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SPECIAL COMMITTEE TO REVIEW THE

**FREEDOM OF INFORMATION AND
PROTECTION OF PRIVACY ACT**

Victoria

Wednesday, October 28, 2009

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RON CANTELON, MLA, CHAIR

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**SPECIAL COMMITTEE TO REVIEW THE
FREEDOM OF INFORMATION AND
PROTECTION OF PRIVACY ACT**

Victoria
Wednesday, October 28, 2009

- Chair:* * Ron Cantelon (Parksville-Qualicum L)
- Deputy Chair:* * Doug Routley (Nanaimo-North Cowichan NDP)
- Members:*
- Harry Bloy (Burnaby-Lougheed L)
 - * Stephanie Cadieux (Surrey-Panorama L)
 - * Marc Dalton (Maple Ridge-Mission L)
 - * Eric Foster (Vernon-Monashee L)
 - * Douglas Horne (Coquitlam-Burke Mountain L)
 - * Ralph Sultan (West Vancouver-Capilano L)
 - * Katrine Conroy (Kootenay West NDP)
 - * Guy Gentner (Delta North NDP)
 - * Harry Lali (Fraser-Nicola NDP)
 - * Jenny Wai Ching Kwan (Vancouver-Mount Pleasant NDP)

** denotes member present*

Clerk: Craig James

Committee Staff: Josie Schofield (Manager, Committee Research Services)

Witnesses: Sharon Plater (Ministry of Citizens' Services)
Catherine Tully (Office of the Information and Privacy Commissioner)

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Freedom of Information and Protection of Privacy Act

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MINUTES

SPECIAL COMMITTEE TO REVIEW THE FREEDOM OF INFORMATION AND PROTECTION OF PRIVACY ACT



Wednesday, October 28, 2009

9:00 a.m.

**Douglas Fir Committee Room
Parliament Buildings, Victoria, B.C.**

Present: Ron Cantelon, MLA (Chair); Doug Routley, MLA (Deputy Chair); Stephanie Cadieux, MLA; Katrine Conroy, MLA; Marc Dalton, MLA; Eric Foster, MLA; Guy Gentner, MLA; Douglas Horne, MLA; Jenny Wai Ching Kwan, MLA; Harry Lali, MLA; Ralph Sultan, MLA

Unavoidably Absent: Harry Bloy, MLA

Also Present: Josie Schofield, Manager, Committee Research Services

1. The following witnesses appeared before the Committee to brief them on the Freedom of Information and Protection of Privacy Act:
 - Catherine Tully, A/Executive Director, Office of the Information and Privacy Commissioner
 - Sharon Plater, Director, Knowledge and Information Services, Ministry of Citizens' Services (9:40 am – 10:20 am)
2. The Committee approved the Call for Submissions advertisement.
3. The Committee considered a meeting schedule.
4. The Committee adjourned at 10:48 a.m. to the call of the Chair.

Ron Cantelon, MLA
Chair

Craig James
Clerk Assistant and
Clerk of Committees

WEDNESDAY, OCTOBER 28, 2009

The committee met at 9:07 a.m.

[R. Cantelon in the chair.]

R. Cantelon (Chair): Good morning, ladies and gentlemen. I presume other members will come in, but we'll begin. We've got a lot of information to cover.

We welcome today Pat Egan and Catherine Tully from the Office of the Privacy Commissioner, here to brief us.

I'm going to start with Katrine and ask us to go around and introduce ourselves.

K. Conroy: I'm Katrine Conroy, MLA for Kootenay West.

J. Kwan: Jenny Kwan, MLA for Vancouver–Mount Pleasant.

H. Lali: Harry Lali, MLA for Fraser-Nicola.

E. Foster: Eric Foster, MLA for Vernon-Monashee.

D. Horne: Doug Horne, MLA for Coquitlam–Burke Mountain.

S. Cadieux: Stephanie Cadieux, MLA for Surrey-Panorama.

R. Sultan: I'm Ralph Sultan, West Vancouver–Capilano.

M. Dalton: Marc Dalton, Maple Ridge–Mission.

R. Cantelon: I'm the Chair, Ron Cantelon, Parksville-Qualicum, and entering is the vice-Chair.

The floor is yours, Pat and Catherine.

Briefing: Freedom of Information and Protection of Privacy Act

C. Tully: Thank you all for the opportunity to come here today and provide you with a briefing on the Freedom of Information and Protection of Privacy Act. I wanted to first pass along David Loukidelis's regrets for being unable to attend today.

He asked me, in particular, to advise you that as an office of the Legislature, we are certainly here to assist you in any way that we can as you go through this process — understanding, of course, that you are very ably assisted by the Clerk of Committees and the research staff. But if there is anything in the course of your considerations that we can do to assist, please feel free to make that request of us.

I understand that we have about 45 minutes for our presentation. I certainly plan to leave room for questions

at the end, although I welcome questions as we go along. Otherwise, my plan is to give you a brief introduction to the act, talk a bit about the policy underpinnings of FIPPA, discuss a very high overview of the basic rules and then give you a bit of information about the role our office performs under the act.

Hopefully, that will meet your needs, but as I say, feel free to ask me questions if other things are of interest to you.

This committee was struck under section 80 of FIPPA to conduct a comprehensive review of FIPPA and then to report to the Legislative Assembly within one year.

[0910]

I understand the purpose to be to ensure that the underpinning goals of access, openness and accountability, and privacy protection are reflected in the language of the statute; to keep abreast of current trends; and to meet rising expectations.

The committee review feature is a fairly common feature of access legislation. The most recent review report that I could find is Ontario. One of their standing committees recently reviewed the Health Information Protection Act and issued a report with, I think, about 11 recommendations, a number of which were to change nothing. Then there were a number of concerns about disclosures to police and to family members. Alberta has a similar feature.

So why undertake reviews by committee? In our view, there is a need for an arm's-length review of legislation — arm's length, that is, from the executive branch of government. This review ensures that the analysis of where the balance lies between accountability and government secrecy is appropriately struck.

I think you have before you a briefing paper that was written by David Loukidelis. In it he has provided a variety of information, including a fairly detailed history of access and privacy legislation around the world. I just wanted to highlight a couple of the key events in access and privacy history.

The first access legislation was passed in 1766 in Sweden. Now more than 60 countries have access and privacy legislation, including such diverse countries as Albania, the Dominican Republic, Israel, South Africa, South Korea, Thailand and the U.K., to name just a few.

In Canada all jurisdictions, provinces and federally, have access and privacy legislation. B.C.'s act came into effect 16 years ago, in October of 1993.

FIPPA was the culmination of the efforts of all of the political parties in British Columbia, including the Liberal Party, under Gordon Gibson; the Social Credit Party; and the New Democratic Party, under Mike Harcourt. In the end it was an NDP government in 1991 that introduced Bill 50, which became our current act, the Freedom of Information and Protection of Privacy Act.

I believe it is a testament to the strength of our democratic process in British Columbia that all parties support

access and privacy legislation. This legislation does not follow the lines of party interests but recognizes the very clear public interest in disseminating, as broadly as possible, government-held information while at the same time protecting personal privacy.

Turning now to what the policy underpinnings are of the act. Part 1 of FIPPA sets out the two purposes of the act: to make public bodies more accountable and to protect personal privacy.

With respect to the first purpose, access to information, the paper includes a quote from the Supreme Court of Canada decision in Dagg. It's a very popular and common quote. In that decision the court noted that "the overarching purpose of access to information legislation is to facilitate democracy...."

It facilitates democracy in two ways. First, it ensures that citizens have the information they need to participate actively and meaningfully in democracy. It also ensures that politicians and bureaucrats remain accountable to the citizenry. Openness and accountability are of critical importance to good government in modern democracies.

Who is using access legislation? Well, if you look at the government's statistics that are published on their website, in fiscal '08-09 roughly 70 percent of the more than 6,500 requests received by ministries were from individuals or their representatives seeking personal information — generally their own personal information. So 70 percent are individuals looking for information about themselves.

Why are they doing that? The main reason is very concrete. They have an appeal they are undertaking. They are seeking some sort of benefit, and they need the information to advance their own interests.

Access legislation is one of a series of tools used to ensure open and accountable government. The constitution, the electoral system, independent watchdogs, and courts and tribunals are all other mechanisms used to ensure open and accountable government.

The former federal access commissioner John Reid had this to say about access legislation:

"Without access to information, however, these other mechanisms are essentially crippled. Other accountability mechanisms don't have any viability without the oxygen of information — information about what governments think, decide and do, information about what governments know about their citizens and about the costs and effects of government decisions and actions."

With respect to privacy protection, privacy is not defined in FIPPA. It is understood in different ways, but in access and privacy legislation it is understood in the context of informational privacy. That is the right of an individual to control to some degree the collection, use and disclosure of their own personal information — in other words, informational self-determination.

[0915]

The aim of privacy protection is to restrain government power and to protect individual liberty balanced

against the public interest. FIPPA is essentially a privacy road map based on internationally recognized rules known as fair information practices. Privacy rules are necessary in order to ensure a reasonable sphere of privacy within which we can continue to flourish as individuals and participate in society.

I want to provide you now with just a brief overview of how the legislation works. Our FIPPA covers probably the broadest range of public bodies. It includes ministries, Crown corporations, police forces, cities, towns, schools and professional self-governing bodies. Part 1 sets out the purpose. Part 2 of the act sets out the access rules.

I'm going to give you some of the essential rules. The first essential rule is that all records that are in the custody or control of a public body, with just a few exceptions, are subject to the act. The basic rule is that a public body must disclose the record unless an exception to disclosure applies.

The act also sets out duties not only for public bodies but also for applicants. The duties on the applicants are that they must provide the request in writing. They must provide sufficient description to show that an experienced civil servant could find the records. They need to request records. They're not entitled to answers to questions. So if a record doesn't exist, there is no response. It doesn't require an answer to a question. And they need to supply any consent forms that might be necessary if they're seeking personal information.

The duties on public bodies are that they must respond openly, accurately and completely and within a reasonable time. Thirty business days is the statutory timeline, although they're permitted time extensions in the act.

When responding to an access request, a public body must tell the applicant the reasons for any denial of information and the section applicable to that denial. They must provide contact information, and they must tell the applicant that they have a right to request a review from our office.

The other duty upon public bodies is that they must sever the information. So if they're reviewing a document and see a sentence on a page that they believe is subject to an exception to disclosure, they must take out just the sentence. They don't remove the whole page. This is a fairly labour-intensive line-by-line review to remove only that information that is subject to exceptions.

A key point in the access rules is that no reason is required when you make an access request. You simply make your access request, and you do not have to tell the public body why you want the information.

One of the reasons for this is that prior to FIPPA, when individuals made requests for records, it was up to the largesse of the organization that had the record to decide whether or not they would give the individual the record. They often decided on whether or not they deserved the record. So you do not have to give a reason under FIPPA.

Public bodies can charge fees under FIPPA. They are in accordance with the schedule in the regulation. They can charge fees for searching for the records, for preparing the records and for shipping. They cannot charge fees if you're requesting your own personal information, and they cannot charge fees for the time spent severing information out of the record.

Public bodies can waive a fee. The three main reasons are because it's in the public interest, the individual cannot afford to pay or for some other reason that's fair and reasonable to waive the fee. Those are the essential access rules in part 2.

Part 3 of the act sets out the privacy rules, and those are the fair information practices that I mentioned in my discussion about the policy underpinnings. These privacy rules are the bedrock of every single piece of privacy legislation in the world. There's a commonality among all pieces of legislation.

Personal information is defined, and it's defined as identifiable information about an individual. The basic rule in FIPPA is that a public body can only collect, use or disclose personal information if it is authorized by FIPPA. There are further rules regarding accuracy, correction, retention and security.

I'm going to give you some highlights of the rules with respect to some of these areas. Under collection, there are three basic rules. The first is that you can only collect personal information if the collection is authorized by the act, and there are three bases for collection. If you have a statutory authority, you may collect. If you need it for a law enforcement purpose, you may collect. If it's directly related to you and necessary for an operating program or activity, you may collect the personal information as a public body.

[0920]

The second collection rule is that even if you have the authority to collect, you must collect it directly from the individual involved, unless the act permits an indirect collection.

The third rule is that you must provide notice to the individual about whom you are collecting the information in certain circumstances. That notice must give the reasons for the collection and your authority for collecting.

With respect to accuracy rules, the public bodies must ensure that the information they have about an individual is accurate if it is used to make a decision about the individual. If information is inaccurate or incomplete, it can have devastating effects, particularly in this time of databases and in the digital age, where information is shared so quickly. Once a mistake is made, it can be replicated and is almost impossible to correct. So it's very important that public bodies keep their personal information accurate.

The most important rules, from our perspective, are the use and disclosure rules in the act. The act says that you can only use the information for the purposes you

originally collected it for — that is, primary purposes. To change the purpose, you must have authority under the act. This is where our interest and concern with data matching and data linkages arises.

With respect to disclosure, there is a very extensive list of committed authorities for disclosure of personal information that has, in my opinion, stood the test of time. There are permitted disclosures within and outside of Canada.

The retention rule is a simple one. It says that if you use information to make a decision about an individual, you must keep it for at least one year.

There is a section that requires that public bodies secure the personal information. They must take reasonable steps to protect the information against unauthorized collection, use, disclosure, etc. It is under this section that we've had quite a lot of complaints with respect to privacy breaches and the need for public bodies to satisfy these rules.

Parts 4 and 5 of the act set out the role of the Office of the Information and Privacy Commissioner. We have the independent oversight of compliance with access and privacy rules. There are 24 staff at the OIPC, including the commissioner, that provide this oversight function. We have an intake unit, an investigation and mediation unit and an adjudication unit.

With respect to access requests, our role is to review any decision, act or failure to act on the part of a public body. The four most common complaints we get under access are complaints about severing, about the length of time it took to respond, about the adequacy of the search and about fees. Those are the four most common complaints we get.

Our process is that the files go through the intake unit and on to a mediator, if necessary. In 92 percent of the cases the matters are resolved without going to a formal hearing.

If a formal hearing is required, we refer to these as inquiries. They are conducted either by David or by the adjudicators, who have delegated authority to conduct the hearing. These are written submission and replies, although oral hearings are possible but uncommon. Applicants are generally unrepresented. The decisions are binding on the parties, and they are subject to judicial review by the Supreme Court of British Columbia.

With respect to privacy, we receive quite a number of privacy complaints each year. Those are assigned to the investigators to investigate the complaint. The investigator will make findings and recommendations. In all cases where we make recommendations, we have been successful in getting the public body to agree to implement the recommendations.

We have published a few investigation reports. The last time we reported to this committee we advised that we hadn't published any investigations on privacy complaints. In recent years we've published a few, the main

purpose being to help public bodies learn what they need to do to comply with the act and to inform the public about what the responsibilities are of the act, the privacy responsibilities for public bodies.

We also have a role in commenting on the implications for privacy or access with new legislation or new systems or projects, information-sharing agreements. It isn't uncommon at all for public bodies to come to us with their information-sharing agreements, their draft legislation or proposals and ask for our comment. We do that fairly regularly.

We also have a role in public education. Depending on our time, which is mostly committed, without a doubt, to mediations and investigations, we do attend and speak at conferences. We give speeches. We have a website where we have quite a few resources available, which you may want to visit and have a look at, that the public and public bodies use quite regularly. We have all of our orders published there and available. We also publish some papers on our website.

[0925]

Most recently we undertook some Right to Know Week activities. Almost all of those involved publishing things, which is.... We did a special website. We did public service messages that we sent out to radio stations at universities. We wrote a bunch of op-ed pieces for smaller newspapers around the province, and we had one small event where we presented some information.

Those were my introductory comments today, and I'd be pleased to take questions.

R. Cantelon (Chair): Questions from the floor.

J. Kwan: A couple of questions. On the issue around waiving the fees, who makes that decision?

C. Tully: The head of the public body has the authority to waive the fee, and heads typically delegate that authority to someone in the FOI shop who has the responsibility — or perhaps a director or an ADM level — to make that decision.

J. Kwan: How often does that happen?

C. Tully: We would not know exactly. The CRTS system that the government uses might track waiver decisions. In a previous existence I was a director of information and privacy for the Attorney General and Solicitor General, and during my time there we waived fees in all cases. It was fairly uncommon for us to get fee requests, but we generally just waived fees in all cases.

What public bodies tend to try to do is — if it's a very expensive access request, it's quite possible that what the person wants is narrower — with some discussion and conversation, figure out what it is they really want.

That will reduce the fee significantly. Then the fee waiver becomes less of an issue because it's less expensive for the public body to answer the request. But they are certainly authorized to charge a fee.

J. Kwan: Yeah, okay. So to find out that information — how often fees are waived and how often the waiver of fees is requested — we have to go through each individual ministry, then, to access that information?

C. Tully: No. The database is managed centrally, and it's capable of producing reports. Sharon might be more familiar with what's publicly available. I'm not completely familiar with that data element and how much of that information is reported. But it is available, because you do, as a public body, keep track of fee waiver requests and outcomes.

J. Kwan: Okay. And on a different question — if I may continue, Mr. Chair....

R. Cantelon (Chair): Well, we have two other.... I might come back to you.

J. Kwan: Oh, all right. Okay.

K. Conroy: Mine's along fees too. Just to add to it, you said that their fees, in their regulations, are structured. So there are set fees? Because it seems, when you look through the information, that some ministries, for example, charge more than other ministries or other bodies. I was just wondering how that works.

C. Tully: In our experience, the ministries are quite good at following the schedule, so they will charge fees in accordance with the schedule. Smaller public bodies, cities and towns.... Public bodies that don't get too many access requests sometimes don't understand the fee structure.

The other problem is in estimating the time. Sometimes the estimates are a bit high, and with some discussion and some careful looking at the numbers, the public body will significantly reduce it down to the actual amount — with some work, though. So there are variations in the estimation exercise.

The way it works is that you make an access request to a public body, and in their view it's quite large. They don't actually do the search for records. What they do is estimate the fee, and they send you the fee. Then if you pay a deposit, they'll do the actual work, and then they're supposed to calculate the actual fee, and then you pay the remainder.

Often we'll get a complaint on the estimated fee, and with some negotiation and discussion, the public body will do more work on getting an accurate estimate, and that will reduce the fee.

Different bodies may be better or worse at estimating their fees.

K. Conroy: But in the end, if they want it to be relooked at, it comes back to you.

C. Tully: It comes to us.

K. Conroy: Yeah, okay. The published investigation reports — are they available on your website?

C. Tully: They are, yes.

K. Conroy: Okay, good.

R. Cantelon (Chair): Okay, I've got a speakers list going here.

D. Routley (Deputy Chair): Thank you very much. It was helpful. My question is related to section 13, the policy advice section, in terms of exemptions. Can you describe exactly how that's applied and what the limits are to applying that section?

[0930]

C. Tully: That section provides that a public body may refuse to disclose information that discloses policy advice or recommendations made by or for a public body. First of all, it's a discretionary exception, so even if it applies, the public body doesn't necessarily have to apply it.

The other thing about section 13 is that it should be read in conjunction with section 13(2) because that subsection lists a number of document types to which section 13 cannot be applied, which doesn't mean.... Other sections might apply to these other types of documents, but not 13. A typical example would be a statistical survey or a final report. You can't apply section 13 to a final report or statistical survey. There might be some other section that applies — possibly 15, "Harm to law enforcement" — something like that, but not 13.

Usually what happens is that a public body will get a request, let's say, for a briefing note. In that briefing note will be some advice or recommendations made by or for the public body. They'll identify the advice and then make a decision about whether or not they're going to sever it, under 13.

D. Routley (Deputy Chair): It seems very broad, that notion that an advice can be given. Anytime a consultation is made, there's a presumption that what comes back is somehow informative. What qualifies as an advising note? Is it the offering of several options, or is it the clear recommendation of an action? What exactly would limit the application of the note of advice?

C. Tully: As it's currently drafted, it is fairly broad, and there has been some discussion. In the previous committee there was a recommendation with respect to specifying a little bit more about what section 13 might mean. That was recommendation 11 of the previous committee.

They talked about defining the terms "advice" and "recommendations" as being similar terms. They talked about narrowing those definitions. I won't read it to you, but you can have a look at recommendation 11.

Also, in our submissions to the committee last time, dated February 5, we discussed section 13 and made some suggestions about narrowing or specifying more clearly what section 13 is intended to cover.

D. Routley (Deputy Chair): As another follow-up, have there been recent improvements to other acts, to narrow that definition? Can we look to other jurisdictions for guidance in terms of narrowing that language?

C. Tully: I'm not aware of that, but we can look and give you that answer.

R. Cantelon (Chair): Back to Jenny again.

J. Kwan: A question on time extensions. Who approves time extensions? Is it your office, or is it someone else?

C. Tully: Initially, the public body has the authority under section 10 of the act to take a time extension. There are three reasons: the volume of the records, a need to consult and a need to clarify. If any of those three things is true, the head of the public body has the authority on their own behalf to extend the time by 30 business days.

If, however, they need to extend it any time beyond that, or if, at the outset, they know it's going to take them longer than an additional 30 days, they can come to our office and request a further time extension. We can extend for those three reasons and additionally, if ...

There's a new fairness provision that arose out of the last committee's recommendations. So in certain circumstances — really, things that are completely beyond the control of the ministry.... Say it's forest fire season, and everybody in the office where the records are held is out fighting forest fires. They can request a time extension till they get staff back in to actually do the work.

J. Kwan: I see. Is that tracked, also, in terms of the length of time each application is made for the information, how often time extensions are requested and how often they're granted?

C. Tully: Now, that's a very interesting question and one that our office has been working on. Last year David Loukidelis issued a timeliness report that's on

our website. What we based that on was statistics we got from the government's tracking system.

We continued to have discussions with the government and receive reports, and we're particularly interested in the number of time extensions and requests that are put on hold. We're interested in fees. The government has produced masses of data for us to have a look at, and we intend to revisit that.

There's lots of data around that type of information. It is tracked, because public bodies need to track it, and the CRTS system is capable.

[0935]

It keeps track of how many time extensions, what the actual amount of time taken to process the file was, what the average amount across all of the requests was. All of that information is indeed available.

D. Horne: Going back to fees for a second, from the schedule that exists today — obviously, it doesn't include the severances, as you talked about — given the amount of time that government and public bodies spend on this, what percentage would those fees represent, from a cost recovery standpoint, of the actual time and cost of preparing these reports?

C. Tully: I don't think I can give you an actual percentage. The numbers are fairly low, and the fee schedule is quite old. For example, for locating and retrieving a letter, it's \$7.50 per quarter-hour after the first three hours. The first three hours are free. That's basically the fee: \$7.50 per quarter-hour. Depending on who's doing the work.... For clerical staff, it would probably cover the costs.

There is a cost associated, without a doubt, with access requests. That's one of the reasons we're very big on promoting proactive release of records. Try to get the records out there and available without the formal access request, if that's possible, on your websites and documents that are of interest. It's certainly a cheaper process, and it leads to the same end result: openness.

G. Gentner: I suppose, rhetorically, to begin.... I'm assuming that when it comes to censorship, the black felt pen is no longer used. I've tried to turn this sheet over, and I can't see anything on it. I guess we're into the electronic age, and it's kind of frustrating.

My question is.... You talk about time restraints. I receive many things relative to — well, we're in a new age of P3s — protecting the rights of a third party. That is something that irks me, because I'm getting more and more back with no information, or information delays, because of consultation with the third party.

How is your department dealing with that phenomenon, and how do we ensure that the public record or rights, our access to information, is protected in light of the fact that you're also protecting the rights of competitors?

C. Tully: I think we address this in two ways. The first way is that, on individual cases, we conduct reviews of the decisions of the public body and, at the mediation stage, make recommendations to the public body if we think it is appropriate that they not withhold certain information. If they don't accept that recommendation, it proceeds to a hearing. That's the individual case-by-case approach.

There are quite a few decisions on our website about section 21 — which is on third-party business interests as it applies to contracts — fairly consistently saying that 21 does not apply to the majority of information in these contracts. But you know, that's a challenge, certainly, to get public bodies to adopt that approach.

The second way that we're trying to address the timeliness issue is through this timeliness report and our ongoing supervision generally of how the government is doing time-wise, how quickly they are responding to access requests. This is something that we are doing on an ongoing basis, and we are planning to issue a second report based on fiscal '09-10.

G. Gentner: Just a supplementary on that, if I can, Mr. Chair.

Who makes the decision on what third-party information...? Is it a recommendation from a particular ministry, or do you arbitrarily decide that this should not be released — on a third party?

C. Tully: When an individual makes an access request, they make it to a public body. Each public body, or each ministry, is a unit unto itself, and the head of that public body delegates the decisions on severing to somebody within the organization. Each ministry makes their decisions with respect to the application of the exceptions.

Typically, if I were to ask a ministry for a large contract, then they would consult with whomever they had the contract with. That's set out in section 23 of the act. It requires a consultation if you intend to release information to which section 21 might apply.

They hear from the third party, and then they make a decision. They issue the decision to the third party, and the third party has an opportunity to request a review if they're unhappy with that decision.

[0940]

If they're satisfied with it, then the public body will deliver the response to whoever made the request. Then if that requester is unhappy with the decision, they can also request a review.

What we try to do in our office is get those two appeals together, if we can, so that everything gets dealt with at once.

H. Lali: You mentioned, and we hear this a lot as well, that one of the complaints, in terms of access to information, is the delays with which the information is actually

accessed by individuals. I was wondering if you could tell me why and where that delay actually occurs.

C. Tully: My answer to that is based mainly on my experience of having been in a public body. There's a process where records go through the processing. The first thing is that the access request comes in, and then the FOI-processing shop has to go to the program area to get the records. That's one of the main delays: gathering the records. It has a lot to do with who's available to search for records and how well they are organized. So there's a delay there.

Once it's in the FOI shop, in our experience, that's usually quite quick. They get through the records. They process the records. Unless it's boxes and boxes, they're fairly quick at processing the records. But then it must go back to the program area for their sign-off, and the sign-off process can sometimes take quite a long time.

One of the things we're doing now, though, is that we have asked the government to provide us with a report that breaks down the time. So where are the delays? They're very interested in that, too, in evaluating how they can improve the process and where the delays are.

We are looking to try to get what percentage of time is spent searching for records, what percentage of time is spent severing and what percentage is spent in sign-off. Let's find where the delays are. That's what the government is doing, and they are going to report that to us.

H. Lali: I've just got a follow-up question, Chair. In terms of the information, obviously the three Ls — land, labour and litigation — come into play. You need to protect the privacy of individuals or organizations. The information that gets blanked out — or "electronically nullified," as my friend to the left here said — how much of that information actually gets blanked out at the deputy minister, minister or minister's staff level before it gets to your shop to go through the final comb?

C. Tully: In general, the process of actually severing is done at the FOI shop level. Higher up, it's only sign-off. I can't speak specifically to what's happening now in the ministries. But, like I say, usually at that level, they're signing off. They're not actually doing any severing. The recommendations for severing usually, in my experience, come from the program areas, where they're familiar with the records.

R. Cantelon (Chair): Just a housekeeping note. We started about ten minutes late, so if it's agreeable to everybody, we'll run about ten minutes over because I don't want to limit questions. We're almost to the point now for the next presenter, so we'll give this another ten minutes, if that's agreeable to everybody — or as long as it needs, within that ten-minute kind of line.

D. Routley (Deputy Chair): Mr. Loukidelis, in his recent report, noted that personal requests for information are followed through on in a timely basis approximately 87 percent of the time, which is a very good performance. But he noted as an alarming finding the fact that political, media, non-profit and interest groups range from 47 to 56 percent compliance. The act is supposed to eliminate political interference. From my point of view, obviously, as an opposition member, I want to highlight that.

Are there mechanisms that your office has considered that could be added to the act to eliminate that difference, to bring it more into compliance? Obviously, a lot of personal requests are quite simple compared to the others, but still, the range between the two in terms of timeliness is clearly unacceptable, I think, in the opinion of Mr. Loukidelis, as reflected in the report.

C. Tully: Well, one of the recommendations of the previous committee that I think would assist this is the recommendation that the applicants remain anonymous. So within the public body, the public body would be unaware of who the applicant was.

[0945]

Another recommendation that has been implemented is to get rid of sensitivity ratings. That one has been implemented, so the CRTS system doesn't record the sensitivity of the request — so anonymize the applicant as much as possible so that the request just gets processed in the normal course of events.

The only other thing that comes to.... I don't have any other specific recommendations with respect to the act. It's also about the process — our office monitoring and keeping an eye on the timing, providing follow-up timeliness reports, commenting on applicant types and seeing how things have progressed in the last year.

We have, by the way, had a few update reports from government on its processing. The reports indicate that their timeliness is improving.

R. Cantelon (Chair): Katrine? May I, just before you start, Katrine...?

David will be here, also, for further questions. If you have any other questions, please put them through to Craig. We'll have quite a period of time before we hear presenters. We'd like any questions you have to go through. The officer can ask them, and they'll be made available to everybody.

This is, by no means, your only chance to ask questions. In fact, the more questions you have, the better.

K. Conroy: This might be a question that David or you might want to take back to the office.

I don't know if a summary has been done of the last report, which was done in 2004 — if a summary has been done of the recommendations that have been

implemented and which recommendations are still current or are still something that is viable that could, potentially, be recommended again.

I think a lot of work was done on this report. I'm wondering how much of it was actually implemented. It still is good work, and we should acknowledge that — have a base to start from, instead of recreating the wheel. So I'm just wondering if a summary was done.

C. Tully: That is something that we have looked at. There are recommendations that were not implemented. We will provide you with a list of the ones that we would recommend again. Yes.

R. Cantelon (Chair): We'll, of course, make sure that that goes to all members.

J. Kwan: On the information that is to be severed. Have there been situations where there has been a disagreement or difference of opinion on what information should be severed between your office and that of the agency that you're dealing with? If so, how is that resolved?

C. Tully: In the course of mediating the complaints, a portfolio officer is assigned. They'll review the documents. We get a copy of the severing and the completely unsevered document. So we'll compare what was taken out and what was left in. We look at the section, and we ask the public body to give us an explanation for why they did what they did.

We, the portfolio officer, will review it in light of the cases. That decision's made under that section by our office. We'll give them an opinion about whether or not they've satisfied the test in the act.

It's very common for a portfolio officer to say to a public body: "Actually, we think you've made.... Perhaps that's too much. You should reduce or eliminate the severing." It's a conversation we have back and forth in mediation. It is very common for public bodies to agree to remove some of the severing.

Now, if they agree to remove the severing and we are then satisfied that whatever's left satisfies the act, we'll then advise the applicant: "We now think that the public body has it right, and we would recommend that you accept this as a settlement of your request for review."

If, however, we make a recommendation to the public body and they disagree, which they certainly can do — it's a mediation — then the matter can proceed to an inquiry. A formal hearing is held, and an order is issued. Now the order can either agree with the portfolio officer that further severing should occur, or maybe they agree with the public body that no further severing is required.

To be clear, the mediation process is separate from the inquiry. The mediation happens. If that doesn't settle it, the adjudicator doesn't see that material. It's a fresh hearing. Both sides get to make their pitch about why the

documents should be severed or not severed. The adjudicator issues an order, and then the public body complies.

J. Kwan: I'm sorry. Who did you say triggers that hearing? Is it the applicant?

C. Tully: What will happen is that the mediator will say: "Okay, I've recommended to the public body that they disclose further information. I'm not satisfied that they're in compliance with the act. Applicant, do you want to pursue this any further or not?"

Sometimes the applicant says: "You know what? I'm fine. The mediation's fine. I've got enough. I'm done." Or they may say: "No. You know what? I want to pursue this. I want to go to inquiry." Then it proceeds to inquiry.

[0950]

J. Kwan: In terms of time delay.... Once a document has gone through the process, then it goes up, I guess, to what are called higher levels within the ministry before it's finally released — right? Do you guys track how often and the length of time which the release of that information is delayed from the higher-up level?

C. Tully: The time spent in sign-off is something that I believe the government is now tracking and is capable of checking in CRTS. We are expecting to get some reports on that.

The other thing that I know they are working on is.... They're talking about the sign-off process and trying to reduce it to make it streamlined.

M. Dalton: On average, how many FOI requests are there per year, and how has the trend been over the past number of years? How does that compare to other provinces on a per-capita basis.

C. Tully: I think that Sharon is best-placed to answer this, and she'll be up next. I do know that last year the ministries received 6,500 requests. It's hard to say, in total, how many there were across all the other public bodies because they don't have a central database. They just do their thing.

I did do an informal survey around health authorities, for example. They do an incredible number of releases that are not formal — in the tens of thousands of releases. These are patients after their own files. There's a lot of information going out that we really just can't keep track of.

Police forces typically are closer to a few hundred requests per year. I think that's probably consistent with most cities. They wouldn't get more than, perhaps, a hundred requests a year.

M. Dalton: What's the trend been like, and how does it compare to the other provinces, if you know?

C. Tully: I think I'll leave that for Sharon to answer. She probably knows. I believe we're higher per capita than other provinces, but I'm not certain about that. She may be up on those statistics.

R. Cantelon (Chair): I'm going to let Ralph have the last question, but I want to encourage everybody to continue to write questions in. It'll be part of an ongoing dialogue over the next couple of months.

I'm sure we could stay here for some time and continue to ask very useful questions, but part of this will be a written dialogue that will carry on. Of course, David will be back again. We do have another presenter, and we do have other business. I don't want to get to the point where people start leaving the meeting and I can't carry on.

R. Sultan: In your activities how big a role does the criterion of feasibility in fulfilling a request play? I have in mind questions which I have sometimes of ministry operations, and I'd like to have all these numbers and so on. I'm sure it's available, but perhaps only with a small army of clerks to pull it all together.

Related to that is the cost of fulfilling the information request. Do those feasibility and cost factors play a significant role in your judgments?

C. Tully: I think what you're talking about, perhaps — and correct me if I'm wrong — is where the data you're seeking is in a database. You know they have it. They just have to get it together — perhaps create a report.

The act contemplates that in section 6. It talks about how a public body must create a record if the record can be created from what they call a machine-readable record — that's a bit old-fashioned language — in the custody or control of the public body, using normal computer hardware or software, and creating the record would not unreasonably interfere with the operations of the public body. That's where that comes in. If the request is to create a document from a database but it would unreasonably interfere, then the public body is not required to create the record.

One of the caveats of this.... There have been a number of cases on this section, and our office has been very clear that when a public body creates a database, they need to create a reporting ability so that people can access the data. Your excuse can't be: "Oh, we created this database, but we forgot to create a reporting capacity." Well, then you're going to have to create the reporting capacity because that's essential for FIPPA. But having a reporting capacity — it should not unreasonably interfere with the operations of the public body.

R. Sultan: And the cost question?

C. Tully: Well, the cost question. Section 75 allows public bodies to charge fees. They charge fees in accord-

ance with the schedule, so they would calculate the fee and make the fee request of the applicant. Then the applicant would make a request to us.

What they would probably try to argue is that the fee should be waived in the public interest. There's a long series of cases and factors to consider in deciding whether or not the public interest is served.

[0955]

We always, always look to applicants and public bodies to negotiate and narrow the request to try to reduce the fee but produce the records that are responsive to the request.

R. Sultan: If I may, Chair, is the fee so determined driven by some full cost recovery philosophy?

C. Tully: I don't believe so. It's set by the regulation, and the regulation is quite old.

R. Cantelon (Chair): Doug, as the vice-Chair, gets the prerogative of a last, quick question.

D. Routley (Deputy Chair): Thank you for your flexibility, Mr. Chair.

We're reviewing the Freedom of Information Act, but obviously a lot of what you encounter in terms of trying to recover documents or to discover documents relates to the Document Disposal Act. How does the office manoeuvre around the interlacing of those two acts, because it obviously must present some difficulties?

C. Tully: We have no particular authority with respect to the Document Disposal Act, but that act does set the standard that public bodies must create schedules in order to manage their records. Having those schedules helps public bodies, first of all, find the records and ensures that they're available when a request is made.

It also means that if the public body properly manages its records, they can destroy them in an orderly fashion and not have everything forever and have huge amounts of information to have to search through.

Better records management, without a doubt, makes access requests and access legislation work better. It is one of the challenges of government, and it's an important piece of legislation and one that we have in the past talked about needing significant updating.

R. Cantelon (Chair): The Clerk, if I may, has something to add to that.

C. James (Clerk Assistant and Clerk of Committees): Just for clarification, under the Public Documents Act there is a beast called the Public Documents Committee which meets, formulates the retention disposal application and develops this package, which then is presented to the Select Standing Committee on Public

Accounts, which some of you may be aware of. The Public Accounts Committee then deals with these applications for the retention and disposal schedules for the various government ministries.

I know that there is a proposal by the Public Documents Committee to appear before the Select Standing Committee on Public Accounts on this matter when it next meets. You may be interested, those of you who are on the committee, and even if you're not, to be aware of the fact that this is a process which has unfolded for many, many years.

R. Cantelon (Chair): Thank you very much for your presentation. I'm sure there'll be many more questions directed to you, and we'll make the answers available to all members of the committee.

I encourage, again, committee members to ask as many questions as they want.

We'll have a presentation from Sharon Plater, and I'm sure you'll have questions for her as well. She is the director of knowledge and information services for the Ministry of Citizens' Services.

This lovely person handing out documents is Josie Schofield. Josie worked with me on the PIPA committee and is a wondrous person with words, as you will come to learn. She can disentangle some of the most convoluted syntaxes that no doubt we'll be presented with and make some sense out of them. So we're glad to have Josie with us.

As the members get their coffee, Sharon, welcome. Glad to have you here, and I'm going to ask you to proceed.

S. Plater: I'd like to thank the committee for inviting the Ministry of Citizens' Services to present a technical brief this morning. As you're aware, the Minister for Citizens' Services, the Hon. Ben Stewart, is the minister responsible for the Freedom of Information and Protection of Privacy Act.

[1000]

I've provided you with a copy of the slides that I have this morning. I'm going to vary the presentation of them to take into account the information that Catherine has provided to you and also the answers to some of your questions, because that would be duplicate information for you.

Before I begin, I just wanted to address one of the questions you asked and Catherine's response. That was around the anonymization of applicants' names. That has been addressed in government where possible.

What I mean by "where possible" is that if an individual has asked for their own personal information, their name would have to be provided to the program area simply for them to be able to find the records related to that particular individual. But beyond that, there has been policy change to address the anonymization of the applicant.

I'd like to begin just by giving an overview of the act, and I'll try not to go into a lot of details, because I realize this is very early stages for the committee. And I will leave lots of time for questions.

What does the act do? As Catherine talked about, it really is about openness and accountability and also provides for fair information practices. It specifically gives the right of access to records in general, with limited exceptions. It gives the individuals a right of access to their own personal information and to correct that information, and it provides for independent oversight as is offered through the Information and Privacy Commissioner's office. As Catherine mentioned, it prevents the unauthorized collection, use and disclosure of personal information.

The scope and coverage. This will answer some of the questions you have asked. British Columbia's act provides the widest coverage in Canada. There are 2,902 public bodies that are covered under the legislation. The closest province is Ontario, which has 2,730 bodies covered, and then Alberta follows with 1,213.

I will caution you with the latter statistics, particularly the one I quoted on Alberta, because Alberta has health information legislation, which B.C. doesn't have. Our hospitals, health authorities, etc., are covered under our Freedom of Information and Protection of Privacy Act, where in Alberta they're covered under a health information act.

There may be additional public bodies added in Alberta, but by and large, B.C. has the broadest coverage. Part of that is due to the fact that B.C. covers the self-governing professions. Those aren't generally covered in other provinces, so your College of Physicians and Surgeons, your registry of nurses.... All the professional bodies have responsibilities under the legislation. As I said, those aren't generally covered in other provinces.

Catherine has gone through who was covered under the legislation, mentioning ministries. I just want to point out that the ministries were the first brought under, and the Crown corporations, in 1993. The local public bodies such as the police, the health and the municipalities were brought under in 1994, and then your self-governing professions were brought under later in 1995.

The reason for that was to allow training of the particular public bodies, but also the local governments and the self-governing professions needed to look at bylaws and do a lot more assessment of their policies and practices to bring them up to speed. Government had been working on this for some time.

I just want to mention that the scope covers all records, so the act is for recorded information — the information that's under the custody and control of a public body. A public body might have control of a document, so they've generated, say, a financial record. But they have a contractor that is responsible for maintaining

their financial services. That record would be in the custody of the contractor in the control of the ministry. Those are two very important words for distinction.

I provided you with the definition of "record," which is very broad. Again, it refers to every form of recorded information, whether it's a little sticky paper on the side of a paper up to databases or large accumulations of written records.

There is a schedule in the legislation, schedule 1, that does detail all other kinds of definitions — so the definition of day, the definition of personal information — and it's really informative.

[1005]

I also want to mention that oftentimes public bodies will get a request for information, and that doesn't fall under the act. An example would be if I were to go to a public body and say: "I want all information on black vehicles that the ministry has." That would be a request for a record under the legislation.

If I were to ask a question and say: "Well, could you tell me about the efficiency of black cars?" There are not necessarily records on that. It's more asking for a piece of information or an explanation, and that doesn't fall under the FOIPP Act.

What I think is important in what is covered by the act is what is not covered by the legislation. Members of the Legislative Assembly are not covered by the legislation, so a minister who has responsibilities with respect to their portfolio is covered for that portfolio but would not be covered when they are out in their constituency office as other MLAs' records are not covered.

The Supreme Court, the Provincial Court, etc., are not covered. Records related to active prosecutions, materials at a government public body on archive that have been put there by private individuals are not covered by the legislation. The records of elected officials that are in local public bodies are not generally covered by the legislation.

There is a very set number of records that have been identified as needing to be outside the scope of the act. I think it is important to be aware that there are those distinctions.

What I'd like to do is look at some of the general responsibilities. I've put three categories here, and one is the Minister of Citizens' Services. The minister has always had general responsibilities for managing the legislation, looking at whether there are changes that need to be done, assessing what's happening in the international realm of privacy or access. Are there new regimes that are coming forward, new ideas that might make sense here? Generally keeping that in mind and looking for ways of improving the legislation.

The minister is also responsible for all the policies, the procedures and the guidelines that flow out under the legislation. The minister provides policy support and advice to the 2,902 public bodies. The ministry does

have a help line. It's called the privacy help line, but it deals with requests around access and everything else under the legislation.

Public bodies can call in and get responses to questions that they have. This help line also responds to the Personal Information Protection Act, which is the public sector privacy legislation.

The ministry also has a website that has a lot of information on it, which again has a lot of policy advice. It includes statistics, such as some of the questions that were being asked here today. There are general statistics up on the website to give individuals an idea of how long it is taking to respond to requests, what types of requests are received, etc.

The minister now also has responsibility for access requests under the act. Recently there was a new office established. It's the information access office. That office is now responsible for responding to all access requests in government. Previous to this time every ministry had staff in it that processed access requests. That staff has now been moved over to the Ministry of Citizens' Services.

This was done to streamline request processes, to help with timelines, to help with delays, etc. The minister has responsibility for that organization as well. They also provide operational support to the ministries in terms of privacy. If a ministry is wanting help with completing a privacy impact assessment or an information-sharing agreement, they can go to the central agency in the Ministry of Citizens' Services and get that kind of support.

The ministry itself is still, under the act, responsible for making the final decisions on access and privacy responsibilities, so the legislation hasn't changed. Just the process through which it is managed has changed. The second box there talks about the ministry responsibilities.

If you look at the legislation, it says "the head of the public body." Within government, the head of the public body is still in all the individual ministries. The processing is just being done by the central agency. In the other public bodies, you will look at schedule 2 in the act and it will say that the CEO is the head or the manager of something is the head.

[1010]

It defines who the head is in all those local public bodies or in agencies, boards, commissions, etc. They are the ones responsible for making the decisions under the FOIPP Act.

The third box there, of course, is the commissioner's office. Catherine has done a very able job of describing what their role is, so I'm not going to delve into that today.

If you have questions as you're going along and there's something really urgent, please don't hesitate to ask me. I'm hoping to leave lots of time for questions at the end.

These stats under the FOIPP Act. As Catherine mentioned, the ministries last year received about 6,500 requests for access. We don't know how many the other

public bodies are receiving. As she indicated, there isn't a tracking system for that.

The public bodies. When we talk about 2,904 public bodies, some of those are staffed by a part-time volunteer person. Asking those kinds of people to provide the statistics would be very onerous for those local public bodies or smaller public bodies.

B.C. receives three times as many requests per capita than Ontario and four times as many as Alberta. I think it has something to do with the air in B.C. ICBC and the Ministry of Children and Family Development, in themselves, receive more requests per year than the entire province of Alberta.

Approximately 5 percent of all FOI requests lead to a request for a review before the commissioner's office. As Catherine indicated, they mediate successfully 92 percent of these. We only have 90 percent, and I apologize for underestimating that by the 2 percent.

You can see that the province receives an awful lot of access requests per year. These smaller public bodies obviously aren't going to receive as many, but some of the large Crowns, like ICBC, receive a significant number of access requests.

Catherine went into the structure of the act already. I have listed it there on the slide for you to refer to.

One of the things I'd like to say about the right of access.... Catherine covered all of this. I'd just like to say that it's fairly well outlined in the act as to what responsibilities ministries have. Government is very serious about meeting the access responsibilities under the act and has developed this information access office in order to expedite request processing.

What I'd like to do is look at some of the exceptions under the legislation. There's a division in exceptions. There are mandatory exceptions. That means that government must withhold that information if it meets the criteria listed in the act.

One of the mandatory exceptions is for personal information. Another one is for business information that would compromise a third party. Another is cabinet confidences. The fourth has to do with the disclosure of abortion services information. On those ones, government doesn't have a choice, if it meets the criteria in the legislation.

The other exceptions are discretionary. There is a limited number of them. You talked about section 13 earlier. That's one. You also have one on legal advice. That covers your solicitor-client communication privilege and the litigation privileges. You're looking at the communications between lawyers and their clients, and also where the documents have been prepared for actual or contemplated litigation.

You have disclosure harmful to law enforcement. This has to do with prosecutions as well as the actual law enforcement activities. It does apply to all public bodies, but you will find that more often in law enforcement agencies themselves.

You've got disclosure harmful to intergovernmental relations. This generally comes into play when you're dealing with different levels of government. It could be between the province and the federal government, the province and municipalities, the province and aboriginal organizations. It has the potential to protect the dialogue between those bodies.

You also have disclosure harmful to the economic interests of a public body. In that particular instance, you're looking at disclosure that may harm negotiations that are ongoing for a public body. It may harm or talk about the personnel relations in a public body, or it may reveal a trade secret. You could maybe have a scientist working for an area in government who's come up with a novel way of approaching something, and government is using that.

[1015]

There's a variety of items listed under there, but they are documented specifically in the legislation. The wording is fairly precise in that particular section.

There's also disclosure harmful to conservation of heritage sites.

Disclosure harmful to individual or public safety. If you have a record and the release of the information in that may put a person at risk, government can choose to withhold that information. There's a very high threshold for withholding information under that section, and it tends not to be used all that often.

The other one is information that will be published or released within 60 days. If an access request comes in, government doesn't need to respond to it if there's a report. Say somebody has asked for a report on a particular study. If that report is due to be released before 60 days, they can simply tell the applicant, "Yes, it will be provided to you within that time frame," and not need respond to the access request.

D. Routley (Deputy Chair): You mentioned public bodies and economic interests. When a public body is considering a land acquisition that could have a public interest aspect to it — say, for example, the acquisition of land in order to create a gravel pit — how do you balance the interest of the public body versus the public interest in knowing that that kind of activity is occurring?

S. Plater: That would come under the discretionary aspect of it. Each ministry is going to approach it differently.

With the discretionary exemption, one of the things a public body needs to do is actually look at and document how they made that decision, to release or not. How did they exercise their discretion? In that particular instance, they would need to be weighing those factors and indicating that they had weighed those factors when coming up with their decision. There isn't any particular protocol for doing that, but it would definitely be

something that would have to be taken into consideration when a public body was making the decision to release or withhold.

Does that answer your question?

D. Horne: In dealing with the severance issues and severing a document, one of the things, with the experience I've had.... I'm just wondering about your advice.

Sensitive, highly severed documents oftentimes.... When certain sections are left in, in the interest of not severing the entire document and leaving parts in, I think that oftentimes conclusions can be drawn from the areas that are left in that are completely erroneous and incorrect. Therefore, basically, those conclusions have been drawn from that, that are factually incorrect, and obviously, they're brought to the public and brought forward.

What's your view of that, and how, in your view, could that be addressed?

S. Plater: I think that's one of the challenges of severing, which I did for a number of years. It's very difficult to make the decisions on removing information from a document. You need to carefully consider what the implication is of removing the information in terms of what is left.

In particular, it may be, if it's a discretionary exemption, that you lean towards leaving in information that you might be able to withhold, because to take it out would leave an erroneous message in the document. So those definitely have to be taken into consideration.

I think, also, that sometimes it's unavoidable. If you've got a mandatory exception that says you have to take out this information because it meets the criteria in the legislation and you know that doing so is going to create a wrong impression or facts that aren't accurate, the public body could write an explanatory letter. So a public body sends a letter, usually with the response to the applicant, and they can write something in there that may clarify what they believe to be an error that is now left in the document.

It really comes down to thinking about the severing when you're doing it and not just going through and removing everything that could be removed. It takes a lot of talent to do that. I hope that answers your question.

[1020]

R. Sultan: I find it astonishing that your slide points out, as you have as well, that B.C. received three times as many requests per capita as Ontario and over four times as many as Alberta. You've suggested maybe it's something in the air we breathe, but I'm sure you have other theories as well.

My own impression would be that there must be some systematic difference in the way our act is constructed or administered that accounts for these rather large differences in activity. Can you comment on that, please?

S. Plater: The acts are very similar. The B.C. act was modelled on Ontario, and Alberta's was as well, so the acts are very similar. I think where the differences come, to a large part, is in your general requests. Those are the requests for non-personal information. I don't have the statistics to back this up, but I remember talking to colleagues in Ontario and Alberta. They indicated that they don't receive the volume of requests from political parties, from media, from advocacy groups.

I think the one thing to keep in mind is that the other provinces, for example, don't have advocacy groups in the privacy and access area. B.C. does, and those groups often make submissions to the federal government, because they are the very active ones in B.C. So we have a climate that is more interested in privacy and access rights in B.C. than the other provinces do, and that accounts for some of it. I'm sure not all of it.

R. Sultan: Perhaps I didn't hear you correctly. Are you suggesting these other jurisdictions do not have advocacy groups?

S. Plater: They don't have the privacy advocacy groups like we do in B.C., no.

R. Sultan: I see. Well, along the same line, in the next line in your slide you point out that ICBC and MCFD each receive as many requests per year as the entire province of Alberta. What is it about our public automobile insurance company that attracts so many requests for information? Who is making these requests, in the main?

S. Plater: The majority of people making the requests would be asking for their own claim files. If they're going through different processes with the agency and they're unhappy with it, then they would ask for their own personal information. That would be a large part of what the requests would be for ICBC.

R. Sultan: And with MCFD?

S. Plater: Again, that would be adoption files. It would be children in care looking for their file. They may be adults now looking for files back when they were in care. The large proportion of those files requested or requests made to MCFD are for personal information.

R. Cantelon (Chair): I've got Jenny, Doug and then Marc. Then I'm going to ask Sharon to finish her presentation, and we'll have more questions at the end. Let's make sure we get to it all.

J. Kwan: I'm wondering: has it ever occurred where an FOI request comes through, and that information is severed because it's a time-sensitivity issue? So that

information is severed because of some time frame, as it relates. Then afterwards that time sensitivity has gone, because time has passed, do you ever release the information after the fact, if you understand what I mean?

S. Plater: I understand your question. I'm just not sure I can answer it. That kind of response wouldn't be recorded in our statistical system.

If I put myself back into a ministry in the early days of the act when I was severing information, I would expect at that time that we didn't go back and release, simply because we had so many requests to respond to that you wouldn't have remembered that that information had now been released and that you could respond to it. I expect that may be the same today, but I can't be definitive on that.

J. Kwan: I have a follow-up. Is it possible for you to find out?

S. Plater: I can ask that question, definitely.

J. Kwan: And then what that process is. I think the applicant may well still be interested in that information. It might shed some light on an important piece of information that they were trying to seek, even though the time frame might be different.

S. Plater: Yes, I will see what I can do on that and get the information to the committee.

R. Cantelon (Chair): Sharon, give it to the Clerk, who will distribute it to everybody.

[1025]

D. Routley (Deputy Chair): When it comes to the disclosure of archaeological information related to first nations—significant sites, perhaps development sites, what access does the act provide to private development and public development in terms of acquiring information about what potential harm or existence there might be of archaeological significance? How does it interact with the other acts that control significant archaeological assets?

S. Plater: Right. The act itself doesn't contain any proactive regimes around: "You need to release information in these cases." If there was an access request that came in for records relating to archaeological sites, the government would look at that. They could release the information, or if there was information that was sensitive to the harm of these sites, then they could withhold that.

What you're asking, or at least what I'm interpreting that you're asking, is: is there a difference between what would happen in the release of information from public

and private sites or where there were developments by a private or government agency? Is that correct?

D. Routley (Deputy Chair): Right.

S. Plater: The one that might come into play there is what we call section 21, which I'm sure you might be familiar with at this point, which is the business information. If you're looking at a private development, government would need to evaluate the information to determine if release of it had any financial or business harm to the company. That would be something that would need to be taken into consideration.

What would be taken as sort of an equivalent to that in terms of government would be: would the release of that information have any financial or economic harms to government? The same thinking would take place in evaluating the information, but it's two different sections of the act that would apply — one applying to private business and one to the government development.

R. Cantelon (Chair): Okay, Marc, the last question, and then I'll ask Sharon to move on. I note the risk is that we start to lose members, and I hate to have information lost, and people won't get it.

M. Dalton: Perhaps I heard you incorrectly, but I thought you said that we have privacy advocacy groups, or did you say private?

S. Plater: In British Columbia there is the Freedom of Information and Privacy Association, which is a very active advocacy group. They deal with privacy and access. The "access" just isn't in their name. They are very active, and they have a website. They do conferences. They do a lot of papers on privacy and access issues and would probably present to a committee such as this.

B.C. Civil Liberties Association also takes a very active interest in privacy and access issues.

M. Dalton: What is the rationale for other provinces not granting this access to these privacy groups?

S. Plater: It's not that the other provinces haven't granted the access. The other provinces just don't have the groups. The groups haven't formed there or aren't active there.

For example, you've got a federal privacy act and a federal access act. Recently they had committees like this that were looking at those pieces of legislation. The advocacy groups in B.C. would present to those committees and would probably be the only advocacy-type groups that would present to those committees, because there just aren't any other ones that are established in the other provinces or in Canada.

R. Cantelon (Chair): Sharon, if you would carry on. Certainly, the privacy aspect is equally important.

S. Plater: Sure.

R. Cantelon (Chair): We have reviewed the amendments, so we know where we are going from.

S. Plater: Okay. Under the privacy protection, Catherine talked about that quite a bit, so I'm not going to go into most of the sections. One thing that I wanted to point out on disclosure is that the act was changed a few years ago. I'll talk about that in the amendments. Disclosure now looks at what can be disclosed inside Canada and outside Canada, and what can only be disclosed inside of Canada. There's a difference.

A couple of examples of the types of information that can be disclosed outside of Canada are if you are looking for a next of kin to notify them, or if you're doing debt collection and the individual's assets are located in another country, then you can disclose personal information outside of Canada.

[1030]

This relates to personal information only. If you are looking to disclose the personal information to an employee within the public body because they need to do that for their work, that's only within Canada. If you are wanting to disclose for a consistent purpose.... For example, you've collected the information for one particular purpose, but there is another purpose that comes along that's very consistent with that. You can disclose that personal information, but only inside Canada. So there are clear distinctions now within the legislation between what goes outside and what goes inside Canada.

The other thing I wanted to mention was access and storage. That is another change in the legislation, and it falls under privacy protection. That is that government, or public bodies — by government I mean all public bodies — is not able to store personal information outside of Canada, except in limited circumstances. The information is also not able to be accessed from outside Canada.

So you couldn't have a company, say, doing information technology services for a public body — well, take a hospital — located in the U.S. and monitoring that data all the time and doing those services from the U.S. That wouldn't be permitted under the legislation. Those are new provisions.

I also wanted to mention a little bit about correction of personal information. The act provides the right for a person to ask or request to have their personal information corrected. However, it doesn't necessarily become corrected because they've made that request.

If they've made a particular request for factual corrections — so my birthdate is wrong in a particular file, and I provide them with my birth certificate that verifies that it's wrong — then that correction often gets made.

But if there's an opinion in a document — a doctor has made an opinion, and I don't like the doctor's opinion, and I want it changed — the public bodies usually will not correct that opinion. But what they're required to do is append the request for correction to the document, so anybody reading it further on sees the opinion was in there but sees the individual's request to have that opinion corrected.

I just wanted to make that distinction in terms of correction rights under the legislation.

As I said, I'm not going to look at the Information and Privacy Commissioner, because that's already been done. Back to special committee reviews, so I've flipped over to the amendments under the legislation.

You had asked some questions about the recommendation history. The special committee that met in and released its report in 1999 recommended 18 amendments to the act. Ten of those recommendations were implemented. That committee also made a lot of recommendations about sections of the act that should remain the same as they were currently written at that time.

In the 2000 report and recommendations the committee made 28 recommendations. Of those 28, 14 have either been resolved or have been amended through legislation, and the remaining are under consideration by government. I hope that answers your question. If not, possibly you can ask me more as we get to the end of this.

I wanted to highlight just a couple of the amendments. Please keep in mind that the first time that amendments were made to the act was in 2002, so the act had been in place for nine years. There were a lot of minor changes that needed to be made — little pieces of wording that you thought made sense when you were writing but obviously didn't when people were trying to apply it, or there were commas misplaced. I'm not addressing any of those kinds of things here. These are just the key ones.

The reason I'm highlighting this is just to give you an idea of what has been done over time to keep the act current. Our business environment, the electronic currency within the world has changed so dramatically and keeps evolving at a fairly rapid pace.

Now, obviously, you can't be doing amendments constantly to try and keep up with that, but there have been some amendments done to the act to try and adjust to changes that have occurred since it was implemented. I've listed them here for you, but I'm just briefly going to look at them.

In 2002 the act was changed to allow new public bodies to be added by ministerial regulation. Before that it had to go through the Lieutenant-Governor-in-Council, and that is a more protracted process than just having the minister sign off on the addition of new public bodies. That was done so that as new public bodies were created, they could be added to the act quickly rather than going through the lengthier process.

[1035]

A personal information directory was established under the legislation in 2002. It's the first of its kind in Canada, and I think it's still the only one of its kind in Canada. What was in place before that were large volumes of records that told you where the records were in government that held personal information.

As you can imagine, when you're dealing with volumes that are, like, a foot thick, updating those was a very onerous process. So the personal information directory allows the public to go on and see where records are located that contain personal information within each ministry and also to look at summaries of privacy impact assessments and information-sharing agreements that have been done within each ministry as well. That is updated as frequently as possible.

The legislation also put in some requirements around privacy impact assessments and information-sharing agreements. The minister has responsibility for setting those. It provided discretion to the commissioner to not hold an inquiry into a matter and also to deem frivolous and vexatious requests, which really freed up his resources to deal with other types of issues he needs. It also put in a requirement for a legislative review to occur every six years, which it's now doing.

It also clarified the definition of "day" from being open to just calendar days to working days. The reason that was done was because you get some months, like December, where there's an awful lot of holidays.

As Catherine had alluded, where some of the delays come into the access process is searching for records and also sign-off. If you're in a month where you have a lot of holidays, you are almost defeated before you begin. The ability to get out and get the records and get them back, in order to sever them, isn't able to be done within the actual working days that are left. We made it working days, so there was at least a fighting chance to be able to complete access requests within that period.

Also, in the fall of 2002 executive committees were added to the cabinet committee confidence to echo what had been going on in practice. In 2003 privacy protections were extended to personal information that was being handled by contractors. Before, the privacy protections just related to public bodies and the staff within public bodies. This extended those protections to the contractors of government and the employees of those contractors, and it permitted the commissioner to delegate his order-making power.

In 2004 the U.S.A. Patriot Act became a very prominent concern in B.C. The BCGEU launched legal action because they were afraid that the outsourcing of the administration of government's health systems, the Medical Services Plan, might put individuals' personal information at risk.

The Information and Privacy Commissioner undertook an inquiry. He had over 500 submissions. Government brought in Bill 73, which brought in a lot of

changes to the legislation, including what could be disclosed inside and outside Canada, and the commissioner's report made recommendations for additional recommendations.

The Patriot Act recommendations.... I'll just go over those briefly. These, again, restricted disclosure outside of Canada. They restricted storage outside of Canada. They restricted the ability to access personal information outside of Canada. They also brought in the requirement for reporting any unauthorized requests for personal information. If there was a request from an agency in another country to one of the public bodies in Canada, that had to be reported to government if it was not one of the authorized disclosures under the act.

There were also fines and penalties put in place if these disclosures weren't reported or if such disclosures were made. There were also whistle-blowing provisions put in so that employees who did report unauthorized disclosure could not be discriminated against. There were also amendments brought in, in 2005, which dealt with the acting Information and Privacy Commissioner and also allowing a commissioner to be reappointed.

[1040]

In later 2005 and 2006 there were amendments brought in to deal with some needed changes in the act. A number of those related to alleviating the restrictions that have been put in around the Patriot Act.

For example, it became evident that there were some things that couldn't be done without the information going outside of Canada. One of those was credit card payments, because all of the credit card processing facilities are in the United States, for the most part. If you've got liquor stores or if you've got health authorities who are taking payments by credit card, they all of a sudden couldn't process. Amendments were made for those kinds of reasons.

In 2008 there were changes made which largely reflected the recommendations in the special committee report of 2004. A number of those were around the commissioner's powers. It allowed his orders to be treated as orders of a Supreme Court. It allowed him to send complainants back to public bodies to try and resolve their issues at that point. It also allowed him to send a complaint back to a public body and ask them to sever.

My understanding is that the commissioner was getting complaints in, where a public body had just withheld all the records and not actually gone through and done a line-by-line review. He wanted to be able to send it back to the public body, saying: "No, you need to do a line-by-line review and then issue your decision." Then the individual could come back and lodge a complaint or a request for a review at that point.

That's a very quick and brief summary. I just wanted to say at the very end that our office is also available to provide you with support in terms of the questions that you have. By all means, if you have questions, get them

to the Chair, and they can ask us to provide that information to you.

R. Cantelon (Chair): We're now nearly 15 minutes over. I think, if I get agreement, I'd ask the members to submit their questions in writing. I'm very concerned that once we lose quorum we can't continue, and we have some important things to carry on with.

Also, I work with a vice-Chair. If necessary, if there are a lot of questions, we can bring people back at any time. We can do that, if necessary, if there's a need to do that.

I thank you very much for coming, Sharon.

We do have to now deal with the scheduling. I'll turn it over to Craig.

Public Consultation Process

C. James (Clerk of Committees): Josie is now just circulating a draft advertisement for a call for submissions. You will see in it.... It's very brief. It mirrors, essentially, the advertisement which was placed six years ago. If the members are happy with it, just a quick approval. Then we can put it in the usual dailies around the province — I thought, probably once.

Advertising for this exercise will also be done by direct e-mail and mail to the many interested organizations, associations and groups that have expressed an interest in FOI and privacy issues. They'll be on our distribution list and receiving the advertisement and updates on the work of the committee, as well, to supplement this particular advertisement.

As you probably are aware, this committee is empowered to conduct video conferencing. The last exercise involved four public hearings, two of which had to be cancelled because of the limited apparent interest in Kelowna and Prince George. The public hearings were confined primarily to Vancouver and Victoria at the time.

R. Cantelon (Chair): If I could hear a motion to adopt this notice to go out. Move? Discussion?

D. Routley (Deputy Chair): Yesterday in our meeting in Mr. James's office, we had a discussion around the deadline, and I brought forward the concern that I've heard from some stakeholder groups that the deadline is perceived by them to be short. The Chair indicated that there would be flexibility if there were bodies that couldn't comply with that deadline.

R. Cantelon (Chair): Absolutely. I think we have a three-month deadline, which seems on the surface to be not unreasonable, but certainly we don't want to appear to be cutting it off either. My thought is we'll make it January 29. I'll confer with the vice-Chair, and

if we need to push it back further, we'll do that. We certainly want to encourage people, but the experience has been on the FIPPA that if you make a deadline, people work to that deadline and then always ask for more time.

[1045]

Then we have to leave time for deliberations. We would start deliberations probably in February and late March. The public hearing meeting on that.... We don't know when we're coming back, but the thought is that I'll work with the vice-Chair, and we'll set up a date about when we're coming back. But we don't have the committee.... I intend to listen to the vice-Chair, and we'll adapt, change those dates as necessary — if necessary.

Okay? All in favour?

G. Gentner: I'm just wondering. What exactly are we voting on? What's the motion? You said that it's going to the normal dailies. And what is the budget? Are we actually going to be reaching all newspapers in the province or just going to a specific few?

C. James (Clerk of Committees): Traditionally, an advertisement such as a call for submissions on this kind of issue would go to all of the dailies, and we would publish once and gauge the reaction. Our experience with this issue in the past has been that the best way to reach interested parties is by e-mail, so they'll be receiving.... Interested groups will be receiving directly from us by e-mail the actual mockup that appears in the newspapers.

R. Cantelon (Chair): And of course it will be on line.

D. Routley (Deputy Chair): And finally, we're indicating that we'll be inviting people through a list of stakeholders that has been assembled through...

R. Cantelon (Chair): That's right.

D. Routley (Deputy Chair): ...the office, through the previous committee. And we are open to submit other stakeholder groups that we would like to have notified?

R. Cantelon (Chair): Absolutely, and if there are other stakeholder groups identified, please let the Chair know, and we'll invite them.

The current thought is one day in Vancouver and then video here as necessary. If there are a lot of presentations, we'll do two days in Vancouver, and we'll adapt it as necessary.

D. Routley (Deputy Chair): Finally, the previous committee had meetings scheduled in the north, two meetings, which we'll cancel because of lack of participation. If we receive a significant interest from other

areas of the province, is the Chair open to considering public meetings in those areas?

R. Cantelon (Chair): We're open to it, but I would say that the experience of the Finance Committee with video conferencing worked quite well. I think it would behoove us to be as parsimonious as we can in our travel because this is a big committee. We have to take Hansard and the whole nine yards with us.

D. Routley (Deputy Chair): Yeah.

R. Cantelon (Chair): If they're agreeable to video — and it worked quite effectively, I understand — then we can do that too. But we certainly don't want to inhibit it. If we have 20 people in Prince George, we'll go to Prince George. Call for the question.

Motion approved.

C. James (Clerk of Committees): Just one other thing. Just to reiterate, if you do have lists of names of persons, groups, associations and so on that you would like to be on our distribution list, if you could just let us know, we'll put them on and ensure that they are fully informed throughout the exercise.

R. Cantelon (Chair): Thank you for letting me wrap up quickly. I don't want to appear too draconian, so please get your questions in, and make them available to everybody. It can be an ongoing dialogue. That's what we need.

Thank you. We're adjourned.

The committee adjourned at 10:48 a.m.

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