

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

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Presenter: Edward Hollett

ATIPPA Review Committee Members:

Clyde K. Wells, Chair

Doug Letto, Member

Jennifer Stoddart, Member

Mr. Hollett: Good morning.

Commissioner Wells: Good to see you again.

Mr. Hollett: Good to see you too, thank you for the opportunity to make a presentation. I don't propose to delay you too long, I wanted to...I provided a short written submission essentially as a basis for some other comments that I wanted to make. What I propose to do for the next 10 or 15 minutes is to go through my own background so you have some idea where I'm coming from. The subject which I've really decided to talk about which not access to information per say, but rather a broader question about the political environment and the administrative environment that I think will address some of the issues that you raised yesterday and then some ideas that I've had that as it turns out are consistent with where we've been going so far on how we can address some of these issues.

I'm a public relations and public policy consultant, have been for about 25 years. My experience includes seven years as a special assistant to the premier, seven years a reserve public affairs officer with the Canadian Army and several positions in the public and private sector. Since 2005 I've been writing a daily blog on politics in

the province, I've written extensively on access to information issues and public administration. And the information that I base my comments on are not only my own academic background as a political scientist and historian, but also on private conversations with current and former public servants, members of the House of Assembly and political staff.

It really reflects on an abiding interest I have in government and the operation of government. And the starting point for that discussion has always been a question of how government works and why. So for example in the question Mr. Wells that you asked yesterday about why does it take 30 days to do something that should only take a day or two, that's a question that I ask. When I see an increase in the number of changes in the senior public service I wonder what impact that might have. That's the starting point of my discussion, that's where I came from on this.

I do have some extra experience with access to information request provincially and federally. I've been on both sides of the process and I do have some limited experience as having been involved in representing a third party in one instance but that's the extent of my interest. And that my real concern here, my real curiosity is about how government works.

As I noted in my brief, the defining characteristic of provincial administration since 2003 has been the fusion of the public service and the partisan political staff at the senior levels and the infusion of decision making at the highest levels with a partisan political consideration above all. That coupled with a natural tendency of government to centralize control and 'control' is a key word, the lack of discretion and lack of ability to act at lower levels I believe explains a number of things about access to information where we've come over a very long time.

I don't want to confine my remarks specifically to Bill 29 because in some respects aspects of where we are today are very different from where we were in 2003-2004 as I'll explain to you in a minute. My own experience I think we've gone through a number of phases in the way government has responded to access over time and there are some very distinct position, time spans you can put on the way government has tended to approach these issues.

I do think though that my point about the fusion of the public service and the partisan and the higher degree of centralized control explains in a very general way the sorts of things that we've seen and some of the public issues that we've seen. One of the most notorious

examples, a request for speeches in the Premier's office is met by a request for \$10,000 which is preposterous on the face of it. The purple files episode with the telegram that you should be familiar with all of these have been in the public domain, or Craig Westcott's experience.

It also explains to a certain extent I believe why cabinet secretariat began refusing requests for polls which are covered quite clearly in the access to information act as something that must be disclosed. And yet we saw the creation of a reason for withholding polls, that they contain proprietary information of the company conducting the poll. That's not the only time that the current administration, the Conservative since 2003 have tried to withhold polling information even though it's a matter of black letter in the Act. The premier since 2004-2005 refused to release polls that his office had commissioned just simply because he didn't want to.

Commissioner Wells: Mr. Hollett, there are polls then there are polls. There are polls that are indeed proprietary information. I can think of one for example the CRA poll in Atlantic Canada is a private business organization that conducts polls covering a variety of topics that may change every quarter when they do it. And then there's always a political poll every quarter.

Mr. Hollett: Sure.

Commissioner Wells: They make...that's their business, they have subscribers who buy those polls regularly. If Government had it and it could be released through access to information, the proprietary value of it would disappear. On the other hand, polls where government funds were expended to achieve them...

Mr. Hollett: Yes.

Commissioner Wells: Clearly Government funds specific polls for which money that the government contracted to have done is a different thing.

Mr. Hollett: Those are the ones that we're talking about here.

Commissioner Wells: Okay, that's what I wanted to make clear.

Mr. Hollett: That clear...wanted to make that clear, those are the things we're talking about.

Commissioner Wells: That's the ones you're talking about.

Mr. Hollett: These are the ones that are done for government purposes these are not ones that I commission for my own purpose and it happens to be in government's possession.

Commissioner Wells: Yeah.

Mr. Hollett: I'm talking about a poll that was done for government purpose, paid for with public money.

Commissioner Wells: That's what I wanted the record to indicate.

Mr. Hollett: Just to make it absolutely clear that's what we're talking about.

Commissioner Wells: Okay.

Mr. Hollett: The extent to which this fusion of the public and the...or the political and the public service component has taken hold I think is reflected amongst other things in the testimony of the former ATIPP coordinator in the cabinet secretariat at the Cameron Inquiry. This became an issue with the couple of the comments that she made are illustrative; the job of cabinet secretary she said is to support the Premier. The Premier was our minister and you know what some people might consider to be an extraordinary involvement of cabinet secretary with an ATIPP request I consider it to be part of my day to day responsibilities. And a little bit later she said, of course you know my executive cabinet secretariat has always consulted on any particular ATIPP request and also the Premier's office is consulted on certain ATIPP requests.

There seems to be increasingly less and less of a distinction about the...may have occurred in previous administrations between the political and the straight forward. In other parts of her testimony at Cameron the ATIPP coordinator acknowledged what I think are the extreme interpretations. This is actually something Mr. Lono mentions as well, they routinely withheld talking points prepared for the use in the House of Assembly on the grounds that they were prepared as advice to a minister.

In discussion you had a moment to go with Mr. Lono, there a couple of point to bear in mind about this. First of all, they largely to contain factual, information, they're often just simply talking point. The sequence of comments about the decisions that were taken and why they were taken, they were intentionally intended for public consumption anyway at the federal level in my experience both in preparing them in dealing with the request for them and in receiving them. It's a very common practice to receive internal media talking points, to be able to access all sorts of that type of briefing material from ministers.

The Acts both at the provincial level and the federal level already contain mandatory and discretionary exemptions to cover the sort of things that would qualify as specific advice to ministers that would not be intended for public consumption, essentially marginal notations or that sort of thing. And yet the practice in this province has been to refuse to disclose any of it, but it also predates Bill 29, it's not a recent invention.

In another instance in that same case, the Access Coordinator saw no problem with simply redacting people's names. Even though the people are identified public individuals in some cases the information

was already in the public domain. It's similar by the way to the...if Ms. Stoddart if you may not be familiar with the request that was made at the Premier's office for a copy of speeches that the premier had delivered. His staff insisted that it would cost \$10,000 to process, the request because the speech is whatever you printed off, manually redacted, photocopied, scanned and either provided as an electronic email or they described a process for a speech that was delivered in public. Somebody who had attended a speech for example by the Premier, as a matter of fact, I'd know this as a matter of fact, attended one of those speeches in Calgary merely had to lean over to the Premier's staff and received an electronic copy of it from her Blackberry.

That's not a logical or sensible response to a simple request for that type of information as the commissioner Mr. Wells will know. In previous times you've handed out those things as readily as you could simply as matters of public information. So the question that comes to me logically is why would any administration want to withhold public information? And it can't seem to me that there's any particular value to it, nor is there...

Commissioner Wells: Was the request for one or two or three speeches or for 300? It may make a difference to the cost.

Mr. Hollett: Well, in terms of the cost yes, it was initially a request as I understand it for speeches delivered from October 2003 up to the time of that request.

Commissioner Wells: And what time was that?

Mr. Hollett: Probably five or six years.

Commissioner Wells: So, there may be a fair amount of work ferreting out all those speeches?

Mr. Hollett: The notion that the speeches had to be redacted I thought was rather curious.

Commissioner Wells: Yeah, well I can't imagine any would have to be redacted; any aspect of it was all done in public.

Mr. Hollett: Exactly.

Commissioner Wells: So there couldn't be any redaction...couldn't support the costs.

Mr. Hollett: There shouldn't have been.

Commissioner Wells: Finding them and gathering them and printing them I can see that's a collection of speeches over five or six or seven years, it might be a fair amount of work.

Mr. Hollett: It might be ... they were all stored electronically, so the retrieval of them was actually quite easy.

Commissioner Letto: Maybe a good practice is a proactive putting them onto the Premier's website as they're delivered.

Mr. Hollett: And this is actually a part of it. If you go through the presentations that I made to you, the written presentation, you can draw all sorts of conclusions that you want but in many cases what happens as a result of this process, and I've heard this from a number of people in the current administration who currently working for government and previously, the administrative process is that you

have to go to get approval to do even the very simplest of things takes a huge amount of time and as a consequence you don't have time to do anything else. So, for example the amount of time it would take to produce a news release and get it approved from a line department can take an extraordinary amount of time.

A lot of the issues that you wind up dealing with in access to information requests are actually transferred over from other areas or other matters of policy. This is the point that I made when I noticed that the largest single number of requests that the department's received in any one year was the House of Assembly. That struck me as being extremely unusual, but it dove-tails perfectly with the information that I have from members of the House of Assembly who said that basically this was...this became a practice, it was a practice in the '80s at one point when the house wasn't regularly opened. But after 1996 it became a very common practice and it was essentially an informal agreement amongst the parties not to place questions on the order paper and instead to use the access to information process.

What the members ended up doing is not just surrendering a right they had to access information, but they essentially created a whole source of work and a whole industry and a whole expense for

government in another corner. And that same sort of thing exists in other places. So many of the things that you see in government access to information requests could actually simply be handled as part of a routine communications policy. I can't imagine...

Commissioner Wells: Would you say there was an agreement amongst the members on the government side and the members on the opposition side?

Mr. Hollett: Yes.

Commissioner Wells: Agreed that the opposition side wouldn't ask questions of ministers as been the practice in Westminster Parliament for centuries, they instead would make access to information requests.

Commissioner Wells: Specific types of questions, questions on the order paper, request for the production of documents.

Mr. Hollett: Okay.

Commissioner Wells: Very specific type of request which is common in Westminster Parliaments and there's most recently a decision in the House of Commons by Mr. Speaker Milliken about the right of members of Commons to expect documents produced without redaction. One of the things in the house administration that I've noticed over the last little while is not just that they don't sit very often, but that in fact many of these sort of things that you might expect members to do as a way of finding out information, those sorts of traditional processes just don't work anymore. Government just won't answer them and members have told me, former members have told me that there's really not much you can do. Even if you stood on your hind legs on a question of privilege it's unlikely to go very far and there may be a...there's not much chance of a ruling in your favor.

I can only rely on this informal information and it is anecdotal I admit, but it does seem consistent with the fact that you just don't see questions on the order paper anymore as a routine matter. That's a very common and very obvious way to gain information. What's essentially been happening across government it seems is that more and more routine requests are being funneled into the access process by one means or another, which is part of it. As somebody who comes from a public relations background I find it very strange

for example...and we go back to that question about speeches that you actually had to go through the process, even today of submitting some form of request somewhere for information that would push forward. In my experience we've tried to push as much of that routine information forward so you just have to deal with it. But it now seems to be a common practice; and it's just simply an administrative practice within the department.

In fact it's probably just as well to jump to it at this point, but in watching the proceedings yesterday the question came up about how long it takes to produce responses to requests and types of requests. So, arbitrarily last night I just went to the government website...to the department, the access coordination office and checked their...the most recent disclosures that they made and I randomly picked two. One of them was a request to the Department of Transportation Works for information about a deed. It took 30 days for the deputy minister to sign a letter advising and requesting individual that they needed to contact the registry of deeds, that the Department of Transportation Works had no such information. I'm baffled to know why it takes that amount of time except it seems people are consumed with other things.

Commissioner Wells: Work expands to occupy the amount of time available to do it.

Mr. Hollett: Or that this was just simply...

Commissioner Wells: Avoidance expense.

Mr. Hollett: Avoidance...there's another example two that I came here. The second one I clicked on was a request from what used to be the Treasury Board Secretariat which is now called I think the Human Resources Secretariat for a list of communications positions, salaries associated with those positions by department. It's a simple spreadsheet, it took from February the 18th until May the 8th to receive a response including in between several requests for clarification. The original request presented in the letter seemed clear enough and I'm still curious as to why it took that long.

It's a very simple thing, that information is stored electronically on spreadsheet; it strikes me as being an inordinately long amount of time. By contrast and in comparison to Mr. Vaughn's comments earlier this morning, let me give you two examples of my own experience, one from 2003 and one from 2006.

In 2003 I made a request of the Finance Department, because it was the easiest way to do it, the Controller General's office, for a list of expenditures under a particular line item in the budget, by the Communications and Consultation Branch. I asked for a list, because it's a simple thing to do, it generally is prepared quite quickly and comes with no charge involved. From the standpoint of someone who is researching it's a very useful tool because it's like digging a test pit. If what I think is there is there I can go looking for it and make a very specific request and if there's nothing there I don't have to waste anybody's time. I got my request within a week at no charge at all; beautifully printed spreadsheet or table and a form came back to me, no charge, no questions asked.

That's essentially the kind of information that Mr. Vaughn and his members are talking about. In my experience within DND and I can point you to an appraisal done by a former colleague of mine, that sort of information request which may or may not be requested for business purposes is actually routine. It is tedious, it does cause some difficulties, but it's not an uncommon practice and it should be provided routinely.

In my second example, I submitted a request to the clerk in the executive council in 2006, June 2006 for a copy of the Orders in Council giving Chief Justice Green his mandate to conduct an inquiry into the House of Assembly, going on in the House of Assembly. I got a written reply within 48 hours on my fax machine with the two Orders in Council and no request for funds.

So, it was possible up until 2006 or so to access information quite simply and quite easily. Almost exactly two years later I submitted a request for a copy of the quarterly CRA poll done and paid for by government. I followed the practice and procedure and sent an email to the assistant secretary cabinet for communications. She replied immediately forwarding my request to the ATIPP coordinator who insisted I fill out a form and pay \$5. And if I wasn't prepared to do that, she wasn't prepared to act, contrary to policy. The stated policy at the time was the same one that applied two years previously.

Her reason, her rationale for...after several emails back and forth that because this information wasn't routinely provided therefore that simple and easy mechanism wasn't available. Again I'm baffled to know that because there's all sorts of information that isn't routinely available, but that's easy to provide simply. My point in illustrating

this is not only to show the connection to the other comments that have been made, but also to point out that somewhere in between 2006 and 2008 something happen in government. There was an internal change in policy that fundamentally altered how they handled access to information requests. I don't know what it was, I presume it had something to do with Cameron, but it seems to be coincidental.

Commissioner Wells: By Cameron for at least Ms. Stoddart may not necessarily be familiar; Justice Cameron conducted an inquiry and it...

Mr. Hollett: Into a particular health issue.

Commissioner Stoddart: Health matter.

Mr. Hollett: It seems to be related to that which would mean the changes were made for political reasons, because I can't find any other explanation for it.

Commissioner Wells: You are talking about a sea change in the culture?

Mr. Hollett: A sea change in the culture. I submitted...

Commissioner Wells: And pin it down to that...

Mr. Hollett: I can narrow it down to within about 12 to 24 months, it seems to be coincidental I have one example I had before and another one sometime after Cameron. And something changed; it became much more restricted and became much, much tighter. There were lots of ways of getting information from government and often times you just simply had to ask a question for the access to information Act isn't the only way. And in my experience with both the federal and provincial governments over a long time on both sides of it, inside and outside one of the key things you do is provide people with information.

In early 2009 I made a request of the Department of Natural Resources for some explanation, just simply to explain to me how the government was proceeding with the process set up in the Abitibi expropriation legislation to compensate those people who had the properties, their assets seized. And the response that came from the department was essentially we can't tell you, because there is a

process. That sounds ludicrous and I can show you the emails back and forth if you'd like. But there seems to have been just a general reluctance to provide information to people. That same mentality is reflected off and I think in news release and all of the things that we would normally consider to be routine activity of government of informing people.

And Mr. Letto will be able to appreciate this the number of news releases that you'd receive in government where the core part of the information, what actually happened, whatever was being announced is often three or four sentences down from the top or three or four paragraphs down from the top. And the most recent style manual the headline on a government news release now these days is something as banal as the government does wonderful things. There is usually some slightly improved variation on that, but that's typically what you'll see. The sub heading is some equally banal piece of information and I think I've gotten somewhat away from where I started out, but I think the key part of what I want to drive at here is that there was a broader culture here at play.

And the access to information that fits into that broader culture it subordinates in many cases just a simple routine act to providing the public with information about what government is doing with these

political interests or with these politically-oriented interests that are designed to make government look good or to change poll results or to get ministers re-elected. That's what I mean by the infusion of the system with the political consideration. For your purposes as well you can date this and I have to go back to 2008, there's a similar episode that occurred and it was a sea change in the way government allowed public servants to speak.

There was a change in policy or there was a particular issue that came up related to the use of sprinklers in personal care homes, it became a public controversy. It was essentially a technical issue that ought to have been handled, a sensible and logical way to handle it, was with the fire commissioner. But at that point the fire commissioner was prohibited from speaking and instead the only person who could speak to government action was the minister even though the minister was quite clearly and quite obviously unfamiliar with the technical issues involved and quite clearly was not the subject matter expert.

Government decided and since then you tend not to see public servants speaking except on background and not for attribution about sometimes even the most routine trivial things. That intense politicization is really...that's become what Mr. Lono made earlier, I

mean that's the kind of thing that we are really talking about in the manifestation of this, and politicization is a terrible word. The extent to which the political pervades everything and whether or not it's conscious or whether or not it's...people are often aware of it, if they're spending their time doing that sort of thing people don't have time to do other things.

When you were speaking earlier about having the Privacy Commissioner's Office, prepare information on how to access information from my experience in government, in the federal government, my limited experience in the federal public service that's actually information that I would expect a department to prepare. How do you get information from us? Well, here's how you would go about doing it. You have all these mechanisms that you can use, one of which is access to information. I find it bizarre that government departments don't engage in this activity and if you speak to communication staff and government these days you'll find that they are often consumed with feeding the ministerial beast and the political beast, and they often don't have time to deal with a lot of these relatively routine simple and straight forward requests. Including straight forward requests from reporters and I find that actually fascinating.

How do you get around that? How do you change it? I'm not sure and we could wait for a change of administration, we may see some changes in September, that might be something that will happen in September, but then there is an election coming and something might change after that. And if as I would suggest to you there have been at least three distinct phases of response - pre 2007-ish, between 2007 and about 2010 and perhaps some different approaches since 2010. It's easy to see that something as straight forward as the administration of an Act like the Access to Information Act can be moved around by political considerations quite significantly in this space of 10 years.

So I don't think that's going to be a reliable source for us. I think in some respects the change of culture inside the government maybe such that we couldn't rely upon that as the sole way of changing it. And I'm not sure that you could draft a statute to do it either. That's why I came back to the conclusion that I reached which is going to sound familiar to you but...

Commissioner Wells: And you say you can't draft a statute?

Mr. Hollett: You can't...

Commissioner Wells: Well, obviously you can't draft a statute that says, "Cultures are hereby change."

Mr. Hollett: Yes.

Commissioner Wells: Okay, you can't be that simplistic, but you can draft a statute that declares the position to be information must be released unless there's a compelling reason not to and then you can spell out what might be a compelling reason.

Mr. Hollett: Sure.

Commissioner Wells: You can provide for a greater role for the commissioner in making orders, compelling release. You could provide for example, much shorter time frames for release to ensure that it was reasonably accessible and the clock wasn't simply run out as far as it could be run out. You could provide for a default position that if it wasn't a release within the time specified the default was that it had to be released.

Mr. Hollett: You're leaping ahead and stealing a little bit of my thunder.

Commissioner Wells: Okay.

Mr. Hollett: What I was...

Commissioner Wells: So you say...your assertion was you can't do it by legislation?

Mr. Hollett: You can't legislate common sense.

Commissioner Wells: You can't...I agree with that.

Mr. Hollett: That's the point that I was actually making, you can't legislate common sense.

Commissioner Wells: You can cause change by it.

Mr. Hollett: You can cause some change and obviously the suggestions I'm going to make will have to come in legislation. What I mean is that the culture inside any organization is such that it's very difficult to change it purely and simply by a single stroke. It grew over time, it will evolve over time and it will change over time. The situation that obtained in 1996 or 1986 doesn't exist today, people change, personalities change. We can't legislate necessarily that common sense, there is a limit by the way in some other aspects and this was part of the discussion yesterday when you were talking about Section 18 and the enunciation of the specific list of items. To reinforce the point of one of the difficulties you can sometimes come to with legislation.

The '81 Act and the early version of 2002 simply said, something that would tend to reveal the substance, the deliberations of cabinet; I think that's generally the wording. And it was extremely imperfect, but it didn't really give you any mechanism by which you could know what was in or necessarily what was out of consideration in that. And as much as it frustrated all sorts of people, the lack of specificity gave a great deal of discretion for good or evil. However, if I give someone a mechanism...in other words it has to be on the agenda for cabinet and Clerk of Council can certify, it gives some people a mechanism for necessarily contrary purposes to be able to hide

something. Because they simply have to add it to the cabinet agenda and that's a little bit off where I was trying to go.

There are some things you can accomplish through legislation; there are some things you can't. I don't think we can necessarily change the culture, I think however we can do certain things and we can reinforce an office. We can reinforce the office of the Commissioner in a way that would enhance...that would bring some of these practices to light and in that sense and accomplish some disinfection with sunlight. But I think also a part that has been overlooked and I haven't really explored this is just an add-on. We can also point to use the Commissioner's Office in a less of a punitive and pejorative way and more of offering advice about good practices and best practices which I think is something that people have tended to overlook as we discuss all the bad things that have happened.

What I believe...what I broadly recommend or suggest is that you should consider making the Access Commissioner and the Privacy Commissioner a form of Auditor General for information and privacy issues. And perhaps go a little bit further by as I just said giving the Commissioner the responsibility to produce an annual report on access and privacy. And that would look at the specific experience of government and essentially be the third party oversight of what's

happened. Right now the only real source of information we have are the people who are doing the compiling and responding.

I think it would be useful to have that external check by the statutory officer on what the actual practice has been. And not just to talk about the difficulties in getting responses but also about some of the ways of improving it. That would give the Commissioner or whoever it is the opportunity for example to make some of the very public recommendations about this as an example of how government's own policy needs to change, because it's obstructing, causing an obstruction that didn't need to be there. And in the process of that it puts it in a public domain; it becomes a wide enough subject. It becomes harder to ignore.

The same thing applies of privacy although there's been very little discussion in privacy today. We do have over the last 10 years a number of examples of privacy breaches in Newfoundland that were the result of simple lapses and negligence, not anybody's malicious intent. I think that area in particular is one where government can profit from having somebody point out good standards and good practices and I don't believe there is a mechanism in place right now that effectively could do that.

On the question of the appointment I agree with the comments that have been made already that the appointment ought to be extended to six or 10 years in a single appointment. I'd ventured a guess that there was a reason why the commissioner was appointed for two years and that was to keep them on a short leash and if he did something inappropriate he could be gotten rid of quite quickly. Even if that wasn't the actual intent I think the impact of it would be that if the Commissioner gets into office discovers how everything works and discovers what to do, before too long they are up for reappointment again and if they find something difficult that they need to deal with, if there's a knotty and difficult problem that they ought to bring public, they're essentially putting their position at jeopardy. And I think it's too much to expect of anybody not just the current administration but I think of any administration to believe that there is not some temptation to get rid of a nuisance or a pain if it happens to be so.

As with the Auditor General, we want to give the information and privacy Commissioner the...a certain amount of security to allow them become a bit of a...in Newfoundland phrase an 'anti-Christ', somebody who is a contrarian and to go against the flow and not necessarily be easily knuckled under. It's the equivalent of a

professorial tenure, to give professor's tenure so that they speak their mind even if you don't like what they are saying.

Those are the sorts of statutory changes I think you could make. Some of those things you've already been doing and the end result of that would at least put some of these issues in the public domain in a way that would I think have a long term positive influence. Those are the sorts of things you could do with the statute and take us from where we are now after 10 years with a bunch of good experience, some notoriously bad experiences, but also some very good ones over the years and actually improve the Act which I think is the ultimate purpose that you were appointed for. Thank you.

Commissioner Wells: Thank you Mr. Hollett do you have any questions for Mr. Hollett?

Commissioner Stoddart: Thank you very much for your presentation Mr. Hollett. So on page eight of eight your submission, do I understand then that you would like to add...confer on the Information Privacy Commissioner a clear mandate for public education?

Mr. Hollett: Absolutely. I think he ought to have a mandate if he doesn't have it now implicitly in an explicit mandate to engage in public...Commissioner ought to have a mandate to engage in public education. I think though as I said Ms. Stoddart that that is also to a certain extent the responsibility of the departments of government as well and the agencies of government to advise people. And it has to be a collaborative effort, absolutely.

Commissioner Stoddart: Thank you.

Commissioner Letto: I've got a question that touches on the privacy area and various others, but it starts with your assertion about the political involvement in the whole determining if people will get access to certain records and then ultimately what it is that they get access to. So, I've got a couple of questions, but I'll just give you an overview of what I'm asking. The role bias could play in determining whether you get anything at all, the privacy consideration involved in knowing who the request is coming from, and any thoughts that you might have to create a better system so that those situations don't come to bear.

Mr. Hollett: There are some academic studies that have been done over the last 10 to 15 years and I don't have the references, I can certainly supply them to you. There have been some academic studies that have been done on the federal access system that suggested even in some departments like health I believe it was that even if the requesting person's name is redacted from the request the nature of the request how it's phrased and so on there were ways of making a reasonably good guess as to who's submitting it. And that based on that assessment requests from news media and requests from politicians and known critics and people who tend to cause problems you can spot those pretty easily.

And they tend to take somewhat longer, but not inordinately longer than a request that's pretty straightforward and clean. I don't think you can construct a perfectly bullet proof or immune system. I don't think it's feasible, but I think one of the difficulties...and the only thing I can do is compare what I know...understand happens today with what I understood happened now 25 years ago. A request process...the requests that I dealt with were the ones that I knew who was requesting them and they were straightforward. It didn't change how I dealt with them in terms of whether somebody was going to get it or the information on it, but it simply meant that we dealt with it. There were an awful a lot of requests in government

though the political staff never saw and the ministers would only be aware of in their capacity as the minister and functional head of the department.

So it's impossible to divorce the two, it's difficult. I think it's almost impossible ultimately to divorce it and this is where the...it's a cultural change. I think the previous time there were two very distinct groups the size of the Newfoundland public service, Newfoundland and Labrador public service makes it difficult to insulate the two one from the other.

If I had been able to come up with a way of doing that Mr. Letto, I would have suggested the...but I really haven't found a bullet proof system or thought of one that...I can't think of from Ms. Stoddart's background there are ways around it. There are ways to find it out.

Commissioner Letto: Okay, and Mr. Wells has talked about timelines and you've talked about timelines, the idea of tighter timelines would certainly focus people's attention that the information...there has to be a decision very quickly on whether you're going to release it or not. If the legislation was written in a...if there was a proactive way

leaning toward disclosure rather than not unless it meets certain of these conditions, could that stuff help?

Mr. Hollett: I think so; I mean one of the difficulties with a piece of legislation like this is if the department doesn't do anything what's the punishment? What's the penalty? It's like the lobbyist registry which was trumpeted as some great step forward for public disclosure, but the reality is if I don't register and I'm essentially a friend of the government, what's going to happen to me? In this case if the department doesn't respond within 30 days or 60 days or 90 days or if they do as you've heard yesterday and simply submit a one sentence letter that effectively says we just don't want to release the information. They don't want play the game and actually explain things to you, what kind of punishment could you possibly give them? I'm not sure the only one that we could possibly build in the registration I think is that the punishment of daylight through bringing these things into the public eye, because it seems to have a great transformative effect.

The actual lesson for Bill 29 by the way in case anybody has really missed the obvious point is that when you do bring it into the public eye it's amazing how rapidly the government can change its direction. As fiercely as the ministers and the members of the House

of Assembly on the Conservative side defended Bill 29 as the most perfect expression of public access, they very quickly abandoned most of the major provisions that they had...most of the other initiatives they had. Once the public...the very office that this Commissioner reports to was created in response to the public outcry over Bill 29, the political impact on the party and power of the criticism they took in 2012 over a whole bunch of issues created a whole series of initiatives about public engagement and public disclosure. So if you give the Commissioner the ability to report annually on things that are going on, I think that will have a less dramatic, but potentially no less of a significant impact.

Commissioner Stoddart: Thank you for that viewpoint. On the other hand one could say that in many jurisdictions information and privacy commissioners have been reporting on things that are going on and they still go on.

Mr. Hollett: Sure.

Commissioner Stoddart: You may be interested to know or perhaps you know that in the UK which has, I'd say legislation that's cutting edge and frequently reviewed, the information and privacy

Commissioner can impose fines on public bodies. What do you think of that as an incentive to action or to the correct action i.e. protect your databases full of personal information, train your employees so there aren't these slip ups, audits so that the rogue employees get caught?

Mr. Hollett: I'm not aware of it, I wasn't aware of it until now; I'd have to give it some further thought. There is some potential merit in it, but I think if you look at some of the...if you look at the experience in Newfoundland and Labrador I don't believe we've quite gotten to that point yet. I believe we can probably fix some of the problems that we're having with some less draconian measures but obviously there is that capacity to do it. There is always that capacity to do it at some point in the future; I just don't think we are at that point yet. That's simply though my first blush response. I wouldn't give it anymore...at this point I wouldn't be able to say anymore till I've had a chance to look at it in more detail.

Commissioner Stoddart: Thank you.

Commissioner Wells: Over the last number of months since the passage of Bill 29 there's been widespread public discussion of the

flaws of the system and they've been battered about in the press. Some well informed and some not so well informed on a variety of recommendations running all the way to release everything.

Mr. Hollett: Yes sir.

Commissioner Wells: Nothing gets withheld and the last couple of days we've heard from the Commissioner and Mr. Murray of the Commissioner's Office, Mr. Hammond this morning, Mr. Lono, yourself of some of these problems and the delays and the time limits that the time that's been involved and just incredible delays rendering the ultimate release of the information virtually useless, because it's so late in getting it. And we've heard discussions about the hazards of knowing the source and whether this causes and promotes delays and so on and avoiding these problems.

Consider for a moment whether a system that had every access sent to the Commissioner, not to the government agency at all. It gets to the Commissioner and immediately he receives it a day or within a day or two he can contact the department and say, "Please provide me with this information or a reason why it shouldn't be provided." And depending on the nature of it he could say, "Provide it to me

anyway and I will decide whether or not it should be released and provide me with any reasons you feel it shouldn't be released." That could take place within the space of a few days. You have no idea, the department has no idea of the source of the request, only the commissioner knows that, because he doesn't disclose it, he just asks for the information. He has the information, he can look at it and come to a conclusion very quickly as to whether it should be released or not.

Would public bodies be less reluctant to make it available if the original request came from the Commissioner than they would if it came directly to them from the individual involved? Particularly they could make a pretty educated guess that they didn't know precisely where it was coming from, they could make a pretty educated guess as to where its origin. Would that system work better or solve some of these problems or would it create more of a minefield?

Mr. Hollett: Conceivably, it would fix some of the problems and certainly I think that was a line of questioning you had yesterday. The idea that you could essentially put an access coordinator in each department who worked for....or somebody's (inaudible) ...worked for the Commissioner. You raised another issue with the Commissioner yesterday about what I believe was the original

intention of the Act that he would be able...that the Commissioner and his staff would be able to have access to government documents on unredacted to make their own separate assessment. The situation you just described my first reaction to it philosophically would be no. And the reason is this; I believe that government had a responsibility to deal with its citizens directly without any interface. I ought to be able to go as an ordinary citizen regardless of who I am whether I'm known to Chick Brick at the current administration or not and request simple information and get it. And I think it's the responsibility of the department to deal directly with me as a citizen to whom they are ultimately responsible. I don't think I need an intermediary, I don't think I have to tap an intermediary. So, the onus in the first instance ought to be on the department to provide that information as a routine part of their business.

Commissioner Wells: I don't disagree with that, but if that system is not working what we are looking for is an alternative that might produce a better result in terms of accessing information.

Mr. Hollett: I think though if we went back to the 2002 structure and actually let it work which I think is where you may have been trying to go at one point yesterday or where the discussion was going yesterday, you might be able to get there in a slightly different

fashion. The Commissioner's Office and the current structure as I understand it is essentially an intermediate step in between the departmental response and going to one of the wise men and women downtown in the trials division and ultimately the Court of Appeal. I think allowing the commissioner to review certain cases and have access to the documents and make certain decisions may be an intermediate step that would work and work fairly effectively. I'm not...again...

Commissioner Wells: What does that do for time delays? I mean wouldn't making the access directly to the Commissioner and having the Commissioner request it collapse the time? All of this going back and forth and intermediate steps and that...that's where your months come from.

Mr. Hollett: Well, the problem in terms of delays in the initial phases actually within the department responding to a request, but I'm not sure that they'd respond any more rapidly for example to a request from Mr. Murray for the production of documents as opposed to me directly.

Commissioner Wells: Unless the legislation provided failure to respond within 10 days required release immediately.

Mr. Hollett: Now, that certainly would work.

Commissioner Wells: Sure.

Mr. Hollett: Sure, that would work. I haven't considered it; it's certainly a viable proposition. I just think there are other things you might want to consider first. And I don't think we should abandon that fundamental philosophical concept, that fundamental notion that the government ought to be directly responsible to its citizens in the first instance. I think everything...we don't really gain fundamentally from adding these; I mean what is the broader sense? We've wound up nationally and adding these parliamentary officers and whether it's a parliamentary budget office or the Auditor General or the Access and Privacy Commissioners, because something else isn't working the way it's supposed to.

And we can add all sorts of other bits and piece in between, but it doesn't necessarily ultimately improve the service. Part of what we have to do though is to just as much as possible remind officials of

government to who they actually work for and that they do have a fundamental service to the public to provide. And one of those is to provide information, somewhere along the line that's gotten lost. I'd hate to think that we'd have to threaten them with immediate disclosure if they didn't respond by a third party in order to get something, it seems to me to be a...I wouldn't want to lose that entirely but your idea certainly is worthy of consideration.

Commissioner Wells: In a perfect world you're right when you say that, but the world as you know is not perfect and that it's seldom advisable to let the perfect become the enemy of the good.

Mr. Hollett: Absolutely.

Commissioner Stoddart: Mr. Hollett on that theme increasing...you probably know that increasingly it's considered that access to information...I'll leave aside the question of protection of information for the moment, is seen in, shall we say more sophisticated democracies as being the default position that the thrust should be that of open government, that there should be more or less automatic publication of information except that which could threaten the privacy of individuals, with computer power now that's

more difficult. How do you envisage, and then I'm bearing in mind that very shortly after the creation of this committee was announced there was a major announcement on open government. But it seems for the moment to be more the idea; I don't think there's a lot of flesh on those bones for the moment.

How do you see open government for Newfoundland and the access to information legislation meshing together and what would there be relationship of one to the other? Because if we go to a very complete system of open government then presumably many of these access to information requests don't have to be dealt with.

Mr. Hollett: That's right.

Commissioner Stoddart: Because all the budget information that people have been talking about will be published.

Mr. Hollett: That's one of the points I was driving at a little earlier. Which is that if you...if government in Newfoundland and Labrador was doing a great...the things that other governments in Canada and around the world have been doing, an awful lot of the administrative burden that they're dealing with currently with the access request

simply would vanish. If they took the initiative to make more information available readily online, a lot of these requests would simply vanish. And so I think a genuinely open government initiative, if by that we mean it's a searchable term and it's a generally understood concept, I think that would solve most of the problem. It's actually a government policy change.

Access to information legislation should be...and this is inherent in the construction of the policy the government employed in 2002. It should be a second or a third step down the road and your first step should be to simply request the information from the individual or department that has it ... if government went a step further than that and actually pushed information forward then often these problems would disappear. There still is within government I think a residual culture of suspicion and fear of disclosure of information for a whole host of reasons some of which goes back 20, 25 years.

Mr. Letto will recall some of his former colleagues who were trying to find mine inspection reports for mines that closed in the '50s and government wouldn't release them. The department wouldn't release them on the grounds that they may be subject to legal action which was a condition of the Act for discretionary, non-disclosure. So, I think you're right, I think open government would actually solve

most of the difficulties and this Act should exist only for more difficult or problematic issues.

Commissioner Letto: We've talked about timelines and your fourth recommendation on page 8 talks about removing the time limit on the production of a review Commissioner's report, currently it's 120 days. Doesn't that just add to the problem where people feel that nothing happens in a speedy way in this whole system?

Mr. Hollett: I put that time-limit there and that...the phrasing review Commissioner's investigation which actually ties back to the third bullet, give the commissioner the ability to investigate an access or privacy investigation or instigate a privacy investigation on his own right. Rather than in the current situation where the Commissioner tends to be involved after the fact is advised after something has occurred. If he discovers a particular problem or issue and, I threw this purely as an idea for consideration to see what reaction we'd get because I haven't thought it through, much the same as you might have a periodic investigation of the specific issue by the Auditor General you want out have that same idea for the privacy commissioner to go in and find out what happened.

Commissioner Letto: Fair enough, we get your point, I confused the two.

Mr. Hollett: Hence the 100 and...more than 120 days, because there may not be enough time.

Commissioner Wells: Thank you Mr. Hollett we do appreciate your coming today and the submission that you've made and we'll certainly take your comments under advisement.

Mr. Hollett: I wish you all the best.

Commissioner Wells: Thank you.

Commissioner Stoddart: Thank you.

Mr. Hollett: Thank you.

Ms. Hollett: Thank you very much

Mr. Well: I guess it's time to adjourn and we will reconvene in two...