8:36 a.m. Tuesday, March 5, 2002

[Mr. Rathgeber in the chair]

THE CHAIR: Good morning and welcome, everyone, to the third meeting of the select special committee to review the Freedom of Information and Protection of Privacy Act of the Alberta Legislature. We're missing a few members, but we do have a quorum, so I think we should get started.

My understanding is that the briefing material was delivered to all the members on Friday afternoon. I hope everyone's had an opportunity to review it in preparation for this meeting. For the record my name is Brent Rathgeber. I am the MLA for Edmonton-Calder, and I am the chair of this committee. If we could go on my immediate right and introduce ourselves, the members first, and then we'll introduce the technical support thereafter.

[Ms Debby Carlson, Ms Alana DeLong, Mrs. Mary Anne Jablonski, Mr. Broyce Jacobs, and Mr. Gary Masyk introduced themselves]

THE CHAIR: Thank you.

The clerks of the committee are Corinne Dacyshyn and Karen Sawchuk, and Mr. MacDonald is now present. If we could have the technical support people, starting with John Ennis, whom I've just introduced, introduce themselves.

[Ms Sarah Dafoe, Mr. Clark Dalton, Mr. John Ennis, Ms Hilary Lynas, Ms Jann Lynn-George, Mr. Tom Thackeray, and Ms Gwen Vanderdeen-Pashke introduced themselves]

THE CHAIR: Thank you.

Has everybody had an opportunity to peruse the agenda for this morning's meeting? If so, could I have somebody move that the agenda be approved?

MS DeLONG: I'll move that it be approved.

THE CHAIR: It's moved by Member Alana DeLong. All in favour? Anybody opposed? It's carried.

Has everybody had an opportunity to peruse the minutes from last Wednesday, February 27, 2002, which was largely an information seminar and orientation helpfully and professionally provided by Tom Thackeray and his team? I hope everybody's had an opportunity to look at the minutes. I don't think any important decisions were made, so I'm hoping that we can approve these minutes without any discussion. Can I have somebody move them?

MR. JACOBS: I so move.

THE CHAIR: Thank you, Mr. Jacobs. Anybody opposed? It's carried.

Now, at our first meeting, at our inaugural meeting, the terms of reference of this committee were approved without much discussion or debate, so I have given my undertaking, I believe, to both Messrs. MacDonald and Mason that we would be able to revisit this issue. That's the next agenda item. The terms of reference are in your binders. They were approved at a meeting on January 30. I think that as a matter of forum, this committee certainly has the authority to amend those terms should we choose to do so, notwithstanding the fact that we have approved them. It's the position of the chair that the terms of reference are appropriate and need not be amended, but that is not my call, so if anybody wants to comment on the terms of reference as approved on January 30 and propose any amendments, now would be your opportunity. Mr. MacDonald?

MR. MacDONALD: At this time, no.

THE CHAIR: This may be your only opportunity. We need to get the terms of reference approved. We need to get our policy paper approved and sent out to the stakeholders so that we can start the process rolling. So this is not an issue that I intend to revisit on a weekly basis.

MR. MacDONALD: Okay, but at this time, after reviewing the information that was provided, it would be pointless unless we want to incorporate the Health Information Act in this review.

THE CHAIR: Well, you have the opportunity to raise that issue if you choose.

MR. MacDONALD: Well, certainly we could. Mr. Chairman, I propose that

> we expand the scope of the review to include the Health Information Act.

THE CHAIR: Okay. At the last meeting I think Mr. Thackeray provided some briefing materials, and perhaps you would like to comment on the appropriateness or lack thereof of that suggestion.

MR. THACKERAY: The difficulty that I see, Mr. Chairman, is that the Freedom of Information and Protection of Privacy Act is under the administration of the Minister of Government Services, who proposed the motion to establish the select special committee.

The Health Information Act is administered by the Minister of Health and Wellness. He had no input into the motion that established this committee. The Health Information Act, which was proclaimed in force April 2001, if I remember correctly, has a similar review clause that the Freedom of Information and Protection of Privacy Act has, which requires that a review be done within three years of proclamation. It's my understanding that the minister of health will be proceeding with that review in due course.

THE CHAIR: Thank you.

It's certainly my position, and I agree with that summation. Given the comparable legislation, the health care freedom of information act – is that correct, Tom?

MR. THACKERAY: Pardon me?

THE CHAIR: Is it the health care freedom of information act?

MR. THACKERAY: No. It's the Health Information Act.

THE CHAIR: The Health Information Act, of course, is a new piece of legislation passed by our Legislature. I just do not believe that reviewing health care information falls within our mandate, but I'm certainly open to persuasion by any of the members of the committee.

MR. MASYK: How about by way of consensus, by voting to see where we all stand on that?

THE CHAIR: Well, we will have a vote shortly, but I don't want to have the vote before the members feel that they've had an opportunity to convince any of us who may have one view or another.

Mr. MacDonald.

MR. MacDONALD: Yeah. Thank you, Mr. Chairman. In light of the remarks by Mr. Thackeray, I would like to add that perhaps it would be prudent, in light of the financial situation we now find ourselves in in this province – as I understand it, it was either $52,000 or $32,000 that this committee was to spend – if we were to combine the review of not only the freedom of information act

but also the Health Information Act, and I would encourage members of the committee to support my motion. We would be utilizing tax dollars very wisely by combining the reviews. There is a statutory requirement that the Health Information Act also be reviewed. I realize it's early, but in light of the Mazankowski report and the use of health information, it concerns many Albertans that we combine both acts, save a few dollars, and go ahead.

Thank you.

THE CHAIR: Well, as much as I am a fiscal conservative – and I appreciate that suggestion – it would appear to me that this committee was struck by the Legislature by a motion introduced by the Minister of Government Services. It was voted on, and it was approved.

The Health Information Act has its own review mechanism, and I don't believe it falls within our mandate to combine two review mechanisms from two separate pieces of legislation, but that again is only my view.

MR. JACOBS: Well, it also seems to me that it would be completely inappropriate here to support the motion that's going to be put forward without consultation with the minister of health. As you pointed out, we have been directed to proceed by the minister responsible for FOIP. It would certainly be inappropriate to go beyond the scope of our assignment and involve another minister, who hasn't even been consulted or with whom we haven't even discussed it, so I totally agree with your point of view, Mr. Chairman.

THE CHAIR: Any other comments?

There's a motion on the floor to amend the terms of reference which were moved by Mr. Masyk on January 30 and approved by this committee. All those in favour of the motion to amend as promoted by Mr. MacDonald? Opposed? The motion is defeated.

The next agenda item. At the last meeting Member Carlson requested information regarding the 1998-1999 Select Special Freedom of Information and Protection of Privacy Act Review Committee and which recommendations were not implemented. I understand the material was provided in the briefing materials which were distributed earlier this morning. Do we need to have a discussion on this, or was that requested merely for information purposes, Ms Carlson?

8:46

MS CARLSON: It was more for information purposes. I have before me the recommendations not implemented, but were the recommendations in total coming?

MR. THACKERAY: The recommendations in total are in the buff-coloured report. I think it's at the back of the binder.

MS CARLSON: Okay. Good. Thank you. Oh, yes.

MR. THACKERAY: That includes all of the recommendations of the review committee for 1998-99.

MS CARLSON: Perfect. Thank you very much. I'm happy.

THE CHAIR: I'm glad you're happy. If you're happy, I'm happy.

Okay. The main course of business this morning is to discuss, review, and ultimately approve the discussion paper as prepared for the committee with some input from the chair, but I can't take a lot of credit for it. The draft discussion paper has been available now for some time, and I know that most members have had an opportunity to read it and discuss it among themselves. I think it's a very, very good draft. I think it covers the issues that we were mandated to review, and I think it raises some interesting topics for discussion. I am opening up the floor to comments regarding the adequacy of the discussion paper and/or any suggestions for improvement or amendment.

Mr. MacDonald, notwithstanding that your motion to amend our terms of reference was defeated, do you have any comments, questions, or concerns regarding the discussion paper?

MR. MacDONALD: At this time, Mr. Chairman, no.

THE CHAIR: Any other comments, questions, suggestions from any of the members? This is easier than I thought it was going to be. Then can I have somebody move that

> the March 2002 FOIP Act discussion guide, Looking Ahead, be adopted.

MRS. JABLONSKI: I so move, Mr. Chairman.

THE CHAIR: It's moved by Mrs. Jablonski. All in favour? Any opposed? It's carried.

I can advise the members of the committee that the edited discussion guide will be mailed to the stakeholders listed and to all MLAs on Friday, March 8.

MS DeLONG: Could we discuss the stakeholders list?

THE CHAIR: You can discuss the stakeholders list. You have the floor.

MS DeLONG: What I see missing in here is more representatives that would be interested in strengthening the family. One of my concerns that I would like to really address in this is parental rights. I believe that in the act it's laid out quite well, but in terms of how it's being carried out within government departments, it's not as strong as it should be. I know that there are a lot of churches that are very strong on promoting family rights and parental rights, and I'd just like to see inclusion of those groups.

THE CHAIR: Well, I'm going to comment, and I'm going to ask Tom to comment. The thing you must remember is that we will also be advertising in all of the major newspapers in Alberta for anybody who wants to make a submission. Be they an individual or be they an organization, they can provide a written brief to this committee, and we will review it. They can also request an oral presentation, and this committee will then entertain that application. So this is not an exhaustive list. This is a list of people that have been identified by the appropriate officials in the Government Services branch of freedom of information as people who would likely be interested in this topic, but not being on this list does not exclude you from participating in the process.

Tom, do you have anything to add to that?

MR. THACKERAY: The list was prepared with input from all government departments as well as other organizations that are subject to the Freedom of Information and Protection of Privacy Act as their stakeholders list as well. We certainly have no difficulty in adding to the list. If members want to give us the contact information, we can certainly send it out to whomever.

THE CHAIR: Do you have a specific group or groups that you wish to be included?

MS DeLONG: No, I don't, but I will think about it a bit and get any names to you that I can.

THE CHAIR: That information has to go through Corinne, not through Tom directly.

Then, of course, the other option is that you don't have to be on the list to participate. If there is a stakeholder you can identify that you think we should hear from, just contact them. Send them a copy of the ad, send them a letter, and they can participate that way as well.

MS DeLONG: Thank you.

THE CHAIR: Any other comments regarding the paper which has now been approved and/or the stakeholders list?

I'd like the record to reflect the attendance of member Mr. Mason.

The next agenda item is a list of suggestions for Freedom of Information and Protection of Privacy Act improvements. We were anticipating a handout regarding this, but we don't have one. I don't know if we're going to be getting one subsequently, but Tom is certainly going to address this issue, and I'm sure he's competent to do it without a handout.

MR. THACKERAY: Mr. Chairman and members of the committee, what we did in anticipation of the meeting today was go through the discussion paper and prepare some commentary that we felt may be necessary for clarification. However, with the committee approving the discussion paper as it was circulated on Friday, we will not continue with the commentary, but we have identified a few issues that came to mind when we were working on the presentation for this morning. So what we would propose to do is just go through the discussion guide section by section – I believe there are 13 sections – and individual members of the team will make some comment about issues that we think may be raised by stakeholders who will be involved in the process.

THE CHAIR: Very good. You have the floor.

MR. THACKERAY: Hilary will start talking about the area of fundamental principles, and it's going to be quite short because – I'll take her thunder – we're not aware of any issues surrounding the basic principles of the Freedom of Information and Protection of Privacy Act. They're fairly consistent with other Canadian jurisdictions, and I think they're also consistent with the OECD principles as well as the CSA privacy code. We did, Mr. Chairman, prepare some handouts, which the members have, and number 5 talks about the fair information practices of the OECD guidelines. So I am assuming that if anyone has any comments on each section, they'll just bring them forward before we go on to the next section.

THE CHAIR: Any comments, questions, or concerns on section 1?

Please continue, Mr. Thackeray.

MR. THACKERAY: The second section deals with the scope of the act. Jann.

MS LYNN-GEORGE: The question here is asking which organizations should be subject to the act, bearing in mind that, generally speaking, public bodies are subject to both the access and privacy parts of the act. The scope of access to information and privacy legislation varies from jurisdiction to jurisdiction across Canada. For example, in Ontario the legislation doesn't include universities. In B.C. it extends to self-governing professions. Scope has tended to be a very significant issue in legislative reviews of access and privacy legislation, and the main reason why it continues to be an issue is because of changing structures of governance. Entities such as public/private partnerships and delegated administrative authorities' shared service arrangements are changing the nature of government somewhat. Also, because of the effect of private-sector privacy legislation.

8:56

During the last review a number of issues relating to scope were considered. You will find in recommendations 9 and 11, that were not implemented, some of the issues surrounding scope. They include the criteria for the inclusion of agencies, boards, and commissions, expansion of the scope of the act to include organizations which have as their primary purpose to perform a statutory function, the possible inclusion of self-governing professions, and the possible inclusion of private schools and colleges. Those first two issues remain somewhat open. We're in the process of developing a policy option paper that will address this issue in detail. It will include discussion of general principles relating to government accountability within the context of recent changes within government, public/private partnerships, et cetera, the effect of private-sector privacy legislation. In certain cases organizations may find themselves subject to the FOIP Act for work done under contract to a public body and to private-sector privacy legislation for their other activities, which could be problematic for them.

The paper will also present some options for consideration such as the possibility of making certain information subject to part 2 of the act only, so not subject to access legislation but to privacy legislation. You will be receiving a policy option paper on that in due course.

THE CHAIR: Thank you. Any questions, comments, or concerns regarding the scope of the legislation?

That being said, can we go on to records and information to which the act applies?

MS LYNN-GEORGE: Questions 3 and 4 deal with two quite distinct concepts, exclusion and paramountcy, which have a similar practical effect: to remove records and information from the application of the act. This doesn't mean that such records can't be disclosed. It simply means that they can't be disclosed under the FOIP Act.

Exclusions and paramountcies raise concerns at times because the FOIP Act provides the general framework for access to records and privacy protection of the public bodies. It should only be in specific cases that information is excluded or that another act or regulation prevails over the FOIP Act to limit access to information.

If we look at the exclusions from the FOIP Act, we find that there are a number of different reasons why it has been decided that the act will not apply. Just to give you some examples, first, there may be a regime for access to the records which would be incompatible with access under the FOIP Act; for example, registries, court records, records relating to a court prosecution. Second, the records may not fall within provincial jurisdiction; for example, the records of federally appointed judges. Third, the records may relate to political activities rather than to public administration; that would be the constituency records of MLAs, for example. Fourth, the records may relate to the functions of an independent officer of the Legislature; for example, the Ombudsman or the Auditor General. Fifth, the records may be considered the intellectual property of the author; for example, the teaching materials and research information of professors in universities whose professional responsibilities include publication.

The main issue with respect to exclusions is whether in some cases it may be appropriate to extend privacy protection to certain information that is excluded under the act.

Turning to paramountcy, where there's an inconsistency or conflict between the FOIP Act and another enactment, the principle

of paramountcy determines which law will prevail or take precedence. A conflict or inconsistency arises in a situation where compliance with one law would involve a breach of the other.

Many of the existing paramountcies in Alberta are very similar to those in other jurisdictions; for example, provisions relating to adoption records, to reports of child abuse, to securities investigations, and information in a census or survey of a statistical office. There's a complete list of the Alberta paramountcies in the handout that you received. It is quite a short list.

Paramountcy becomes an issue when there are competing interests. For example, a ministry may wish to establish a paramountcy in order to be able to provide an absolute guarantee of confidentiality to a business partner or client. If the effect of the paramountcy is to remove a certain class of information from public access, it may be expected that this will be opposed by interest groups. It's within the commissioner's mandate to raise concerns when a paramountcy is proposed, and the commissioner has raised concerns in cases where it's been argued that there should be a paramountcy but it appears that none is actually needed. That would be the case where the FOIP Act provides for the situation, subject perhaps to a harms test.

We have a policy option paper in development on this as well, and it will explain the concept of paramountcy and how it operates. It will discuss the rationale behind some of the exclusions and paramountcies and provide some comparisons with other jurisdictions. It will highlight significant legislative developments relating to information that's not subject to the FOIP Act, most importantly the effect of private-sector privacy legislation. So you'll be receiving that in due course as well.

THE CHAIR: Thank you.

Any questions, comments, or concerns arising?

MS DeLONG: Are these paramountcies set in stone, or are they up for review?

MS LYNN-GEORGE: These are established at present. There are some expiry dates on several of them, so departments have been asked to develop amendment acts to put the paramountcies, if they're still needed, into their own governing legislation. For example, you've got the Electric Utilities Act, the first one on the list, where the paramountcy expires December 31, 2002. We can expect to see an amendment act that will either remove the paramountcy altogether or put it into legislation that will go before the House for debate. Some of the others have no expiry date, but all ministries have been asked to move their paramountcies from the FOIP regulations, which was considered a way of dealing with paramountcies in the short term, into their governing legislation so that all paramountcies go before the Legislature.

MS DeLONG: So there's sort of a move to move regulations away from FOIP and into the individual . . .

MS LYNN-GEORGE: Into the legislation for that area.

THE CHAIR: Mr. Jacobs.

MR. JACOBS: Thank you, Mr. Chairman. I'm just a little bit confused here. If we have concerns about paramountcy or the items just explained, will we discuss those later, after we get the submissions? Are these items up for discussion at this point, or will we wait till we receive the input from Albertans and then react according to what we receive?

THE CHAIR: Well, it's more the latter. The discussion paper, as you can appreciate, is to form a framework to generate discussion among both the stakeholders and any other interested parties that might make submissions and thereafter guide us in our deliberations as to whether or not the balance between protection of privacy and freedom of information needs to be altered and, if so, in what direction and using what mechanism. So to answer your question, yes, all of these issues are up for discussion, but the discussion paper is just to promote dialogue and to promote both stakeholders and the members of this committee to start thinking about these issues.

MR. JACOBS: Okay. Thank you. I guess my other question is simply then: what if some issues that we feel need to be further discussed here aren't raised by anyone? I mean, I doubt that that'll happen, but just assume it did happen. Would we as a committee still have the option to discuss areas that we thought needed to be addressed in the FOIP review?

9:06

THE CHAIR: Certainly. Our mandate was broadly defined by the Legislature and tweaked and fine-tuned by ourselves. We're inviting input from stakeholders and from any interested members of the public, and thereafter it'll be up to us to sit down and discuss what we want to do with that input.

MR. JACOBS: Thank you.

THE CHAIR: Mr. MacDonald.

MR. MacDONALD: Yes. Thank you, Mr. Chairman. In reviewing the information that I just received and the fact that we have currently before the Assembly Bill 11, the new Bill 11, which is going to make some, in my view, significant changes not only to the Electric Utilities Act, the Mines and Minerals Act, but various statutes governing oil and gas and development and exploration of that, first, it's unfortunate that this act is coming before the Assembly before this committee has had time to work with and certainly hear from organizations such as CAPP, the Canadian Association of Petroleum Producers, or even the Power Pool of Alberta. My interpretation of this legislation at the time – I'm disappointed to say that there will be a longer time frame when this information will not be available or will be less available, I think in some cases 10 years. There is an increase in the time frame of 10 years for citizens to have access to this information. In light of that, I would like to express my disappointment, first, that this is before the Assembly, and I would encourage all members of this committee to have a thorough look at that legislation in light of what we heard here this morning.

Thank you.

THE CHAIR: Thank you, Mr. MacDonald.

Go ahead.

MS LYNN-GEORGE: Could I just draw your attention to a publication that we have produced in Alberta Government Services. It is called Paramountcy, and if you'd like any further information on it – it's a somewhat technical publication, but it does explain the concept and the policy and the procedures when paramountcies are proposed.

MRS. JABLONSKI: Mr. Chairman, just a point of clarification. Under Legislation Paramount over the FOIP Act and under Environment, we show the Environmental Protection and Enhancement Act. In certain sections the paramountcy expires on

December 31, 2002, so does that mean that at that time any information that's covered under those sections would be a part of FOIP if the department doesn't extend their paramountcy?

MR. THACKERAY: What it means is that those sections of the act are no longer paramount to FOIP but FOIP would apply, so individuals could seek access to those records and the public body couldn't say: you can't have access because the Environmental Protection and Enhancement Act is paramount to FOIP.

MRS. JABLONSKI: Thank you.

THE CHAIR: Any other questions, concerns, or comments on this portion of the paper regarding paramountcy and access to records? Going once, going twice.

MS DeLONG: Could we all get a copy of the more recent FOIP publication that you have there?

MS LYNN-GEORGE: Certainly.

MS DeLONG: Thank you.

THE CHAIR: Anything else? Does that bring us to fees?

MR. THACKERAY: No. It brings us to access to records, Mr. Chairman, of which fees is a part, I believe. This is going to be a two-part presentation. Linda Richardson will start, talking about the access process and some of the issues there, continuing on to the mandatory and discretionary exceptions, and following that Hilary will talk about fees.

MS RICHARDSON: Thanks, Tom. The access process in the discussion guide: we're looking at that from the perspective of both an applicant making a request and also from the perspective of public bodies and how they process requests.

One of your handouts, item 2, is the FOIP request handling process. That just is a bit of a quick overview of the steps that public bodies have to take when they're dealing with access requests. The steps for processing a request are set out in the act. It's very clear in the act what steps both an applicant has to take and a public body has to take in responding to a request.

I just want to make a few comments before I get to the issue that's raised in the discussion guide. Just to clarify, any person can make a request for access to records in the custody or under the control of a public body subject to specific and limited exceptions that are set out under the act. Some of those exceptions are mandatory. In a few minutes I'll talk about a couple of the important mandatory exceptions: first, disclosure that would be an unreasonable invasion of an individual's personal privacy and disclosure that would harm business interests. Those are the two most frequently used exceptions to access by public bodies and the most complex and sometimes the most difficult to understand.

Anybody can make a request for access to records, anybody can make a request for access to general records, and anybody can make a request for access to their own personal information. There are a few exceptions that apply to personal information as well, such as disclosure that would harm an individual or public safety or disclosure of confidential evaluations. Remember that personal information includes somebody else's opinions about an individual, so when those are being requested, then there may be exceptions that apply.

At the last meeting we talked about individuals making requests for access to information either for general records or their own personal information through authorized representatives. That's certainly allowed under the act. An authorized representative could be a guardian of a minor. It could be a guardian or trustee appointed under the Dependent Adults Act. It could also be any person authorized in writing by the individual. So the act allows for that as well.

Now, it's important to understand that even though records are accessible under the act – in other words, they may be subject to the act because they're under the custody or control of a public body and they're not subject to any of the exclusions under section 4 that Jann was talking about and another act or provision of another act doesn't prevail over the FOIP Act and, in other words, it doesn't fall under other legislation that's paramount, so they're subject to the act – that doesn't mean that they're going to be automatically handed over to an applicant. There are specific and limited exceptions under the act that may apply, so that's important to understand.

When responding to a FOIP request, the public body must only sever the information that fits within the particular exception, so again there are provisions in the act that deal with how much information can be removed from an act. Again, some of those are mandatory and some are discretionary.

Public bodies can also refuse to confirm or deny the existence of a record in response to a FOIP request. That provision may be used if a record contains information that may harm an individual or public safety, harm a law enforcement matter, or if disclosing the existence of the record would be an unreasonable invasion of a third party's personal privacy.

There's a duty to assist applicants under the act and to respond openly, accurately, and completely to the requests within the time frames that are set out in the act.

It's important to understand that the reason why an applicant is requesting records is generally considered to be irrelevant in responding to the request. Also, public bodies need to be very cautious in terms of protecting the anonymity of applicants.

In terms of the requests for review that the commissioner may receive in terms of the access process, they've included whether the public body has fulfilled its duty to assist the applicant, whether the public body conducted an adequate search for records – that's often an issue in front of the commissioner – whether all responsive records were disclosed to the applicants, whether the time limit was extended appropriately, whether fee estimates were appropriate – and Hilary is going to talk a little bit about fees – whether too much or not enough information was withheld, depending on whether you're the applicant or the third party in the access request, and whether the right exceptions were applied. So all of those kinds of things can arise when you're talking about issues that may surround the access process.

9:16

Getting to the issue that's raised by the question in the discussion guide, we're talking about how to locate records. The question in the guide raises an issue concerning the requirement for producing a directory of records, and what was produced in 1995 was the *Alberta Directory*, which is quite a large publication, and it lists not only the public bodies that are subject to the act and their contact information and their mandate but also all the categories of records that they hold and personal information banks.

Now, the issue arises because section 87(1) of the act states that "the Minister must publish a directory to assist in identifying and locating records," but there are other sources for this information: through web sites, through referrals from public bodies themselves, and so on. There is the issue of the expense of producing and keeping the directory current. So the question is: should it still be necessary for the minister to publish a directory of records to assist applicants in locating the public body most able to respond to their

requests? That's the one question that's been raised in the discussion guide.

THE CHAIR: Okay. Any questions, concerns, or comments regarding disclosure, mandatory and discretionary exceptions?

MS DeLONG: I notice that this sort of starts with receiving a request in the FOIP office. Generally departments do know that they do have to disclose personal information; right? Surely most requests go directly to where the information is. So this is sort of just an exception, when the citizen isn't getting the information that they think they should be getting, and then it goes through FOIP. Is that what the situation is?

MS RICHARDSON: Maybe I'll respond to that. As you know, the act is an act of last resort, so in many situations, yes, requests for information will go directly to the program area, and that would include personal information as well. Now, the way that records are prepared, often they contain personal information about other individuals, so if it's the kind of case file that contains other individuals' personal information, then it would probably have to go to the FOIP office to be processed as a FOIP request. But the other option is there. Certainly individuals have a right to request access to their own information, and that can be outside the act as well as long as there aren't exceptions that need to be applied. This request handling process is really at the point where the determination has been made that an individual does need to make a request under the act, so then it would go to the FOIP office in that public body.

MS DeLONG: Is there any penalty at all in terms of if you have a department that is sort of repeatedly blocking information from flowing? Does the FOIP office have any sort of correction mechanism to say, "Hey, you guys, you're not living up to how information is being disclosed"?

MR. ENNIS: I could answer that question. I'd like to start by clarifying just one point. We talked about the FOIP office, but of course that is the office within the public body, so there are in theory perhaps up to a thousand of these FOIP offices across the province. Certainly every ministry, every public body has an office they call the FOIP office, the appointed office within the public body where access requests are to be made.

If an operating division or a program within a public body is causing people grief by not giving them access to information, that tends to catch up with them in terms of that they will probably attract more formal FOIP requests, which are more work to do. There's a lot more formal activity that has to go into it, and of course whenever you're dealing with a formal FOIP request, you're involving the head of the public body as well in a formal way, so a division or an operating arm of a department that isn't meeting the public's needs will have to deal with their own head office people on that issue. If that becomes a chronic problem, they'll end up in front of the commissioner's office more often than they're comfortable with, and that's a process that people want to visit really only once. After that, it becomes more work than was really necessary. So there are some self-correcting mechanisms there.

MS DeLONG: Thank you very much.

THE CHAIR: Thanks, John.

Any other questions or concerns regarding the exceptions?

Okay. If we could move on to fees.

MR. THACKERAY: Perhaps before we move on to fees, there are a couple of issues that were identified under the mandatory and discretionary exceptions which I'll ask Linda to address.

THE CHAIR: Please.

MS RICHARDSON: I was going to provide some comments on section 16 and section 17. I think it's important for the members to understand how these provisions work, but you do have the sort of comments on the exceptions, how they work, in your handouts.

Tom, do you want me to go through the process in any event?

MR. THACKERAY: I think it's important to do it briefly. Section 16 deals with the business interests of a third party, and section 17 deals with the personal information of a third party. I think it would be of benefit to the committee to have a brief overview of those two sections.

THE CHAIR: Please proceed.

MS RICHARDSON: Okay. Great. You have a handout on section 16, first of all. This is one of the mandatory exceptions under the act. Generally, this exception will arise when an applicant requests access to records, and when the public body locates them and retrieves them, it appears that they contain the business information of a third party.

Section 16(1) creates a mandatory exception for information which, if it were disclosed, would reveal certain types of third-party business information supplied in confidence and the disclosure could result in one or more of the harms that are specified in the section. This exception may appear to be broad at first blush, but it really is narrow because all three parts of this test have to be met before the public body can apply the exception.

So, first of all, the record must contain business information of a third party, and that could be a trade secret. Trade secret is defined in the act. It could be commercial information. That could be things like customer records, market research, pricing structures. Financial information could be financial forecasts, budgets, profit and loss statements, labour relations information; for example, information on negotiating a collective agreement, hourly wage rates, personnel contracts, and so on. It could be scientific information. An example of this was in an order of the commissioner dealing with operating manuals that were part of a photoradar contract between a public body and a third party. Or it could be technical information; for example, system design specifications or plans for an engineering project. So that is what is meant by business information of a third party.

The second part of the test is that the information must have been supplied explicitly or implicitly in confidence by a third party. Now, a third party is any person, group of persons, or organization other than an applicant or the public body. So it's not an employee within the public body, for example. It has to have been provided by the third party either voluntarily or because the third party is under some requirement under the law to provide that, but it doesn't mean that it was compiled by the public body. So if the public body goes out and does an inspection, that is not business information that was supplied by the third party.

Explicitly in confidence means that there is documentary evidence of the request for confidentiality, such as some sort of written agreement between the third party and the public body. Implicitly in confidence means that there's some evidence that the parties understand the confidentiality, such as the way in which the information was provided or the way that it's secured and distributed within the public body. So that's the concept that the information has to be supplied explicitly or implicitly in confidence by the third party.

9:26

The third part of the test is that the disclosure of the information would have to result in one of the following harms, such as significantly harming the third-party's competitive position, interfering significantly with the third-party's negotiating position, resulting in information no longer being supplied to the public body and the public body needs that information being supplied, resulting in undue financial loss or gain to any person or organization, or revealing information concerning the resolution of a labour relations dispute.

So those are the three parts of the test that must be met for that exception to apply.

Now, what do we mean by the harms test? The commissioner in some orders has described it as being evidence showing a clear cause and effect between the disclosure and the alleged harm. Secondly, the expected harm must amount to damage or detriment, not just interference or inconvenience. Finally, the likelihood of the harm from disclosure must be genuine and conceivable, not speculative, not something where it's a possibility it might happen.

So that's section 16(1), third-party business information.

Section 16(2) is also a mandatory exception, and that states that the public body must refuse to disclose information "about a third party that was collected on a tax return or collected for the purpose of determining tax liability or collecting a tax."

Then in section 16(3) are the situations where the exception for third-party business information doesn't apply. There are always exceptions to the exceptions in this act. The exceptions are if the public body consents to disclosure after third-party notice is given. We're going to be talking about the rights of third parties to be consulted when you are thinking of disclosing information that may fall under one of these mandatory exceptions.

Secondly, the exception doesn't apply if an enactment of Alberta or Canada authorizes or requires disclosure. So, for example, under the Municipal Government Act municipalities must provide a tax certificate to anyone who requests that information. So that's a provision in an act that authorizes or requires disclosure.

Thirdly, if the information relates to a non arm's-length transaction between the government of Alberta and another party. So the exception wouldn't apply, for example, if there's an agreement between a corporation and the government of Alberta to invest in and pursue a project together.

Finally, if the information is in a record in an archives and has been in existence for 50 years or more. In other words, the third-party business information exception can't be applied in those situations.

Any questions about that exception?

MR. MASON: Mr. Chairman, I had a question about the definition of "implicitly in confidence," and I was wondering if you could provide a little bit more background on what the test is for that.

MS RICHARDSON: Well, it means that confidentiality is implied. It doesn't mean that every time you stamp "confidential" on a document, that's automatically going to be seen as supplied in confidence. It has more to do with the relationship between the public body and the third party if they have always received that kind of information in confidence, if they treat it very securely once it's in the public body; in other words, it's not just distributed freely sitting out on desks, that kind of thing. If there is that context of confidentiality around the way that the document is treated, then it may be

MR. MASON: It seems rather subjective.

MS RICHARDSON: It is somewhat, but the commissioner has dealt with the test in some order, so public bodies do have some tests that they can follow based on commissioner's orders as well.

MR. MASON: In the past in government, secrecy or confidentiality was more the rule than the exception, so many traditions of confidentiality have no doubt arisen. The objective seems to me to be to clear those away and, unless there are very good grounds for maintaining confidence, to make the information transparent and available. So this particular concept gives me a little bit of a problem, because it seems to me that you can sort of in a vague way grandfather understandings of confidentiality that may run against the intention of the act.

MS RICHARDSON: Maybe I'll make a few comments, and then somebody else, John, may want to jump in from the commissioner's perspective. There are a couple of things. First of all, as I said, all three parts of this test need to be met. When a public body applies an exception, they have to indicate to the applicant the number of the exception that they're applying. Also, if they're intending to disclose the information, they would have to give the third party an opportunity to be consulted and make their representations. If they're intending not to disclose it, they don't have to provide notice to the third party, but certainly they have to let the applicant know that they are using that exception. Then the applicant has a right to take that to the commissioner, to request a review of the decision by the public body to apply that exception. So there are some checks and balances there.

THE CHAIR: Any other questions, comments on the first mandatory exception?

Okay. Do you wish to proceed?

MS RICHARDSON: We'll move on, then, to section 17, which is disclosure that would be an unreasonable invasion of a third-party's personal privacy, and you could refer to handout 4. We usually think of this exception arising in two situations. First of all, if you're looking at the access side of the act, part 1, this is where an applicant requests access to records that contain the personal information of a third party. In this situation the public body has to determine whether disclosure of the records would be an unreasonable invasion of the third-party's personal privacy, and in that case, then they would go through the analysis in section 17, that we're going to be talking about in just a minute, to make that determination. So that's one situation where you may be looking at this exception.

Under part 2 of the act, which is the protection of privacy side, we're talking about collecting, using, and disclosing personal information. Another public body or another level of government or other organization or a member of the public asks a public body to disclose personal information about, for example, a client or a staff member. In that situation, the permitted disclosures of personal information are listed in sections 40, 42, and 43 of the act. One of those permitted disclosures is where it would not be an unreasonable invasion of the individual's privacy under section 17 to disclose their personal information. If there's no other permitted disclosure under sections 40 or 42 or 43, then the public body could go back to section 17, go through that analysis and determine whether it would be an unreasonable invasion of personal privacy to disclose that personal information.

So those are the situations where you may be looking at doing the analysis under section 17.

What does that analysis mean, and what are the steps in doing it? First of all, the public body would determine if section 17(1)

applies. This is a mandatory exception. The public body must not disclose personal information if the disclosure would be an unreasonable invasion of a third-party's personal privacy.

So how do you determine that? Well, first of all, under section 17(2) there are some situations where the act says that these would not be an unreasonable invasion of an individual's personal privacy. Some of those circumstances are that the third party has consented in writing to the disclosure, there may be compelling circumstances affecting someone's health or safety and you send notice of the disclosure to the last known address of the third party, or it may be that what is being asked for is disclosure of the third party's salary range, classification, discretionary benefits, and employment responsibilities, for example, of employees or officers of a public body. To disclose that information is not considered an unreasonable invasion of personal privacy. The disclosure may reveal financial and other details of a contract to supply goods or services to a public body, or the disclosure might reveal the nature of a licence, permit, or other similar discretionary benefit granted to a third party by the public body and relate to a commercial or professional activity or to real property, so a development permit or a building permit, something of that nature.

9:36

If the personal information is about an individual who's been dead for 25 years or more, that's not considered an unreasonable invasion of personal privacy to disclose. The disclosure is not contrary to the public interest if it reveals only an individual's enrollment in a school or program offered by a postsecondary educational body, admission to a health care facility as a current patient or resident, attendance at or participation in a public event or activity related to a public body – that could include a graduation ceremony, sporting event, cultural program or club, field trip – or a recipient of an honour or award granted by or through a public body. The is section 17(2)(j) of the act, and this was considered to be a commonsense amendment back in 1999 to ensure that some of the personal information that had been provided as a matter of course in the community over a long period of time, and was considered to be in the public interest to provide, could continue to be provided under the act.

So when you are looking at disclosure under section 17(2)(j), which is one of the situations where it's not considered an unreasonable invasion of personal privacy to disclose, you have to also determine if the third party has requested nondisclosure. So you don't have to give notice to the third party in this situation, but if an individual has concerns about their personal safety and they've asked the public body not to disclose even that basic information – for example, they're enrolled in a postsecondary institution – then the public body wouldn't disclose that information.

The next thing you would do if you've gone through to determine if it wouldn't be an unreasonable invasion under 17(2) is that you'd look at 17(4). These are the presumed unreasonable invasions of personal privacy. This raises the presumption that if you are thinking of disclosing this kind of personal information, it's an unreasonable invasion of the individual's privacy. The kind of information that is being talked about in this section would be medical, psychiatric, or psychological information, information that is an identifiable part of a law enforcement record, eligibility for income assistance or social service benefits, employment or educational history, personal recommendations or evaluations, character references, personnel evaluations, personal tax information, racial or ethnic origin, religious or political beliefs, and the name of an individual when it's associated with other personal information such as handwriting of an individual or gender. So those are the presumed unreasonable invasions of personal privacy.

Finally, you would look at section 17(5), and these are some of the circumstances that a public body has to consider. A public body has to consider all the relevant circumstances, and some of these will rebut the presumption that was raised in section 17(4). Some of those relevant circumstances are the following. Some of them weigh in favour of disclosure; some of them weigh against disclosure. This is part of what the public body has to weigh when they're looking at this provision. Some of the ones that would weigh in favour of disclosure would be subjecting the public body to public scrutiny, promoting public health or safety and protecting the environment, if the disclosure would assist in determining an applicant's rights, in researching or validating claims of aboriginal people, or if the information was originally provided by the applicant. Then there are some factors that weigh against disclosure, such as if the disclosure would expose the individual to financial or other harm, if it would reveal information supplied in confidence, if it would be disclosing inaccurate or unreliable information, or if it would unfairly damage someone's reputation. So those would weigh against disclosure.

That is basically taking you through section 17, which is the one that is probably the exception that is applied most frequently, particularly in the human service departments of government and other public bodies.

THE CHAIR: The chair has a question on section 17(2). Last spring I contacted the principal of the only public high school in my constituency and asked for a list of graduates so that as the MLA I could write them congratulatory letters. I was denied that request, so I read with interest where 17(2) talks about a graduation ceremony. I guess my question is that given this analysis, would I have been likely to have been successful had I launched a formal request?

MS RICHARDSON: Mr. Chairman, you were asking for the addresses of the graduates or just who had graduated? Because certainly they could disclose to you a list of the graduates.

THE CHAIR: I think I needed the addresses to send them letters.

MS RICHARDSON: This is a very limited section. It certainly would enable a school to disclose the names of who graduated and to put their photographs in a newspaper, for example, because a convocation ceremony is a very public kind of situation. But it would not necessarily, without the parents' consent or the individuals' consent, allow the school to provide you with their home addresses.

THE CHAIR: Now, just to follow that up, because I guess I have a problem with it. Given the other criteria that you have to consider under 17(5) and given the highly innocuous nature of why I wanted to do this, could you just comment as to why. Admittedly, I didn't take it any further than past the principal's office. But could you just comment on how the other factors in that analysis would lead one to the conclusion that an MLA should be denied those addresses in order to send pins and letters to people graduating from grade 12?

MR. ENNIS: If I can pick up on that, Mr. Chairman, this was a major subtopic for the previous committee that looked at this act in 1998-99. The committee at that time arrived at the conclusion – perhaps reluctantly but they did arrive there – that the name of a student could be disclosed by a school but only the name, and they left address alone. I think one of the problems in the situation we're looking at is that the act doesn't confer particular rights on any class

of user, if I can put it that way, so whatever rights would fall to someone acting as a Member of the Legislative Assembly would also be the same rights that would fall to any other citizen. So if a way were opened up to provide this class of information to MLAs, that way would have to be open to every citizen.

THE CHAIR: And I agree with that, but I think the more germane issue was the innocuous reason that I was requesting the information.

MR. ENNIS: Well, this was a problem that the commissioner's office actually waded in on about three years ago to try to find some resolution to this, because the commissioner felt that it was important to allow elected officials an opportunity to congratulate people who finish high school on their achievement. I recall that we achieved an understanding with the school board officials across the province through the Conference of Alberta School Superintendents to co-operate wherever they could with helping MLAs send their congratulations to students by providing distribution services, basically, for the MLAs. So the addresses themselves didn't have to move around, but the net effect was that students would receive a letter of congratulations from their MLAs. Ways were found to do that. It seems to be more of a problem in large urban areas, where schools have pointed out to our office that they are not perhaps as willing as their rural counterparts to provide this service or to go through the work of segmenting their students across political boundaries, especially in the large high schools in Edmonton and Calgary.

9:46

THE CHAIR: I don't mean to belabour this point, and I appreciate that other mechanisms can be arranged. I mean, if I were so motivated, I could walk through the hallways and hand deliver the letters. I appreciate that other accommodations can be made, but dealing strictly with the analysis when I look at 17(5), my request for the names and addresses of high school students wasn't exposing anybody to financial harm. It wasn't revealing any information that was supplied to any principal in confidence. It wasn't disclosing any inaccurate or unreliable information. It certainly wasn't unfairly damaging anybody's reputation, and it wasn't providing information that wasn't originally provided by the applicant.

I want to enter into more of a generic discussion here. Given that analysis, why would that principal and/or your office, if I had carried it that far, deny me access to those addresses?

MR. ENNIS: I'm not sure how it would work out if you went to a formal process.

THE CHAIR: Has anybody ever challenged it? Has anybody taken the issue of high school students' addresses, grade 12 graduates to Mr. Clark or to Mr. Work?

Mr. MacDonald, that sounds like something you would have tried to do at one point in your career.

MR. MacDONALD: No, but I do know that the hon. Member for Little Bow has many times expressed frustration over limited or no access to the addresses of high school graduates.

MS DeLONG: Can I also wade in here? When my kids were growing up, just having kids was one of the things that sort of brought me into the community. It was one of the things that gave me contact with the other mothers, and it was something that was very much a community-building type of experience. One of the reasons this worked was that every time my kids were in a new class, they always had the names, telephone numbers, and addresses of all their classmates.

I was talking to my constituency assistant, and she was saying that over the last several years she always gets an envelope that has all those names and addresses in it. She is not allowed to open it unless there is an actual emergency, a true emergency that would be like the school blowing up or something, and she no longer has access to her child's friends or parents of their friends. This is something that's quite detrimental, I think, to our communities.

THE CHAIR: I'm foreseeing that we're going to be revisiting this issue.

MR. MASON: Mr. Chairman, are you looking for some general discussion on this point?

THE CHAIR: I'm just looking for some help.

MR. MASON: I may not be of much help, but it seems to me that one of the things we've heard is that the use to which the information is going to be put is not a factor in determining it. The other thing we've heard is that what's good for the MLA is good for anybody else. So I guess from my perspective in this day of stalkers and so on, if they provided it to you, they'd have to provide it to anyone else. Then the question is: do you want your child's address to be made publicly available to anyone who makes a request of the school for whatever purpose? I mean, your purpose is laudable, but I just think, given the parameters, that maybe there's good reason for this.

THE CHAIR: Thank you.

Mr. Lukaszuk.

MR. LUKASZUK: Thank you, Mr. Chairman. Hell must have frozen over outside, because I'm in agreement with Mr. Mason today. That brings me to the point of classification of applicants. Mr. Mason, in my opinion, is correct, and I must disagree with Ms DeLong. Simply publishing names and addresses of students in schools simply for unifying communities may not be appropriate because there are many good reasons why one would not want their child's address or phone number to be released, such as custody problems and such. However, would there not be perhaps a forum right now for the purposes of this committee to discuss classification of applicants? If an MLA, for instance, or any other public official requests information with the purpose of performing some function that will result in public good and will not infringe on any of the subsections of section 16 and/or section 17, would there not be room for making those exceptions? I think it would be erroneous to assume that all applicants would fall in the same category and would use the information for the same purposes. Because of the confidentiality of the office that one carries, perhaps the confidentiality of the information could still be preserved yet used for public good.

THE CHAIR: Certainly that's a discussion we can entertain at the appropriate time.

Mr. Jacobs.

MR. JACOBS: Thank you, Mr. Chairman. I just want it noted that it's not quite that cold outside for me.

You know, as I listen to this discussion – and I assume we're going to get into this later. Originally my question was: are we going to do this later? But just to offer a comment, it seems to me that there must be a case to be made for common sense. An MLA

seeking the list of the addresses for the purposes as it has been described is certainly a far different reason for a request than someone who may have an ulterior motive. Surely the principal or superintendent or whoever would know the MLA, and surely, you know, there is a case to be made for providing the MLA with that information. I actually had to go to the school and seek out the kids and hand them their envelope.

THE CHAIR: Yeah. As I indicated, that was one of the options that would have been available to me.

Well, I think we'll move along at this point, but I think it raises some very interesting issues that I'd encourage the members to think about over the next few weeks and months. I mean, this is an issue that is certainly relevant to all of us as elected officials. Mr. Lukaszuk is right, as I believe myself and Mr. Jacobs are. There are two ways to deal with that specific problem. One is if you deal with the type of applicant and elevate elected officials into a different category, which without having thought about it too much would not be my preferred option. I think the better way of doing it is to have the respondent do an analysis as to why the information is being requested, regardless of who is requesting it. I just throw that out for consideration, and I'm quite confident that we will revisit this issue.

If you'd like to go ahead with your presentation.

MS RICHARDSON: Thank you, Mr. Chair.

THE CHAIR: I'm sorry. Mr. MacDonald.

MR. MacDONALD: I had a question, if you don't mind, please, Mr. Chairman.

THE CHAIR: You have the floor.

MR. MacDONALD: Thank you. This is in regards to section 17(4)(a), and that is the personal information relating to a "medical, psychiatric or psychological history." I've learned from a doctor that this individual was concerned that information about his prescribing patterns are being assembled and exchanged and sold without his consent. Now, this information is gathered, according to Mr. Dickson – Mr. Dickson was a privacy consultant. He's still a lawyer, and he's a former member of this Assembly. According to Mr. Dickson there is a multinational corporation that gathers this information in Canada from Canadian pharmacies. It includes the physician's name, and there are all kinds of information included here: the drug that is prescribed, its strength, repeat authorizations, quality, form of payment, and insurance information. This information is shipped out of the country, apparently to Philadelphia for processing, and it's repackaged in a way that lists all the physicians within a sales territory and provides detailed information about the prescribing practices of these physicians. From the conversation that I had here two weeks ago with this doctor, this practice, I can only assume, is not only going on across Canada but certainly in this province. How can that be going on with the definitions, as I understand it here, in 17(4)(a)?

9:56

MR. THACKERAY: I'd like to respond. Firstly, this issue was before the federal Privacy Commissioner, who made a recommendation as to whether or not this practice infringed on the Personal Information Protection and Electronic Documents Act.

Secondly, I understand that Alberta's Information and Privacy Commissioner has scheduled an inquiry on this specific issue. John, do you know the details? Is it public, private, oral, written?

MR. ENNIS: This is as open as you go. This is public, an oral inquiry. I'm sorry; I don't have the dates with me. It's imminent. It's scheduled for April, I think, and the inquiry will be into the practice of accumulating that information.

Now, just to be clear, the information being accumulated is not information that is patient information in the sense that it's identifiable to patients, but it is information about the prescribing practices of doctors as that is reflected in the prescriptions they write to pharmacists. So the information is gathered from pharmacists and analyzed by private-sector organizations and used as intelligence for the pharmaceutical industry. So there is an inquiry under way. I guess more than that we really cannot say. The matters will be explored during the inquiry.

THE CHAIR: A supplemental, Mr. MacDonald?

MR. MacDONALD: Yes. Thank you, Mr. Chairman. So I'm to understand that the acting commissioner will be having an inquiry and will be interpreting this practice?

MR. ENNIS: Yes. If I can just complete a thought I should have completed before, the inquiry is being held under the Health Information Act, not the Freedom of Information and Protection of Privacy Act. The commissioner, as acting Information and Privacy Commissioner, is operating in his role as Health Information Commissioner, so this is a Health Information Act inquiry, not a FOIP inquiry.

MR. MacDONALD: Well, that disappoints me. You know, I realize that the Health Information Act means no diagnostic, treatment, and care information, but being specific to this, "the personal information relates to a medical . . . diagnosis, condition, treatment, or evaluation," and that's what a prescribing pattern or prescription is. I'm sure I'm speaking for a lot of Albertans here that it's no one's business in Philadelphia what I am prescribed by my doctor. That is between the doctor and the patient. I don't understand.

THE CHAIR: I don't disagree with you, Mr. MacDonald, but I think you must appreciate that the Health Information Act has its own criteria and its own rules regarding what is and what is not disclosed, and it also has its own review mechanism. So if you have issue with that, I encourage you to take it up with the minister of health, and when that act gets reviewed, you should put your hand up and volunteer.

MR. MacDONALD: Yes. But, Mr. Chairman, with due respect it's specific to the FOIP legislation, in my view, in my interpretation of this.

THE CHAIR: Well, it's not, because that decision isn't reviewable under FOIP. It's reviewable under the Health Information Act.

MR. MacDONALD: Well, perhaps it should be reviewable under FOIP.

THE CHAIR: But it's not.

MS LYNN-GEORGE: Could I just add that the reason why it's not under FOIP is that that information would not be in the custody or under control of a public body, because physicians or pharmacists are not public bodies. So the FOIP Act has access to information that's in the custody or under the control of a public body.

MR. MacDONALD: Mr. Chairman, could I ask, please: is Alberta Blue Cross on the stakeholders' draft list?

THE CHAIR: Tom, do you know off the top of your head?

MR. THACKERAY: No, it's not.

MR. MacDONALD: Okay.

THE CHAIR: Ms DeLong, you had a comment.

MS DeLONG: I just wanted to say that this is a very serious problem, but unfortunately it doesn't fall under our review.

THE CHAIR: I think that's a given.
Okay. You can proceed.

MS RICHARDSON: I'll just make a few comments about discretionary exceptions. We talked about two of the mandatory exceptions. There are actually five mandatory exceptions and 10 discretionary exceptions, and I'm not going to go into all of those exceptions. They're listed in the discussion guide. But in light of questions that came up at the last meeting of this committee, I thought it might be helpful to go through some of the process that public bodies use when applying discretionary exceptions.

First of all, a public body would determine whether certain information falls within the category of information that may be withheld from disclosure, and then the head of the public body must exercise his or her discretion as to whether the information should be withheld. A public body can't replace the exercise of discretion with a blanket policy. So the public body, the head of the public body or whoever is delegated to make that decision, must apply his or her discretion on a case-by-case basis.

Now, some of the factors that public bodies consider when exercising discretion are the general purposes of the act relating to access to information, the wording of the exception and the interests which the exception attempts to balance, whether the applicant's request may be satisfied by severing the record and providing the applicant with as much information as is reasonably practicable. Sometimes you can provide other information that may satisfy the applicant's request without providing the information that needs to be withheld under the exception.

Other factors would be the historical practice of the public body with respect to the release of similar types of records, the nature of the record and the extent to which it is significant or sensitive to the public body, whether the disclosure of the information will increase public confidence in the operation of the public body, the age of the record, whether there is a definite and compelling need to release the record, and also whether commissioner's orders have ruled that similar types of records or information should or should not be disclosed. So those are some of the factors that public bodies would consider when they're exercising discretion with respect to the discretionary exceptions.

Now, in terms of the issue that may arise and will be a subject of a policy option paper, it has to do with the definition of law enforcement in the act and section 20, which is one of the discretionary exceptions dealing with disclosure that would harm a law enforcement matter. Section 20 is a discretionary exception except for one provision of it. Section 20(4) says that it's mandatory to withhold information where "disclosure would be an offence under an Act of Canada"; for example, under the Young Offenders Act. But the rest of it is a discretionary exception.

The policy paper will consider access to information and privacy issues relating to administrative investigations and proceedings. The way that law enforcement is defined, it includes policing, including criminal intelligence operations, a police security or administrative investigation, including the complaint that gave rise to the investigation, that leads or could lead to a penalty or sanction imposed by the body conducting the investigation or by another public body to which the investigation is referred. So it could be an investigation of that type or a proceeding that leads to a penalty or sanction, including one that's imposed by the body conducting the investigation or another body to which the results of the investigation are referred.

10:06

With that definition in mind some public bodies, not police services that are public bodies, are concerned that the FOIP Act may not provide adequate protection for information obtained in the course of certain investigations conducted under legislative authority but for which there is no penalty or sanction specified in a statute or regulation and investigations conducted within the employment context where the information may be highly sensitive but the matter is dealt with under policy rather under law, such as a sexual harassment policy or something of that nature. So that may be one of the issues that's arising.

THE CHAIR: Questions or concerns regarding discretionary exceptions? Mr. Masyk.

MR. MASYK: Thanks, Mr. Chairman. Would enforcement include fish and wildlife or a national park game warden? If they're doing an investigation, would that include that? I noticed you said police forces, but enforcement would go into these areas.

MS RICHARDSON: Yes. I think that may be one of the issues, but I think there's probably sufficient authority under the Environmental Protection and Enhancement Act and some of that legislation that would be treating a provincial fish and wildlife officer like a special constable.

THE CHAIR: Does the legislation not use the term "peace officer"?

MS RICHARDSON: Not the definition of enforcement, but under the Environmental Protection and Enhancement Act it may talk about "peace officer," and peace officer is defined a little more broadly than police officer. So I don't think those kinds of investigations are at issue.

MS DeLONG: Under confidential evaluations does it spell out that if someone evaluates you, that information becomes your information?

MS RICHARDSON: You're talking about a performance appraisal or something of that nature? Normally that would be your personal information, and that's not what confidential evaluations are intended to protect. It's intended to be applied in a situation, and it is discretionary, so it may or may not be applied.

In a situation where someone, for example, applies for a job or for some kind of a benefit or contract, a confidential evaluation of their suitability and eligibility is provided to the public body. Now, if the job applicant asks for that confidential evaluation, the public body may or may not provide it to them. That's the kind of evaluation that is being talked about. It's not the performance appraisals situation.

MS DeLONG: Again, we'll get back to schools. How does this apply to schools?

MS RICHARDSON: It would apply to teachers that are applying for jobs or if they're in a situation where they're evaluating potential contractors.

MS DeLONG: But what about students?

MS RICHARDSON: I don't think it's really intended to apply to students. It's quite a narrow exception. Normally students either themselves, if they're in a position to understand the nature and consequences of making a request, or through their parents should be able to get access to their own personal information.

THE CHAIR: Any other questions or comments on the discretionary exceptions?

You can go on to fees, please.

MS LYNAS: As stated in the discussion paper, the principle behind the fee structure is that there should be a fair sharing of the costs between the applicant and the public body. Section 93 of the act deals with fees. The FOIP regulation contains a fee schedule – it's schedule 2 in the regulation – and this schedule sets out the maximum fees that may be charged. Basically, the act sets up three different fee structures.

The first one is that for personal requests fees can only be charged for photocopying. The rate is 25 cents per page, and the fees may only be charged if the cost exceeds $10, which is 40 pages of information that are part of the responsive records. If there are more than 40 pages, the public body may charge fees and charge the applicant the total cost of the photocopying.

The second fee structure is for general requests. There's a $25 initial fee that must accompany the request. Public bodies will prepare a fee estimate for requests that involve a large number of records. If the costs are expected to exceed $150, then the fee estimate is sent to the applicant before the processing of the request continues. The maximum fees that can be charged are listed in the regulation. The common charges that are applied are $27 an hour to search, locate, or retrieve records; preparation time to disclose the record, which is the time it takes to actually sever information from the record at $27 an hour; and photocopying charges of 25 cents per page.

The third type of fee structure applies to continuing requests. These are general requests. They follow the same structure as general requests, but the exception is that the initial fee is $50 rather than $25. For both types of general requests if the total cost of preparing the records for disclosure is less than $150, then no fees are charged other than the initial $25 fee. If the costs are greater than $150, the total amount must be paid.

The act also allows for fee waivers. Fee waivers can be granted if the applicant cannot afford to pay or if the records relate to a matter of public interest. If the head of a public body refuses the applicant's request to waive fees, the applicant can appeal this decision to the commissioner and ask for a review. The commissioner's office has established a nonexhaustive list of criteria that public bodies take into consideration when reviewing a fee waiver request that would be based on a matter of public interest. The commissioner can reduce the fees, eliminate the fees, or substitute a new decision.

The main fee issue that has been raised since the beginning of the FOIP Act deals with whether or not fees should be charged. The committee can expect submissions that'll range from advocating no fee at all to recommending that fees be raised to be full cost recovery.

THE CHAIR: Thank you.

Any questions or concerns regarding fees? Mr. Mason.

MR. MASON: Thanks, Mr. Chairman. This isn't exactly on fees, but the presentation just brought it to mind with respect to photocopying costs. Is there provision for applicants receiving information in an electronic form? As a way of dodging the photocopying fee, I guess, was how I thought of it.

MS LYNAS: They can ask for it. I believe the regulations set out a cost for providing information on disk or other formats as well.

MR. MASON: Does that vary the fee schedule?

MS LYNAS: It applies if the information is already in electronic form. They can't request that it be taken from paper and made electronic.

MR. MASON: Is there a specific fee schedule for that?

MS LYNAS: Yes. Costs are $10 per disk for floppy disks, and there are costs for tapes as well. If it's some unusual form of media, then it's the actual cost.

THE CHAIR: I take it that fee schedule is standard from FOIP office to FOIP office?

MS LYNAS: Yes. It does set out the maximum, and public bodies may set a lower fee schedule, but this is the maximum standard across all public bodies.

THE CHAIR: That's set by the minister through regulations? Thank you.

Anything else on fees? Mr. MacDonald.

10:16

MR. MacDONALD: Yes. Mr. Chairman, I'm quite concerned that fees or the use of fees, the excessive use of fees, is prohibiting people, including myself, from getting information. I think it's wrong. For the first two years of my life as a member in this Assembly it didn't seem to be an issue, but certainly as time went on, it became an issue.

There are fees in excess of $60,000 to get information on, for instance, the risk management fund payout for the former Member for Red Deer-North. This is vital information; it's in the public's interest. There are fees in excess of hundreds of thousands of dollars on other issues. It seems to be a growing problem, and I'm afraid it is being used by various government departments to get around providing information not only to members of the Assembly but to various people who apply for that information. They have a legal right to it, and this is a barrier. People are operating on very modest budgets, and hopefully, Mr. Chairman, this committee will deal with this issue as we proceed.

THE CHAIR: Thank you, Mr. MacDonald. I'm quite confident, as we've just been advised, that we are likely to receive voluminous materials on this topic ranging from zero fees to full cost recovery, and I'm sure that we will have many opportunities to dissect those submissions and discuss them at great length.

MR. MacDONALD: Mr. Chairman, could I please ask for some advice or perhaps guidance?

THE CHAIR: Sure. Go ahead.

MR. MacDONALD: You know, at some time in the future would be fine, but could you please tell me, in relation to the Eurig decision in Ontario, why our fees – are they just on a cost basis? I notice the floppy disk for $10. I'm sure with the volumes that the government buys, they're less than a dollar.

AN HON. MEMBER: It's the time to put it on the disk.

MR. MacDONALD: No, I'm sorry. It's not the time to put it on the disk. That's another matter.

Can you explain to me in the future, if you don't have the answer now, as to why those fees are set like that whenever we think of the Eurig decision and the changes it's made to other fees in this government?

MR. THACKERAY: Perhaps it would be of assistance to the committee if we provided a table showing the types of fees that are charged across the country.

THE CHAIR: That would be helpful, I think.

MR. MacDONALD: I have that.

THE CHAIR: How do we rank, Mr. MacDonald?

MR. MacDONALD: Not well. In fact, we could be described as greedy.

THE CHAIR: Okay. Well, we'll have this discussion after we receive submissions on the point.

It's 10:20. I think we have to wrap this up in about the next 20, 25 minutes. Is there anybody that can't stay till quarter to 11? Can't or doesn't want to? [interjection] Okay. Well, that being the case, I'm going to have to end this discussion on the paper now, and we can revisit it. It's not an inappropriate time to do so, because we've sort of done the access part, and the next portion deals with protection of privacy.

Is that reasonable, Mr. Thackeray?

MR. THACKERAY: With your indulgence, Mr. Chair, if we could just have a quick discussion of rights of third parties.

THE CHAIR: Yeah, let's do rights of third parties. That ends access.

MR. THACKERAY: That ends access.

THE CHAIR: Okay. Go ahead, quickly.

MS LYNAS: At the last meeting we talked about the importance of providing information outside of the FOIP process, but when this cannot be done because doing so would violate somebody else's rights – for example, there's information about a family, and one individual wants information, but information on others is in the same files – the FOIP Act sets out a process to consult with third parties and take into account their position when the public body makes a decision on whether or not to release information.

The public body gets input from the third parties but ultimately has to make the decision on whether to sever the information or to disclose it, and both the applicant and the third party have a right to request a review by the commissioner of the public body's decision. No information that is being considered by the commissioner's office may be disclosed until the commissioner has made his ruling. However, if there are other records as part of the request, those can continue to be processed and provided to the applicant. We aren't aware of issues around this process.

THE CHAIR: Okay. There are no issues. Hopefully that means there are no questions. Excellent.

Okay. The next agenda item is new business arising. Any members have anything that they need or wish to discuss? Good.

Now, Tom, I need some assistance here. I understand that the discussion papers are going out on 10 March.

MR. THACKERAY: The envelope stuffing takes place on Friday of this week. The press release will be going out next Monday, the 11th of March. The correspondence from yourself as chair to your colleagues in the Assembly will be going out as well around the 11th of March.

THE CHAIR: So based on your experience, when can we anticipate more than a trickle of response?

MR. THACKERAY: The deadline is May 10, so I would imagine that by the middle of April we should start receiving some comments.

THE CHAIR: Have we put a deadline on MLA submissions?

MR. THACKERAY: I believe that your memo says that the deadline is May 10.

THE CHAIR: That's good that I know what my own memo says.

The other thing that I want to canvass among the membership is that there are really only two times that we can meet. One is at 8:30 in the morning and the other one is at 5:30 in the afternoon and only on given days given that Public Accounts I think meets on Wednesdays. Is that correct, Mr. MacDonald?

MRS. DACYSHYN: And Private Bills on Tuesday.

THE CHAIR: Am I supposed to be in the Chamber right now? I sit on that committee.

MRS. DACYSHYN: Not today. Not until the 19th.

THE CHAIR: If we could just go around the room and if each of the members could comment briefly on their preference as to when is the most appropriate time for this committee to meet.

MR. MacDONALD: Tuesday at 8:30.

THE CHAIR: You're aware that Private Bills sits at that time, and we can't even have this room.

MRS. DACYSHYN: Starting on the 19th of March it will be meeting every Tuesday. That's my understanding.

THE CHAIR: How's Thursday at 8:30? No, Thursday at 8:30 is no good. We have caucus. What about Monday at 8:30? I guess that's difficult for the people from out of town.

MS DeLONG: It means we all have to come in the night before.

THE CHAIR: Thomas, what are your thoughts?

MR. LUKASZUK: Well, it seems like we exhausted all the mornings.

MS DeLONG: How about Fridays?

THE CHAIR: On Fridays I suspect that the out-of-towners are in their constituencies.

MR. LUKASZUK: Five-thirty on any given weekday?

THE CHAIR: That's complicated by SPCs. I don't know. I need help here.

MRS. JABLONSKI: What times does Private Bills meet in this room?

MRS. DACYSHYN: Private Bills varies but usually around 9 until about 10:30, I think, but Mr. Rathgeber is on that committee.

MRS. JABLONSKI: Why can't they meet from 8 till 9:30, and we meet from 9:30 till . . .

THE CHAIR: Discuss that with Marlene Graham.
Mr. Mason, do you have any help here?

MR. MASON: I'm afraid not. It sounds like we're between a rock and a hard place.

THE CHAIR: The other concern is that several members seem to have difficulty making it here by 8:30, so I was wondering if you had a preference to go late in the afternoon.

MR. MASON: It all depends, you know. I might be late then too.

MR. JACOBS: Mr. Chairman, it seemed to me there were some possibilities for a Monday 8:30 a.m. meeting. I suggest that I live about as far away from this building as anyone in the room, and Monday at 8:30 is not a problem for me.

THE CHAIR: Alana and Mary Anne, can you make Monday meetings if we say please?

MRS. JABLONSKI: Yes, I can make 8:30 on Monday morning.

THE CHAIR: I don't see any reason to meet next week. Do you, Tom?

MR. THACKERAY: No.

THE CHAIR: In fact, I don't see any reason to meet the week after that.

MR. THACKERAY: No. Keep going.

THE CHAIR: I'm only thinking out loud, but what I'm suggesting is that we meet the last – oh, when does the Legislature have its spring break?

MS CARLSON: The last week of March and the first week of April.

10:26

MR. THACKERAY: Perhaps if you look at the 8th of April, which is after the break.

THE CHAIR: I kind of wanted to meet before then, though, but the two-week break kind of throws a wrinkle into that plan. I mean, all we really have to do is get through the second half of this discussion guide with respect to privacy issues. I don't think we have any more administrative things to take care of, short of starting to go through the responses. Is that fair?

MR. THACKERAY: Yes, and we could probably do the second part.

THE CHAIR: That won't take more than half an hour.

MR. THACKERAY: No.

THE CHAIR: Okay. Well, is the 8th of April a Monday?

MR. THACKERAY: Yes.

MS DeLONG: I don't believe I'll be here on the 8th.

THE CHAIR: Doesn't the session resume on the 8th of April?

MS DeLONG: It does.

THE CHAIR: Well, I'm not convinced we're going to be able to accommodate everybody, so we have to look for common denominators. Can we meet on the 8th of April in this room at 8:30? It's a Monday. It's the day that session resumes.

MRS. JABLONSKI: How about 9 o'clock?

THE CHAIR: Well, 9 o'clock is problematic because we sort of ran out of time today.

MRS. JABLONSKI: You said that it was only going to take half an hour.

THE CHAIR: Well, no. We may have some responses by then.

MRS. JABLONSKI: Oh, okay. That's fine, 8:30. I tried.

MR. MASON: Can I ask, Mr. Chairman, just how we're going to deal with the written responses? Are they going to be sorted and evaluated by staff first, or are we just going to start getting them in raw form as they come in?

THE CHAIR: They're all going to be delivered to the NDP caucus, and you're going to summarize them for us.

MR. MASON: Well, as long as they come in brown envelopes, we don't care.

MR. THACKERAY: My suggestion, Mr. Chairman, would be that once the responses start coming in, they be sent over to the support team. We would put together a one- or two-page summary of the main points and then provide the summary and the submission to all members.

THE CHAIR: Yeah. You and I have discussed that, and unless the membership prefers the Mr. Mason review plan, I think we'll go with Tom's plan.

MR. MASON: I like Tom's plan.

THE CHAIR: Okay.
Then could I have somebody move that this meeting is adjourned? Thank you, Mrs. Jablonski. All in favour? We'll see you on April 8 at 8:30. Thank you.

[The committee adjourned at 10:28 a.m.]