3,000-4,000-5,000.

Mr. Murray: Minimal – it's hardly worth talking about.

Commissioner Letto: So, why have any fees at all?

Mr. Murray: Yeah, it's a good question. I think it's definitely worth talking about. We have – we didn't put anything in our submission about it, I guess it's – there is a million things you could make here and throw in your submission, we've got lot in here, I guess we didn't get to that.

Chairman Wells: Having to pay a fee even as small as \$5 goes to the process ought to at least deter this frivolous, vexatious...

Mr. Murray: And of course the ability is there for them to turn those aside anyways this frivolous and vexatious. They can – and a public body can turn those requests aside anyways.

Chairman Wells: I know but – I mean you know, it's hard for people to keep justifying, turning aside or – on the basis of there being frivolous and vexatious if in fact they are not. But it seems to me to find out a \$5 fee is not in order in any manner.

Mr. Murray: No, yeah. And in fact I've heard some discussion about 'Wouldn't it be great if I didn't have to send in this cheque' and public bodies have talked about 'I've got this cheque' which they are not used to dealing with any more cash – where do I bring this? There is someone in the basement of my building that knows what to do with this \$5, I've got to go find them now. So it's –

Commissioner Stoddart: But if we put it in another way, in the 21st Century in a democracy, why are we charging citizens for information that the elected officials and the public servants only handle and care for as custodians for individual people?

Mr. Murray: That's an excellent point.

Commissioner Stoddart: Could – I wonder if we could ask you to – if you are appearing I think at the end, you are experts on this question, you know this field, what is the state of thinking about charging fees, charging minimal fees, charging for copying in a day when things are on CDs and can be transferred CDs. This approach hasn't changed in roughly 30 years and maybe it's time perhaps to look at it.

Mr. Ring: That's a very good issue and it's one that we can certainly provide some further clarification about for example, when you look at the Access and Privacy Regime for the Irish commissioner it's \$300 to make an access request and – you know, so token \$500 -\$5 is – you know. Could I just add one thing to clarify a point that Commissioner Letto mentioned a minute ago and that was, 'Why would someone have to pay a large amount of money for a fee when 2 or 3 days later it's going to be made public anyway?' that is a recent development here in Newfoundland where the research was done when the Office of Public Engagement were trying to look at ways to populate their initial phase of the open government initiative and one of the things that they wanted to put up there was all the access requests that had been made and so on. So, there was a notion of pushing it out and I think the model that was chosen was the BC model which is –

but it's new here and when you look at large amounts of money, it does seem very unfair. So, -

Mr. Murray: But it's – there is no reason why – I mean if they are disclosing these information after three days, there is no reason why they couldn't wait a little bit longer so that for example a journalist would have the opportunity to use the information first before it's put online. I don't see any reason why that couldn't happen.

Chairman Wells: Yeah, particularly -

Commissioner Letto: Or you had no fee you could just put it up.

Mr. Murray: No fee – but I mean, still from the journalist standpoint though even if they didn't pay a fee, it's there online, their competitor sees it–

Commissioner Letto: Resourcefulness that – yeah, fair enough.

Mr. Murray: Yeah, they've put the work and research into getting the story and filing the access request and following it, they get the information and all the other medias always get it the

same day, they might throw up their hands and say, “Why bother because I am trying to get – sell a newspaper here.”

Chairman Wells: Well that’s what Mr. McLeod did. That’s it yeah.

Mr. Murray: Yeah. So I think that’s something then and whether that would be any – there would be a legislative provision on that or whether it’s something that the committee could look at in terms of a practice. I would like to say one other thing about fees which was referenced in our submission. There is under the – there is a fee schedule and it says that the first four hours is free but it says ‘Here are some of the things that you can charge a fee for; it’s \$25 an hour of person time after the first four hours for locating, retrieving, providing, manually producing and severing which includes the review of records to determine whether or not any of the exceptions to disclosure apply and the subsequent reduction of the records if necessary.’ So, our – we looked at that and we went – this is the – part of that is new from this post with Bill 29, that when they revise a fee schedule as well and the part – one part that is new I think it’s probably the part that is new is the ability to charge someone for time spent reviewing records to determine whether or not any of the exceptions to disclosure apply which to us seems like you are charging them for the

time that they are spending deciding what information you might not be allowed to get now which just seems wrong.

Chairman Wells: Seems inordinate, doesn't it?

Mr. Murray: It does. It doesn't seem fair to – because you could have a situation where someone could file an access request and they might get everything and there would be no fee but someone – the next person might file an access request for the same amount of information probably from a different document and there might be a lot of exceptions that someone has to think about whether to apply those and it's not even charged for whether they are applied but, just the time spent thinking about it. So if it's a really complicated document that they've got to spend time thinking about the exceptions and they might apply some and you might not get as much information as the first person, then you've got to pay more for it.

Chairman Wells: Yeah and there is automatic aversion to it and I saw it the same way when you first raised it the other day, just sort of automatically have an aversion to it but then that time and money wouldn't have to be incurred by government if the request for information were not made.

Mr. Murray: That is true but you've got to look at it –

Chairman Wells: That's the other side of the coin.

Mr. Murray: It is, there are two sides of the coin, you can look at it that way and say look, here is something – here is work that is being performed by a public servant that would otherwise not be done and there must be some way to account for that.

Chairman Wells: It would be an expenditure – it's an expenditure to taxpayers' dollars that would not have been incurred had the request not been made.

Mr. Murray: But I mean, the other side of the coin is –

Chairman Wells: So, there is two sides to that.

Mr. Murray: There is. The other side of course is that the information exists – all of government exists for a public purpose and it's in a democratic society, we need to ensure – it's the whole purpose of the ATTIPA, ensure that people have a right of access to information so that they know what's going on and they know how to vote and they know how to feel about what

the decisions that are being made about them, they are informed. So, it's two sides of this same coin for sure.

I would like to move on to discuss briefly the piece that we have there about the ATTIPA regulations. The ATTIPA regulations, one of the things that the regulations do is that they carve out provisions in other laws which take precedence over the ATTIPA. In some cases, the right is still there but under another piece of legislation. In other cases, the provisions function like an exception to the right of access against which in some cases there is no appeal. Public bodies which are responsible for these various pieces of legislation should be able to explain – I propose to the committee although somehow there should be a process to account for and to review I think whether there is a necessity to maintain each one of the provisions being in the ATTIPA and overriding – being paramount over the ATTIPA. We have proposed a couple of ways of doing this again, perhaps the committee could invite the departments to come forward and make their case, we also suggest that perhaps there should be some sort of automatic process every time the ATTIPA is reviewed that all of these things are looked at and there has to be an assurance that they continue to be relevant. We've given some examples there where in fact that the legislation has changed and the references are not the same

any more, there is situations where these weren't included in the regulations to begin with and I would question now – an example was in the Fish Inspection Act whether they ever really made sense to be put in there in the first place and I don't know what process went into putting them in the first place – was it just a wish list from different departments and it was just automatically put in there or was there a great deal of thought given to the inclusion of these different provisions being put in the regulations. So, -

Chairman Wells: Without specific legislative provision or authority for this committee to do anything, it can only comment on it and most I could do is recommend that the Section 74 be added by – be changed by adding a Sub-section that would require all authorities – the authorities responsible for the administration of those Statutes – those 24 Statutes to make a case for their continued – to the next review, make a case for their continuation in the schedule to the regulation or else they would - the committee would recommend they be removed.

Mr. Murray: Yeah, yeah.

Mr. Ring: I could suggest that that kind of recommendation could be accompanied with the recommendation that it could be done in conjunction with the commissioner's office because we were looking at it from the perspective, if you had an amended piece of legislation that maybe irrelevant for – because of our interpretation of various Sections of the Act to do that work in conjunction with various departments. Not sure exactly – didn't think much about it but –

Chairman Wells: If you are – if as Mr. Murray is suggesting, the committee should - and I am sure we should invite the authorities to do that, it seems to be a bit beyond our terms of reference at the moment but the most we could do at this stage I think is make a recommendation for legislative amendment that would provide that – provide for that in future reviews.

Mr. Murray: Yeah, that would be fair enough, yeah, okay. Just - we are getting down to the end here now. Just wanted to briefly reference again, the review the idea that we have in our submission that the commissioner should have the opportunity to review draft amendments as well as the transitional clause. We have found the transitional clause in Bill 29 which is Clause 34 to be a cause of confusion and it's

not – it's certainly – it's currently one of the subjects of an ongoing court case as to which version of the Act should be used and it's – we think it should be straightforward however it hasn't been. So we believe that it's important to have a transitional clause which is easily understood and operates as intended and along in the same vein, we are understandably very interested in the mechanics of the legislation, -

Chairman Wells: So that issue is before the court at the moment?

Mr. Murray: It's - yeah. There is going to be –a court will now determine how to interpret the transitional clause and by that they are going to be determining which version of the Act applies to a case before that judge, whether it will be the version of the Act that existed before Bill 29 or after Bill 29 and it –

Chairman Wells: I've read this Section and it appears – I can't make a determination that there is an ambiguity but it appears superficially that there is an ambiguity there.

Mr. Murray: Yeah, I would agree and I think it – there is a sensible way of going about having a transitory clause but I think the

way it's worded right now you could interpret it in one of two ways. So, -

Chairman Wells: So you are suggesting we should make a recommendation for legislative change to remove that?

Mr. Murray: Well, I would suggest that if the – presuming that the ATTIPA is going to be amended again and there will be another Bill amending the ATTIPA, there will be a new –an opportunity for a new transitional clause and I think that some attention needs to be paid to that. We didn't have a chance to see it before Bill 29. As soon as we saw Bill 29, we said to the people at the – involved with the ATTIPA that 'You are going to have a problem with this and here is the exact problem we can anticipate' and it's the exact problem we are now in court with right now, we are intervening because – and we are intervening because we are trying to say, "Well, this is how we think it should be interpreted just so that it makes logical sense" but we agree that there is an ambiguity there.

Chairman Wells: At Sub-clause 1, Sub-section 1 appears to set a standard basically, -

Mr. Murray: Yes, yeah.

Chairman Wells: Sub-section 2 creates a little confusion?

Mr. Murray: It does, yeah.

Chairman Wells: Yeah, that's what I saw when I went –

Mr. Murray: Yeah. So in the same vein again, we are very interested in the mechanics of the legislation and we've proposed that we should be – we should have an opportunity to comment on all legislation that impacts access and privacy but even before the – any amendments pass we were hoping to get the committee's support for the idea that we would have an opportunity to view the draft legislation before it goes to the house of assembly so that we can look at the mechanics of the legislation because we have throughout our submission, we've identified a few situations where the timelines don't work out or the appeal mechanism is not there or it's the wrong appeal, it's appealing to us when it should be to the courts or something – you know, there is some errors I think in terms of matching one thing to the other that – I mean sure, we could miss something too but we have a unique perspective on it and we can have – we have the oversight lens that we can apply to it that I think we might be able to be of assistance to –

because we just want to make sure that the Act is going to work well whatever becomes through a future amendment.

We want one that's not going –

Chairman Wells: That doesn't change into policy review the fact that it acted it just means trying to avoid any anomalies.

Mr. Murray: That's all, that's exactly it, yes.

Chairman Wells: Doesn't seem to be an unreasonable recommendation.

Mr. Murray: Yeah. So that's pretty well it. We had a couple of our miscellaneous things if - but if there is anything else – sorry, there was one other thing we were going to mention. We did have a recommendation in there which did come up earlier about the commissioner's term of office and I know you had some discussions with some other people earlier, I don't know how you feel about advocating for a longer term of office here if you are going to be appointed to – again, but it's a funny position to be in but I think we all agree that the 2 year appointment period is out of step from what it should be. There is obvious problems with it in terms of perception and as independent as –and as strong a commissioner as you can be

with a 2 year appointment that you could – you always invite the possibility or invite the perception from time to time that maybe someone might think you are not being –

Chairman Wells: You cause the perception.

Mr. Murray: Yeah, just the 2 year appointment period and as commissioner Ring has said himself and many others have said that – you know, we've got two complex pieces of legislation to oversee here and if a new person came in with a 2 year time frame starting from scratch which can happen, you can get a commissioner starting from scratch in their familiarity with these – both these pieces of legislation. It is a big challenge to undertake to – and you could be gone again in 2 years and someone else come in. so, it's – you know, -

Mr. Ring: In my particular case is a good example I suppose four 2 year appointments back to back and during those - that time period, we had access and we had privacy and then we had PHIA. So there's always a learning curve – and on the light side, I've had folks say to me in a social environment 'They've got you on a short chain' and – but it's I think representative of the optics of a 2 year term.

Chairman Wells: Like that demonstrates what the perception –

Mr. Ring: Yes, exactly.

Commissioner Letto: And it's interesting, I am glad Mr. Murray brought this up. What does it feel like to have this kind of a role – an oversight role and it lasts for 2 years, it may or may not be renewed?

Mr. Ring: Well for me, this is a great job, it's an important position and I've been enthusiastic about this position from the first day and I still am to this day in fact, as time went on I have gotten more enthusiastic about it but the fact is if I – you know, I am at an age where I am going to retire in the very near future anyway, probably be on to 2 years but if I was like some of the other statutory officers they are 40-50 years old, it would be more of a concern in terms of continuity with your life and your career and so on. So, for me it works, I don't particularly like it because you are going through the – I guess a bit of an analysis, it's debated in the house every 2 years, there is really no need for it and –

Commissioner Letto: How do you feel though about the perception, you said that people will –

Mr. Ring: Oh, the perception is – yeah and again, I am - I've been around the block, I am the big boy and the perception is you are on a short chain and that's okay, get on with the job. It's – we recommend the change to this in the first review, it didn't occur for whatever reason and this – it's really no big deal to me –

Commissioner Letto: But the further you take that perception further, that people might say that you might feel inclined to be kinder to the public bodies than you would otherwise and I am not suggesting that you are but that's where the public perception and confidence about the whole thing starts into it it seems.

Mr. Ring: Exactly - but - that's a very good point but I think the - I don't think there is many people saying that about me because of the reality and my willingness to try to do the right thing when the request for reviews requires hard decisions, always quite prepared to make them.

Commissioner Letto: Would you wish that your successor – you said you will be around for a while but your successor would have longer than a 2 year term?

Mr. Ring: Absolutely. I personally think that it should be agreed with Ms. Rogers it should be at least 5 years to go beyond the term of an elected government. So, the – you are not – the perception, you are just there because this particular government wants you there or not is not valid. So, yeah it's –

Chairman Wells: There is a - I should make one further comment and I would say the outset of all of the representations we've heard in the public hearing and all of the ones we've read that have written submissions, there is a good deal of commonality in the views expressed as one might expect but the one thing in respect of which there appears to be unanimity is commissioner's term of office. All appear to have expressed apprehension about the consequences of this and the consequences you've identified some of them now, 2 years it certainly creates a perception that the commissioner is susceptible to pressure to make decisions more favorable to government that perception is created. The other aspect of it is even if you have a 10 year perception, there should be a prohibition against reappointments to have a longer term because the prospect of reappointment could itself cause a similar –

Mr. Ring: Totally agree, yeah.

Chairman Wells: So you agree with that?

Mr. Ring: Exactly Sir, yeah.

Chairman Wells: Thank you Mr. Ring.

Commissioner Stoddart: I would like to ask perhaps what is a question about a final issue and it's in your submission, Sections 86 and 87. I believe this is a very important issue because there is a significant part of Newfoundland and indeed Canadian workers that are not protected by privacy legislation. I am wondering for the benefit of the committee and those who may be watching it, could you explain to us what that problem is.

Mr. Murray: That's a very great interest of mine. I have noted since our office opened in 2005 or since the legislation came into force in 2005. We from time to time would receive a phone call from an employee or even some cases an employer wanting to discuss what legislation applied in the employer-employee relationship in terms of privacy and in our jurisdiction there is no legislation. Now what you will get

except at the federal level of course, there is a legislation that applies to federal employees to protect their privacy and federally regulated industries that which protects their privacy rights, but at the provincial level, some provinces have legislation which has been deemed – and you will correct me on this Commissioner Stoddart but has been deemed to be substantially similar to the federal PIPEDA or PIPEDA legislation which regulates the private sector – privacy in the private sector and this legislation has been acted at - enacted at in some provinces covers not only the ground that PIPEDA covers but it also protects the privacy rights of employees in the private sector and commissioners in those jurisdictions do have oversight over that legislation and there is been – issues have gone to Supreme Court of Canada that from Alberta for example on that. Important issue about establishing what the privacy rights are of people in the work place and here in this jurisdiction, if you are an employee of a non-federally regulated private sector business and you are not a public sector employee, you are not an employee of a public body for example, you are just working for a business out there in the community, there are no – there is no piece of legislation which says what your rights are as an employee in respect of how your personal information should be treated or whether you should be subject to certain types of monitoring of your

activities or whether your keystroke log should be logged for everything you do at work, whether your every movement should be watched and recorded by a video surveillance or other types of recording devices. A whole host of issues in relation to privacy in there and there are no – there is no piece of legislation which covers it. The approach that has been taken in some of these provincial jurisdictions as I said is to enact a piece of private sector privacy legislation which would – takes over the entire sphere of PIPEDA and also adds in this the privacy – protecting the privacy of private sector employees. In a small jurisdiction like Newfoundland and Labrador I don't think – and this is just my pitch for what I think might work, I don't know if we need – we don't necessarily need to supersede PIPEDA I think the federal privacy legislation that governs the privacy rights of consumers in the private – dealing with private sector businesses is there now, it's well established and it can continue to work but I am wondering whether we can find a legislative remedy to set – to carve - that deals with this particular area of protecting the private sector, the rights of private sector employees. I don't think that approach has ever been taken in any other jurisdictions to just enact a piece of law that covers the private sector – the rights of employees in the private sector but I would love to have the opportunity to have a discussion with

someone in government about that to see whether that could be - whether that would be a useful solution or not.

Chairman Wells: There is two things that come to my mind listening to your comment. One is that if you are going to protect private sector rights of employees only in the private sector, proper place for that is the Labor Standards Act.

Mr. Murray: It could very well be a section added to the Labor Standards Act, yeah.

Chairman Wells: If that's what you are looking at.

Mr. Murray: I thought about that too, yeah.

Chairman Wells: Labor Standards Act would be an appropriate place to do it. If you are looking at giving privacy protection generally, we do have a Privacy Act in this province.

Mr. Murray: We do, yes and employees –

Chairman Wells: And it creates a tort on breach of privacy.

Mr. Murray: I am familiar with it and employees could use it in theory if their actions were monitored or subject to surveillance or something contrary to their wishes. They could in theory use that Act but they would have to hire a lawyer and their job would probably be over for all intents and purposes.

Chairman Wells: Yeah, well in – it seems to me that Labor Standards Act is where that belongs but I am not sure you can create a special preference for a person who has an employee. What about employee's status? What about persons who don't have employee rights? They've got – they have a measure of similar protection.

Mr. Murray: But the privacy Act that exists – I mean, you could sue your neighbor for installing a video camera in your backyard or something like that – you know, so, -

Chairman Wells: For any breach of privacy and the courts will be developing over the longer term what constitutes that kind of a breach of privacy.

Mr. Murray: But I don't think you want a piece of legislation that is going to regulate how you interact with your neighbor to that extent. I think that the privacy Act is there as you said, it

provides a tort but in a work place, employees don't really have a whole lot of leeway. They don't have – if they were to try to sue their employer as I said, the employee-employer relationship will pretty well be done. And so not a very good impractical solution for employees which is why that Act is almost never been used I think.

Chairman Wells: But if you are going to confine it to the employee status, I suggest do it in the proper place is the Labor Standards Act because if you don't do that you are creating privacy rights to standards one for those who have an employee classification and one for those who don't.

Mr. Murray: I agree that it's – you could easily put it in the Labor Standards Act, I think you could – you would then want to have a discussion even though there is a – there are people that oversee the Labor Standards Act, you would have – then want to ask the question, 'Do you want those people to oversee that particular section of the Labor Standards Act who don't have any particular background in privacy?' or just because the provisions are in the Labor Standards Act, I would think there is no reason why we couldn't oversee that one part of the Labor Standards Act.

Chairman Wells: That's quite true.

Mr. Murray: Yeah. So I would love to have the opportunity to have that discussion with somebody to see if that idea could go somewhere.

Commissioner Stoddart: Could I just ask, are there other clauses in collective bargaining agreements in the non-federally regulated sector that you may have seen that deal with the privacy rights of unionized different land employees?

Mr. Murray: I haven't encountered one although we've – when people do call us, that is one of the things we ask them, "Are you a unionized employee? Is there any chance that your collective agreement might address it?" So far, anyone who is contacted us that is never been the case but there could very well be collective agreements out there which would reference it.

Commissioner Stoddart: Thank you.

Mr. Murray: You are welcome. I am done.

Chairman Wells: I don't know if we mentioned this in the last meeting we may have but I just – if, it's at the tail end of your presentation, you referred to the Auditor General again there,  
-

Mr. Murray: Yes, right.

Chairman Wells: And you've suggested that we deal with it. My immediate reaction on looking at it is that the mere fact that that section was in Bill 29 and it amended the Auditor General's Act, it amended the performance of the Auditor General in his capacity as Auditor General not a privacy or access to information rights and it amends the Auditor General's Act not the ATTIPA. So, I think –

Mr. Murray: I trust that your – I thought your mandate included Bill 29.

Chairman Wells: No, it doesn't –

Mr. Murray: It doesn't –

Chairman Wells: If you look at the specific mandate, it doesn't ask us to assess Bill 29.

Mr. Murray: Okay, the Bill 29 amendments are – I can't remember what it is right now after –

Chairman Wells: Yeah, what the terms of reference say is 'The committee will complete an independent, comprehensive review of the Access to Information and Privacy Act' that's it. That is our – that's the fence around what we are going to do. And then it says 'Including amendments i.e. amendments to the Access to Information and Privacy Act as a result of Bill 29'.

Mr. Murray: Fair enough, just thought we would throw it in there because it was in Bill 29 so I thought we will throw it in there. We got the kitchen sink in there if you will. We got a lot of stuff in here and we are hoping that you will give due consideration to everything we've said.

Chairman Wells: Well, Mr. Ring and you Mr. Murray and no doubt with the aid and assistance of people in your office, have prepared and submitted to us what we consider to be a very thorough presentation covering most of the aspects at least perhaps all of the aspects that would be of concern to this committee and we appreciate very much the effort that you have made in causing this to be prepared and the effort you

have made in being present and presenting it and your continued interest in what the committee is doing and we thank you very much for it. We, as you know from comments the last day are going to ask you if you would come back again either at the end or very close to the end of the public hearings on this and give us your reaction to what you've heard from others because we think essentially you are correct, that when government is considering changes to legislation they would be quite wise to consult your office to see what potential adverse consequences might flow from the proposed legislation. So before we are going to be considering any recommendations, we think it would be helpful for us to have your comments on that and we invite you to follow what's happening with this committee and be ready to respond.

Mr. Murray: We will certainly do that.

Chairman Wells: We understand you will be – I just wanted to record that invitation.

Mr. Murray: We look forward to it.

Chairman Wells: I –

Mr. Ring: I am so sorry.

Chairman Wells: No, that ends that, so you have something you want to say, go ahead.

Mr. Ring: Yeah, I said our intention to monitor all of the presentations of the – to the committee and so we've got firsthand information about what's being presented and then we'll make appropriate commentary. The other point I would like to make is that there is various pieces of information that we said that we would go back and provide – do some further research and analysis and provide to the committee, would it be okay if we did that in written form and then be at the call of the committee if they are to appear – if there is required information in the meantime that –

Chairman Wells: That would work very well Mr. Ring, yeah.

Mr. Ring: Okay.

Chairman Wells: The only other think I was going to say is that, I suggest that you not be disheartened by the fact that there are not overwhelming crowds applauding your representation, in fact you – right now there are two rows of empty chairs as you

are very much aware but these proceedings are being live streamed on the web and people are following it. We know from advisors to the numbers that they are following it by the hundreds at least 5 or 6 or 700 at times. I don't know that everybody is glued to their computer screen to follow it but at least there is some significant numbers observing what's taking place. So don't be so disheartened by the fact that you don't have a huge audience behind that.

Mr. Murray: We are very pleased by that – those numbers.

Chairman Wells: Well, thank you very much gentlemen, we are adjourned for the day and we are adjourned until the committee serves notice as to the next exact date. We don't know what it is yet because we've had those who want to make presentations haven't been speedy in coming forward to speak whether they would like to do it or whether or not they would like to make an oral presentation and we are trying to pilot these information out and as soon as we have it, we will provide notices by the usual processes and certainly on our website as agreed.

Mr. Ring That's great.

Chairman Wells: Thank you again, very much.

Mr. Murray: Thank you, we appreciate it.

Chairman Wells: Thank you.