Title: **Monday, September 21, 1998** Freedom of Information Review Committee

Date: **98/09/21**

10:04 a.m.
[Mr. Friedel in the chair]

THE CHAIRMAN: We may as well call the meeting to order. I did have this stuff organized at one time. The first item of business on the agenda is the approval of the agenda.

MR. DICKSON: Mr. Chairman, just one query.

THE CHAIRMAN: Okay.

MR. DICKSON: I don't know whether we're going to deal with it today or another day, but the last time we talked about having the submission from the public bodies, the provincial government departments, it was expected they would have their submission and their input to us today. We talked about that on August 31, page 30 of *Hansard*. I'm wondering: is that where that's going to be dealt with on the agenda?

THE CHAIRMAN: It will be eventually. My original information was that it was going to be dealt with, consolidated sometime about the middle of September. I spoke with Murray Smith early last week, and it wasn't available yet.

MR. DICKSON: Okay.

THE CHAIRMAN: So as soon as it arrives, we'll make sure that all the members get copies, and we will deal with it immediately.

I had also suggested to him that if there were issues of concern, even having an unofficial heads-up or comments from the various ministers, or however it's going to come to us, would be helpful so that we could deal with it as early as possible, and they said they were going to do that. As soon as we get something on it, I'll make sure that all committee members have that information.

MR. DICKSON: The concern, Mr. Chairman, is that now we're starting to get into substantive issues as we work our way through the working papers. It's going to be awkward to go through that, I think, and then find out after, if there's some huge concern from public bodies or whatever, that that's not part of the material we're dealing with.

THE CHAIRMAN: I did express that same concern to him, that we were at the point where we had to forge ahead and that the longer they delayed in getting that information to us, the greater the risk was that certain observations and at least a sense of direction for recommendations would be formed and that it would be more difficult to go back and react if their submissions were somewhat different than anything that came from the public.

MR. DICKSON: Well, thanks, Mr. Chairman. You anticipated my concerns, I see.

The only other thing was that last time we talked, Sue Kessler had indicated she thought she'd be able to get her hands on a copy of a Uniform Law Conference report. I see on the agenda, item 4, we've got a one-paragraph resolution, but the report or draft report we don't have. I'm just wondering: were we going to deal with that today or at another time?

THE CHAIRMAN: Okay. I'll have to ask Sue if there's something else.

MS KESSLER: I did provide a copy of Alberta's response to the private sector. I wasn't aware that I was to get a full copy of the Uniform Law Conference of Canada, but between Clark or me, we could certainly do that. Clark, would you like to speak to that?

MR. DALTON: Yes. Mr. Chairman, I am a commissioner for Alberta in the Uniform Law Conference, so I can speak to this point. There is no report. There's only a resolution of the body in August, and it's very short. The resolution was that in view of the discussions they had, the matter would be put over for another year at the Uniform Law Conference.

THE CHAIRMAN: And that document we have with our agenda.

MR. DALTON: That's correct. So there's no report, Mr. Chairman. They don't produce a report necessarily as a result of discussions at the conference. Sometimes they'll do as happens here. They'll produce a paper prior to the conference and some of those papers are available, but after the conference or in the conference itself, the discussions and so on, there's no recording of it. There are no minutes taken other than a very shorthand version of what occurred and then that resolution. The resolution is the official document.

THE CHAIRMAN: Does that answer your question, Gary?

MR. DICKSON: It sure does, and I can follow up with Clark directly in terms of getting access to the draft bill that had been done. That's good. Thanks, Mr. Chairman.

THE CHAIRMAN: But a draft bill would be just a lead document, discussion paper type thing related to that organization. Would I be correct in that?

MR. DALTON: That's correct, Mr. Chairman.

THE CHAIRMAN: Okay. Any other discussion on the agenda? If not, all in favour of approval of the agenda? The motion is carried.

The next item is the minutes of two separate meetings, and I suppose we should do that for each meeting. Could we have a mover to approve the minutes of the August 31 meeting? Moved by Ron. Discussion? All in favour? It's carried.

Minutes of the September 1 meeting. Do we have a mover? Pam Barrett. Discussion on that? No? All in favour? The motion is carried.

Okay. We have five of what we call background papers. I'm sorry; there's actually another document that's listed on the agenda first. It's the Revised Summary of Public Submissions. Now, yours isn't quite this thick. I was getting a little nervous when I saw it. Mine's one-side printing, and I was just wondering how much new stuff had come in when I first saw it, and then I compared it to one of the other ones. There's usually a one-sided copy in case someone asks to have it faxed, and I'm hoping that we're at the point where we're not going to. I would really hate to have something like this sent to my office by a fax machine.

At this point I think we'll just take it for information. Are there any notable changes in it, Sue? I haven't had a chance to discuss that with you. I'm assuming these are just updates, a few late items of feedback, and there was also a request to flesh out some of the comments. Is that what's essentially included in this?

MS KESSLER: That's correct. We updated it to include the submissions that had not been included before. We added some

more substantive comment about some of the items that had been documented, and we added a bit of a comment field to explain some background behind some of the recommendations.

THE CHAIRMAN: Yes. The third column now is adding new information, but this was requested by the committee.

Considering the size of this thing, I think it would be appropriate from here on in, now that this seems to be reasonably conclusive, that we should find a way of flagging changes, because you can't possibly go through and read each time to find the differences. Would there be a simple way of identifying, in italics or bold printing, what the changes are if we make further revisions to this, Sue?

MS KESSLER: Yes, we could certainly do that.

THE CHAIRMAN: I think now people are going to want to go through this and not have to read it in detail and compare one document to the other. So possibly some way of flagging the pages to get the revision number so that you could go through it and read a footnote, find the pages that have new items or changes, and then italicize those that are changed so it would be easier reading. We'll leave it at that.

I think we're going to be spending a fair amount of time today on the background papers that have been prepared for us. We have five of them. I want to commend Sue and whoever else was responsible for this. We've said somewhat lightly in the past that we know there's been a lot of work to produce this stuff in a relatively short time. I want to make sure you understand that this isn't just lighthearted chatter. I mean, we do understand the amount of work and the pressure, with the limited resources you have at your disposal, that you and the staff that are working with you and Diane are under in putting this out.

There are three more to come. You did tell me last week when you expected them. Unfortunately, I forgot.

10:14

MS KESSLER: The one on postsecondary institutions as well as the one on the municipal government and police issues should be completed this week.

THE CHAIRMAN: We'll get them out to the committee members as soon as they're hot off the press.

MS KESSLER: Right.

THE CHAIRMAN: So for today what we want to do is go through these documents. For the most part, because they got to you very late, depending on how successful your office staff was in getting them to you, particularly those of you from out of town, at the very best you'll have had a chance to go through them. We're not planning today to make any major decisions based on any of this. We'll use the time at today's meeting for briefing, questions, whatever it takes to have people as familiar with the contents of these as possible.

We've set up a format where different members of our technical team are going to brief us on this. We had actually hoped to have a briefing on the registries situation from the Department of Municipal Affairs. We were putting this together fairly late last week, and by the time Sue was able to contact them, there was just no way that the people who are knowledgeable about this could be here this morning. So we'll deal with that at a subsequent meeting if we can.

Unfortunately, the paper we had written on who was going to carry us through some of these, how we were going to deal with it – if all else fails, read the rest of your papers.

Did everybody get a copy of this memo?

MS KESSLER: Yes. It should be right on the agenda.

THE CHAIRMAN: Mine's so – I'll use the word "rearranged." That probably would look better. That happened as soon as I got my hands on it.

Do you want to go through these, Sue, in the order that they're listed here or in the order that they're numbered for papers?

MS KESSLER: In the order that they're listed. The first one would be the Access Process and Fees, paper 3.

THE CHAIRMAN: Okay. Then Peter is going to take us through that?

MS KESSLER: That's correct.

MR. GILLIS: Thank you, Mr. Chairman. The paper itself only deals with fees, so I'm just going to preface my briefing with a couple of minutes on the process itself.

In the freedom of information act, of course, the responsibility lies with the head of each public body, and that head delegates responsibilities, particularly for processing freedom of information requests. I think it's important as the process itself is very legalistic, I guess you'd call it, in a way, and sometimes you get on a treadmill when you get into the act. There are requirements and each requirement can be taken to the commissioner, so it's a very legalistic process. It's important to view it as: inside the act only these rules apply. That's really the reason for that, that it is supposedly the last resort for getting information. So in that sense there are lots of other ways of getting information, but if you get inside the act, a lot of the rules apply.

As to the process itself there will be an office inside the public body, whether it's the FOIP co-ordinator's office – and that would normally be the place, but some other organizations have other offices that receive FOIP requests. That's very important, because a request is not a request until it gets to that office, and it has to come in a particular way. It has to be written; the act requires it to be written. It has to in some way specify the act, whether it's on a form or whether it's in a letter that says that I'm applying under the freedom of information act. If it's referring to general records, it's got to have the $25 initial fee. It doesn't have to have that initial fee if someone is asking for records about themselves. It has to specify information, and it has to ask whether it's copying or examining the record.

In a FOIP office, when you get a request, the first thing I always recommend for them to do anyway is say: can we handle this some other way? Can we go back to the applicant and say: can we give them this information in some other way? Because it is a major step into the FOIP world. That's sometimes the case, but quite often it's not. So you're into then determining whether you've got a complete request if you're in the public body. This is the time when you should be talking a lot to the applicant, trying to make sure you understand what the request is about and focusing the request as much as possible, because most citizens coming in are going to say, "I want everything about this subject," when they really only want five or six documents that relate to the subject. So clarifying the request.

The other thing you have to be clear about is whether you're dealing with what's called a continuing request. Somebody can ask for a request to last for a two-year period. Are you dealing

with a continuing request, or is it a onetime request? Again, the request should be signed and dated.

So basically the first step is: do I have a complete request, do I understand what they want, and is it at the appropriate office?

Now we start the process. We have 30 calendar days. That breaks down to about 23 to 24 days for response. So the public body has to get busy pretty quickly to handle the request. The request would then go to the areas where the FOIP co-ordinator thinks the records will be, or a best guess, looking at the records of the organization for search and retrieval. The definition of records in the act is inclusive. Again, it's everything from sticky notes and notes on somebody's desk through to the formal file, from what may be on the particular drives in your computer through to whatever electronic filing system you've got, photographs, whatever. It covers the waterfront.

The program area is responsible for finding all the records, an adequate search. It should be asked by a good FOIP co-ordinator to show that they have done that. Once you've located the records, you do what's called a preliminary review. That's normally done in the FOIP co-ordinator's office with the program people. It does a number of things. First of all, is this ours? Do all the documents that we found have CCs on them, and are we in receipt of the CCs? Is it some other public body? Should we be transferring the request? The act says that you've got 15 days to make that decision, whether it's transferred or not to another public body.

10:24

Second, can we release this information right now? No exceptions that we want to invoke apply; it's virtually open information; let's release it.

Third, do we have third-party information in here? What I mean by third party is: is it personal information about other people or business information, and what are we going to do about it? If we're going to be releasing it, we'd better start the third-party notification process to those individuals or those companies.

Fourth, what is the general range of exceptions that we're dealing with? Clark's going to be talking about the exceptions. So that preliminary review does that.

The most important thing also at the preliminary review, the fifth thing, to talk about in a moment, is: what fees are going to apply? If it's over the $150 level, you're going to be doing a fee estimate, and once you do the fee estimate, you're going to be sending it to the applicant. The applicant then has 20 days in which to respond, and they may do a number of things at that point. The applicant may accept the fees and say: let's go ahead with this. We'll ask for a deposit and go ahead. They may say: let's sit down and talk about the request. They may want to narrow it a bit here. "I don't think I want to pay this kind of money for this situation." So you start the clarification process again. Or they may say: "This is exorbitant. I'm going to the commissioner, and I'm going to complain about this." In all those instances the public body has stopped processing the request. Okay? There's no more work done until this fee situation is worked out.

There may also be, as I said, other complicating factors after that in the sense of the third-party notification, because again, third-party notification automatically adds 30 days onto the processing of a request. It takes 30 days to go through that process.

After this preliminary review and after what we call the notices, fees, perhaps a time extension, again you may find that you've got a huge number of records and you'll want to extend. You're permitted to extend up to 30 days, but again, if you need more time than that, you're going to have to go to the commissioner and ask for permission to go beyond that period. So notices perhaps for time extension or third-party notification are out at that point, and information is traveling back and forth.

After you've gathered all your information about the request, you've got to then make sort of a final decision and recommendation to whoever the decision-maker is in the public body in regard to what you're going to do. Are you going to release all of the information, release none of the information, or release it in part? Normally it's releasing it in part. When that decision is made, then the decision-maker has to sit there and say: okay; this is how we're going to go about it. If the decision is that you're going to be releasing in part, you have to go through detailed severing of the documents. Now, severing of the documents is going line by line and taking out words, phrases, whole sentences, whole paragraphs that would qualify for exception and nonrelease and indicating on the document or listing and referencing back and forth why you are taking out those particular parts of the document.

Then you're at the final stage when you go back to the applicant. You're going to respond. You're going to indicate that (a) either you're not going to release any information or (b) you're releasing all the information or (c) and again most normally, you're releasing part of the information to the applicant. If there are fees outstanding, before you release the information you collect the outstanding fees, and at that point in time you then ask the applicant whether they want the records mailed to them or whether they're going to come in and examine the records. You make arrangements with them as to when that will occur.

So that's sort of in a thumbnail the process that you go through. It seems like a lot of things to do in 30 calendar days, although a lot of requests are responded to in that period of time. Should I stop there?

THE CHAIRMAN: It might be a good idea to stop here briefly for questions and comments, and then we could keep these things in context. Does anyone have any questions at this point?

I have one. The process is fairly formal, and you mentioned at the beginning that the head of the department, whoever receives this request, would look initially at alternative methods, I'm assuming, of simplifying this. I would imagine that would be particularly for people who are looking for information and may not have realized they had triggered a formal FOIP request and to keep the costs down and keep the process simpler. If the request is submitted in this way and there's, say, a simplified version agreed on, does that change the dates of the commitment periods? And if you find that it isn't working and you have to go back to a formal request, do you start over?

MR. GILLIS: Basically you are taking someone – and it is a serious matter – outside the formal FOIP request process when you're saying: we can provide this informally. You should be very clear with them whether they're going to get all the information that they asked for; in other words, talking to them and saying: here we can give you this; does that meet your needs? If they say no or they say it only partly meets their needs, you should be keeping the part that doesn't meet it inside the request process and go on processing the request. Don't ask them for a new process. And it has to happen in a two-day time frame right up at the front of the request process.

THE CHAIRMAN: So this gives you a very short period of time to decide whether the simplified version will work because your clock is ticking officially.

MR. GILLIS: Yeah.

THE CHAIRMAN: Okay.
Mike, did you have a comment?

MR. CARDINAL: Yeah, just a question, and this overlaps into other areas, I think, a bit. In relation to the rationale or reason for requesting information, what do other jurisdictions do as far as the use of information after it's been received? I suspect a percentage of the information will be used for political purposes, and I have a bit of a concern there as to how that issue may be dealt with. I'll give you an example. There's a request in my constituency right now for a particular department to provide all of the invoices for the last eight years or so of a particular program, and that's going to cost lots of money to provide that information. I know where the request is coming from. It's specifically for political purposes. Is there anything anywhere that maybe other jurisdictions have in place to deal with issues like that?

10:34

MR. GILLIS: No, there isn't.

MR. CARDINAL: It's not a request from an individual. It's for other purposes.

MR. GILLIS: Right. There really isn't in any other jurisdiction. Really what you've got are the exceptions, and that's all you've got to hang on: exclusions and the exceptions. The FOIP co-ordinator in a department really shouldn't even be asking – they may know; I mean, it may be very obvious – why the person wants the information.

MR. CARDINAL: It's not an individual though; it's a group.

MR. GILLIS: I realize that.

MR. CARDINAL: It's a witch-hunt. It doesn't benefit an individual. It's going to cost thousands of dollars to the taxpayers to find out if, just in case, something went wrong in the last eight years.

THE CHAIRMAN: So essentially, if the individual is willing to pay the fee, the process kicks into gear.

MR. GILLIS: The process kicks into gear.

MR. CARDINAL: Even for a political party?

MR. GILLIS: Yeah. Absolutely.

MR. CARDINAL: I have a concern with that, because it's going to cost thousands of dollars in this one case, and from what I understand, there's nothing in it other than just to hunt to find some dirt. If you can't find it, well . . .

THE CHAIRMAN: Your concern, Mike, is that the fees only cover a small part of the actual cost?

MR. CARDINAL: Yeah. The cost could be into thousands of dollars to pull out all the invoices.

THE CHAIRMAN: Gary, you had a question?

MR. DICKSON: Thanks, Mr. Chairman. I know Mike Cardinal isn't deliberately trying to be provocative this morning.

MR. CARDINAL: Oh, no, no. I wanted it on the table.

MR. DICKSON: I want to explore, if we can just for a moment, the impact of regulation 200/95 when we talk about time and fee, because they're sort of related. Even though section 10 talks about a 30-day time limit, can we agree that if an application comes, say, on a letter to a head of a public body, the 30 days doesn't start to run if it's not accompanied by the $25 payment?

MR. GILLIS: That's correct.

MR. DICKSON: Then would you agree that there's currently no time limit for the public body to provide a fee estimate? In those cases where it looks like it's going to be more than five hours of search time involved, after the $25 application fee has been paid, is there anything in the regulations or the act that requires that there be a fee estimate provided, say, before 30 days?

MS SALONEN: No. But the time doesn't stop in that interim. The time is still continuing until the fee estimate is provided, and that's when it stops.

MR. DICKSON: Okay. So the fee estimate has to be provided, clearly, within the 30 days. No question about that. Okay. Then everything stops until at least half of the estimated fee is paid. Is that correct?

MS SALONEN: Yes.

MR. DICKSON: Okay. So often what you get is that the public body may get an application and they may have significantly more than 30 days, in effect, because of the operation of waiting for the fee estimate to go out, waiting for the 20 days to elapse, or to get some response from the applicant. Is that accurate?

MR. GILLIS: Basically, if they chose to go on processing the request, I suppose they would have more than 30 days. I mean, basically if you're receiving a large number of requests, you're probably going to truly suspend that and deal with the applicant on the fee issue and go on and deal with other applicants whose work is in the mill, so to speak.

MR. DICKSON: I just ask a further question, Peter, because of your experience with Ontario. My recollection is that Ontario started out, as B.C., with no application fee.

MR. GILLIS: That's correct.

MR. DICKSON: They brought the application fee in – I think it's a $5 application fee, the same as the feds'. Is that correct?

MR. GILLIS: Yeah.

MR. DICKSON: They experienced a 30 to 40 percent decrease in volume of applications. Can you tell me if that's accurate?

MR. GILLIS: I don't know if that's accurate, Gary. I've not looked at their statistics in that regard. To support you somewhat on that, I would think that would be true to some extent, because again, without wanting to discourage grade 8 civics classes and so forth, when I was a FOIP co-ordinator, I quite often got large numbers of requests from classes and so forth. So I'm sure an application fee would discourage some of those types of requests, and civics, I guess, will have to be learned in a different way.

THE CHAIRMAN: I was just going touch on that. For a $5 fee, if that's what the cost was, one would have to assume that it would discourage some of the rather lighthearted and certainly frivolous applications, because $5 wouldn't be considered onerous. Would that give some kind of a reflection of the kinds of things that could happen if there wasn't a bit of a handle on this?

MR. GILLIS: Yeah, I think that's true. I mean, basically any type of initial fee is to make sure that you're aware that you're entering a costly process.

THE CHAIRMAN: If we're talking about the civics class or whatever like group that might want that kind of information, one would assume that if they're looking for educational purposes or the like, an informal request for that kind of information rather than the formal FOIP request would be much more appropriate, and that would head in that direction instead.

MR. GILLIS: Yeah.

MR. DICKSON: I'd just finish off by asking: can you confirm my understanding that British Columbia, the one jurisdiction we've modeled our act most closely on, has had no application fee from the time their act came into force throughout the first full four years of their operation? Is that the case?

MR. GILLIS: That is correct.

MR. DICKSON: Thanks.

MS PAUL: Could I ask: what would be the average cost of a request? Have you sort of done a total cost?

MR. DICKSON: For a nonpersonal request.

MS KESSLER: We don't really have a handle on that.

MS PAUL: No percentage?

MS KESSLER: No.

MS PAUL: Okay. Then I'll follow up. If there is a dispute or a complaint with respect to the fee structure and the process of the request is stopped, what would be the average time frame for the complaint and sort of some sense of resolution? How long would you hang on to that request and deal with the complaint with respect to the fee?

MR. GILLIS: Well, as long as there was a complaints process, you would certainly be on that request.

MS PAUL: Is that that 20-day time frame?

MR. GILLIS: No, no. You're then going to the commissioner. The commissioner may determine that they will deal with it more expeditiously because it is a request that's ongoing, but if they didn't, I suppose it's possible it could go to 90 days in actual fact. But I doubt it would, given the fact that it's an ongoing request and should be dealt with expeditiously.

THE CHAIRMAN: Pam.

MS BARRETT: Thanks, Mr. Chairman. You referred to the formal requests by civics classes and the fee being a bit of a deterrent to that. I assume that the reason they were doing it was for the purposes of going through the exercise as opposed to gaining the information, that that would be the priority. What kind of information were they seeking?

10:44

MR. GILLIS: It was generally information that could have been made available to them outside of FOIP. Basically the teacher was saying: I want to teach you about access to information, freedom of information, so we're going to fill in the forms and send them in to various departments. They were requests for statistics, for example, reports on various things that were public information, and certainly that was made available to them.

MS BARRETT: Right.

MR. GILLIS: It was just that the FOIP process itself is so formal that it becomes difficult if you've got, say, 20 kids and they all arrive on the same day in the same office and you have to deal with them all as formal requests.

MS BARRETT: Yeah. I can see that.

My apologies. I had to take a call while you were responding to Gary's last question about British Columbia. Could you repeat your response, please?

MR. GILLIS: I responded that there has never been and is not at the present time an initial fee in British Columbia.

MS BARRETT: Do you have any sense on a per capita basis, then, if the number of FOIP requests going through British Columbia are approximately similar to Alberta's or if they are quite a bit higher or lower?

MR. GILLIS: The problem in British Columbia is they don't really keep statistics. It's rather difficult, but my impression – and it's only an impression – is that the number of requests is probably higher. Now, again, it's complicated because they've already extended into the local public bodies.

The other thing, again having worked in British Columbia, is there are no strong mechanisms for getting information out in other ways. In other words, the act does not really work as the last resort. For many it is the first resort. That has some strengths, I suppose, because it has legal rights attached to it, but on the other hand it is no less complicated than this act. I'm sure some become frustrated with the process itself, so it's a balance.

MS BARRETT: You probably can't answer this question, but I'm befuddled: they don't keep stats?

MR. GILLIS: Not very well.

MS PAUL: I think that if there's no money involved, they don't keep stats.

MS BARRETT: Well, I don't know. They need a new computer.

Thank you.

THE CHAIRMAN: Okay. We touched on the first part. Do you want to go on, Peter, to the fees part of the presentation?

MR. GILLIS: Yes. We've been basically walking around fees in the first part here.

Basically, in every jurisdiction in Canada, with the exception of

Quebec, there is a fees provision in every piece of FOIP legislation that attempts to balance and share the fees in some way between the public body and the applicant. There's a range of items that can be charged for: searching for, locating, retrieving the record, preparing the record for disclosure. People have problems with preparing. You cannot charge for reviewing the record. As I'm sitting here leafing through this trying to determine whether this information should be released or not, you can't charge for that. But you can charge for the physical going through and x-ing out, if you will, of particular chunks, and that can be a formidable task if you've got a thousand pages of records. It can be a very time-consuming process.

You can charge for the cost of copying the record in any format. So it could be just straight xerox, or it could be a computer diskette or a photograph. You can charge for the cost of reprogramming or creating a computer-based record. So to the extent that you can't just walk in and hit the print button on the computer and print off the document, to the extent that you've got to sit down, maybe do a little reprogramming and working with the document, you can charge for that. You can charge for the cost of supervising an applicant who wishes to examine the original records. So if someone comes in and says, "I want to look at the record," they'll sit there, and you're probably going to have someone sitting with them. You can charge for that person's time and the cost of shipping a copy of the record too. That is the normal range of things that can be charged for.

I differentiate Quebec because they have a rule that follows the American model. The American model is that you only charge for dissemination of the record; in other words, copying the record. That's all that's charged for in Quebec. In all other jurisdictions in Canada there is this other range of things that can be charged for.

I talked about the fact that for the general records the initial fee of $25 must be paid. That basically is, if you want, buying you up to $150 worth of cost. Basically, you can go up to $150 before there's anything in addition that's charged. If you go above the $150, everything is charged.

Okay. With personal information it's different. There is no initial fee, and then nothing is charged until you get over $10 of copying costs. All you can charge for with personal information are the copying charges.

Then my favourite, the continuing requests. The initial fee for continuing requests is $50 at the current time. Then you provide an estimate for the total fees that you might expect over the course of the continuing request. Now, that's tough, because you may not have created those records yet. Two years out you may not have created the records. Again the same limit works, $150 for the whole request. If you go above that, everything is charged. The Information and Privacy Commissioner has raised continuing requests, just how complicated it is for estimating and collecting the information, because what you're doing is setting out a schedule, and on each quarter or whatever you're going to be – it's just like processing a full request, but it's part of the continuing request. You then collect fees in that time frame. Then you go on to the next quarter, start the request over again for new documents, and you collect the fees. It's very complicated, and it may merit a look at reformatting that in some ways.

There's also an issue, I think, in the collection of goods and services tax on requests, on fees. It does not apply to the provincial government, does not apply to most of local government. But as you get out into some of the other local public bodies, they don't have an exemption, so we're probably going to have to deal with that in Treasury.

As far as the basis of fees, I guess the most novel one has been the Australian Law Reform Commission, which has recommended that they attempt to put a per page cost, total cost, of processing the request. Again I have some difficulty, from experience in the field, how you would come up with that figure. So you're left basically, I guess, with the established system. Other systems are sort of in the preliminary stages, and I haven't seen anything else that works. I've seen situations where they get so many requests, like health and human services in the United States, from business that they just roll over. You have a standing account with the department, and you just put in your request and bank up your account as it goes on. I don't think those are things that we would particularly want to contemplate here.

10:54

There is room for waiver of fees. The first one is when an applicant cannot afford to pay, and that normally occurs when someone is asking for information about themselves. In that case I guess it's the one instance where a co-ordinator would be asking for a lot of personal information from the applicant, because they're going to have to have some demonstration that they can't afford to pay the money that's there. It does not happen all that often, but it does happen, and there have been rulings in front of the commissioner in other jurisdictions about ability to pay.

Other reasons for a fair excuse. Well, that's a sort of catchall phrase. It could be, for example – I've had it happen personally where we inherited a set of records and they were in terrible shape. It took us a long time to find the records, and we didn't feel that the applicant, who had made a reasonable request, should be penalized for poor records management, so we reduced the fees accordingly. Just to help Mike out, it was also a provincial political party, and I was working for the federal government.

Then the big one: a matter of public interest, including environment, public health and safety.

Yes?

MR. DICKSON: I wonder if this is a good time to ask a couple of questions about the fee waiver. It looks like we're moving from that.

MR. GILLIS: Well, we're just going to do the public interest one.

MR. DICKSON: Oh, okay. Well, finish that off, please.

MR. GILLIS: I'll just do that very quickly. Basically, there is a waiver where it is deemed that the subject is in the public interest. It could be the environment, public health and safety, but it could also be the broader public interest. The commissioner – I'm not going to go through them; there are 13 criteria that he has set. The departments are not bound, but they should be looking at those criteria if they're determining if something is in the public interest. There are some common things that would not be in the public interest. If someone's going to use it for commercial purposes, that's not in the public interest. If someone, for example, is going to disseminate the information broadly and it's information of general use, that can well be in the public interest. I want to say that it does not have to be a large group. I use an example of a mental health institution in Ontario, where parents wanted to take information and make it available to prospective parents whose children may well be coming into the institution. The commissioner found it to be in the public interest to do that. So those types of things.

Then the final thing on the fee waiver is that the Alberta commissioner has the ability in 87(4) to look sort of de novo, I guess, at whether or not a fee waiver should have been granted. That could happen during the request or, in one instance here, after

the request had been in process. So a sort of different power than in some other jurisdictions.

So I'll leave it at that, Gary.

THE CHAIRMAN: Okay.

Gary, you have some questions?

MR. DICKSON: Thanks, Mr. Chairman. Just in terms of fee waiver, I'm trying to remember the stats we had last time. My recollection is that in our first three years' experience with FOIP we had only waived – I think it was less than $4,000; was it? I don't know, Sue, whether you've got the number there, but it struck me as being a very small amount. I think I've asked before and been told that we're not sure how many different applications would be involved with that. I just want to confirm that.

MS KESSLER: I've got the stats here. Yeah, we've waived a total of a little over $6,000 in fees, and we don't have the number of requests associated with that.

MR. DICKSON: Mr. Chairman, it strikes me as actually quite a small number, and I guess I'm wondering: how do individual applicants find out about the fee waiver? I mean, short of reading the act, how well do you think applicants and prospective applicants understand their ability to be able to seek a fee waiver?

MR. GILLIS: Well, again, a FOIP co-ordinator under their duty to assist should be telling individuals, if they're having trouble with the fees, of the waiver criteria. I mean, they're supposed to be responding openly with that information. Again, my experience, not working as a co-ordinator here in Alberta but working in other jurisdictions, is that I generally did not have problems with applicants knowing about fee waiver. They were quite au courant with what their rights were. They certainly had others outside to let them know what it was they were venturing into. Also – again, I think this gets down to the duty to assist – if you've got a citizen who is not aware of what the act says, it's really incumbent upon the co-ordinator to be explaining to them what it's about.

MR. DICKSON: I wonder if you can just confirm, as a result of Commissioner Clark's ruling in 96-002, that the $25 application fee has to be paid first, before you can ask for the fee waiver. Maybe you can explain that so people are clear that you have to pay that, but then you can ask for a waiver, which would include getting your $25 fee back.

MR. GILLIS: That is correct.

MR. DICKSON: Mr. Chairman, if I can. Contrasting our experience with B.C. and Ontario in terms of fee waivers, do we have a sense whether significantly more or less fees are being waived in this jurisdiction than in Ontario and B.C.?

MR. GILLIS: Again, this is an impression. I would undertake to go and look for the statistics in Ontario for you to see if I can find it, but my impression is that it's about the same. My impression comes from reading commissioners' rulings where they are fairly tough on the waiving of fees. I'll give you an example of one. Video terminals and the emanations from video terminals causing disease: I would have thought this was waiver material. The commissioner – and it was the commissioner, not an assistant commissioner – found in that instance that more than enough information had been put out to the public, that this was just more information piled on top of it, and said: no fee waiver. Again, this is just an impression – and I will check the statistics – from the commissioners' rulings. They run sort of 2 to 1 not granting the waivers. Again, I don't have a good handle because of the lack of statistics, but in B.C. the main fight there, as I understand it and follow it on the Internet, is over the raising of fees, the government wanting to raise the fees. I look at the commissioner's findings, and he's not granting that many fee waivers. Again that's, you know, anecdotal. It's tough to make a public interest fee waiver case. I'll use an example there: an Indian band on the Apex road coming in and saying that they had their consultants come in and ask for a fee waiver on the records being released. The commissioner said: "No. If you can afford to hire consultants, you can afford to pay." The commissioner there did wade in on what I would call informal access, saying he wanted to see reasonable fees outside the act as well as inside the act. But for actual public interest fee waivers, I think it's about the same as Ontario. That one I won't be able to check, but I will check Ontario for you.

11:04

THE CHAIRMAN: Ron Stevens.

MR. STEVENS: Thank you. Peter, if you have the information, I'd appreciate it if you could spend a moment and explain how the fee schedule was determined in the first place, both as to the items for which fees can be charged and the amounts. I note in appendix 3 the opening line is that the amounts that are outlined there are maximum amounts, which to me means that something less than that per item can be charged. I was wondering if you have any experience as to whether there is a standard; that is, the maximum amount being charged or typically some lesser amount.

MR. GILLIS: It's never that clean. Basically, public bodies will charge the rate that is in here, then make a decision afterwards whether they would reduce the total fee for some reason. If anything goes along the way it used to operate in my office, we were very generous at the cutoff line, at the $150 here, but in other jurisdictions where I worked, we had other hourly rates. If somebody was coming in at $162, we might just find that we could squeeze it in under the $150 or whatever. So those things happened, rather than you going back and asking the applicant: "You know, we've got this range of records. Do you really think these five pages are relevant to what you need? And if you don't," – I mean, it's a bit of negotiation – "maybe we can do some stuff on fees for you." Those types of things go on. They're not written in the act, but they happen. As to how those were arrived at, the fee range and the hourly rates, I would defer to departmental personnel here.

MS KESSLER: Basically we did some research in terms of what other jurisdictions were charging, but we also looked at the range of salaries in Alberta and came up with a per quarter-hour rate that seemed reasonable. For the other charges such as photocopying, et cetera, we canvassed departments that do a lot of copying of that type of material, and those were some of the suggested rates they recommended to us.

MR. STEVENS: So would that have been effective as of 1994 or '95?

MS KESSLER: In '95. Correct.

THE CHAIRMAN: Ron?

MR. STEVENS: I'll go on the bottom of the list.

THE CHAIRMAN: Okay.
Denis.

MR. DUCHARME: Thank you, Mr. Chairman. Some submissions have argued that the fees do not come close to meeting the real costs of providing information. I'm wondering: have you taken the time to work out the math to see what the fees would have to be in terms of being able to get full cost recovery?

MR. GILLIS: I've not done the math. It's virtually impossible to do it as every request is different, but I can give you the best sort of statistical analysis that's been done. It was done by the federal government, and it was done I think three times. It has basically worked out a methodology that if you do not charge for review of records, you're taking somewhere between 70 and 75 percent of the total cost of the request and you're not charging for it. In other words, all this other stuff about search, preparation, and copying is between 25 and 35 percent of the cost. Review is the rest, and you're not charging for it.

MR. DUCHARME: Thank you.
My next question would have to do with the fee waiver process. Again I guess I have to look at the economics of that process. Is the commissioner's office spending more time and cost, time being dollars and cents, than what the fee that's being requested is?

MR. GILLIS: That's a tough one. I'm not sure I can answer that.

MR. ENNIS: Peter, if I can wade in here. Peter mentioned that in section 87(4) of the act the commissioner has the power to make a brand-new decision on fees. The practice we've adopted in the office is that if somebody is coming to us asking for a fresh decision on a fee waiver and hasn't approached the public body with the same request, we ask that the applicant go to the public body and get a decision there so we can line up behind that decision and be able to comment – when I say "we," I'm talking about the office and essentially the commissioner in the end – so that the commissioner can review a decision that has been made ahead.

We have had some cases where people have come to us as the first stop and we've sent them back, and people accept that. That makes a lot of sense, and I think the public bodies also see that as a sensible approach. We have had one particular case where the public body made a decision not to waive fees, and when the commissioner reviewed the case in inquiry, he determined that the public body's decision was correct. But he made a fresh decision to waive the fees because of other information that had come to light since the time the public body made its decision. This had to do with the information being used for a purpose that was, in the commissioner's view, clearly in the public interest. When the public body made that decision initially, they had no evidence that the information would be used that way. When the commissioner made his decision, he had the benefit of that evidence, so both decisions were seen as being correct. The commissioner came out with a different determination than the public body, however, because of the new evidence.

Going back to the question of how much time and effort is put into fee discussions in the office. Many of the requests that are made to the office around fees are returned to the public body for action, so that's a fairly simple deflection back to the public body. In some cases we are analyzing the issue of fees and often in the context of a wider complaint about how an entire request has been handled. Fees are sometimes the tail end of a more comprehensive complaint, and sometimes the complaint is about a technical error in the calculation of fees: a public body that has applied a fee and, for example, double-charged for a particular function. Those are usually straightened out by the portfolio officers quite quickly, so there isn't a lot of inquiry time rolled into fees. It would be fair to say that fee cases have been a small minority of the commissioner's work.

MR. DUCHARME: Okay. The reason I ask is that it shows in the report that basically the average fee that is charged is a little under $21 per request. I'm just wondering: if we're having to spend a day in looking at a request, is our process correct?

11:14

THE CHAIRMAN: I have one question. When the department or the agency or whoever has to estimate a fee, is there any rule of thumb or is there a requirement as to how accurate that has to be?

MR. GILLIS: Well, basically you're living by your fee estimate, and estimating really only comes with some experience. There is no handbook on estimating FOIP fees, but there are some tricks to the trade. For example, if you have common documents, say contracts for example, you can go through and, you know, pick every 10th one or whatever that you're looking at and come to some reasonable estimation of what the costs are going to be for dealing with that type of request.

It really comes from experienced people knowing the records they're dealing with, and at that point in time – I certainly found this out – you have to deal with the program people to really find out how complicated those records are. I have also faced the situation where I did the fee estimate, and at the end of the day we're sitting there saying: "We didn't estimate right here. Are we going to eat the 300 bucks, or are we going to go back to the applicant and ask for more money?" Again, it's not written in the act or in the regulations. It becomes a matter of how that particular request is unfolding. I've done both: I've gone back and asked for the money, and I have eaten it as well, with the program area eating it.

The other thing is that if you overestimate, you're bound to give the money back to the applicant. If you estimated $1,000 and it came in at $800, you take off or you never collect the $200.

THE CHAIRMAN: Well, if you underestimated and found out that the estimate is going to be exceeded, do you have to advise the applicant in advance?

MR. GILLIS: Absolutely.

THE CHAIRMAN: There is no procedure that if you do not, you can then exceed the . . .

MR. GILLIS: Well, then you're going to be talking to the applicant, and the applicant is probably going to say: "I've got my estimate here. It said it's 500 bucks, and you're now saying it's 700." And if push comes to shove, your estimate is your estimate.

See, the other thing is that this always seems like it's a clean process, that you're dealing with one request and it doesn't change. But in fact for any request I've ever had to deal with, you start out with one request and the request you end up with at the other end that you're producing the records for has changed eight or nine times over the period as the applicant finds out more and wants to know more. Just doing one estimate often isn't the end of the process. You're actually in a negotiation of saying: well, if you change the request this way, we either reduce the fees or, if you go this way, we're going to have to increase the fees. You're in fact

almost doing a new estimate at various stages in the process.

THE CHAIRMAN: I'm thinking of the situation where the application looked reasonably straightforward and you have done the research and find that this appears to be somewhat in line, but then as you're going through the detailed work, you find, say, additional related documents or, you know, some extenuating circumstance that would change the scope of it. Are you at that point bound to provide all of this information simply because you stumbled across it? Or can you go to the applicant and say, "This is what I estimated, and this is what you'll get unless you pay more money"?

MR. GILLIS: Well, no. Your latter point is right. I mean, if you've now found other records, if you were only estimating on 200 pages and now you've got 4,000 pages of records, then basically at that point you'd say to the applicant: "There are a lot more records here. I'm going to be re-estimating how much this is going to cost. The other side is that you're going to get more information."

THE CHAIRMAN: Okay.

You have something more, Gary?

MR. DICKSON: Thanks, Mr. Chairman. Just a comment. When Denis was talking about the average cost, I just wanted to make the comment that I've had occasion to make a few FOIP requests over the last number of years, and $700 would probably be about an average fee estimate for the requests that I've made for access to nonpersonal or general information.

The query I wanted to ask. The Canadian Association of Journalists makes the argument that there should be no fee charged when an accredited member of the media makes an application to access documents. I know that doesn't exist in any other legislation, at least in Canadian jurisdictions. But I'm curious. Have we sort of tracked what's happened, how often the media request a fee waiver and how often that's either accepted or declined? Do we have some sense of what the experience has been with accredited media?

MS KESSLER: We don't have that data.

THE CHAIRMAN: Okay.

Ron, you had another question.

MR. STEVENS: Actually I have a couple more questions. Sue, if I understood you correctly earlier, you indicated that the government doesn't keep information with respect to the cost of requests.

MS KESSLER: That's correct, not on a per request basis. We know on sort of a global level the direct costs that the departments are spending on FOIP, but that's not all the indirect costs, and a lot of the indirect cost, like Peter was saying, is the review time. We have no data on that at all. All we do know is that from the public bodies it's about $2.9 million to $3 million of direct costs for this fiscal year. That's what's budgeted. So that's the only information we have.

MR. STEVENS: As a matter of practice, what information do you recover from a time input perspective on an individual file basis?

MS KESSLER: Sorry; could you repeat that?

MR. STEVENS: In other words, I make the application; you provide the information. What if any information regarding the amount of time it takes to do that do you routinely record?

MS KESSLER: We don't collect that information at all. I believe the departments do. They do, but we don't compile it.

MR. STEVENS: So it's out there someplace.

MS KESSLER: It's out there somewhere.

MR. STEVENS: Okay. Thank you.

The other question I had was with respect to the commissioner's recommendations regarding changes to the legislation. Peter, you alluded to the one with respect to guidelines on how fees should be assessed for continuing requests. Can you tell me: is there a proposal somewhere in the material as to how we should do this? Or is this just one of these points that people have raised as an issue and have said essentially, "If you think it's something that is worth tackling, then we'll take the next step and try to figure out how to make it better"?

MR. GILLIS: The commissioner's submission actually makes some detailed proposals in regard to continuing requests.

MR. STEVENS: Thanks.

THE CHAIRMAN: Okay. It looks like we've exhausted the requests for questions.

MR. ENNIS: Mr. Chairman, if I can just make a comment. Sue mentioned that the cost of $3 million or thereabouts for public bodies is a total person-year kind of cost for the program, not just for access requests. Much of what FOIP co-ordinators do, day in and day out, is their educational function, dealing with staff, reviewing computer systems, ensuring privacy, doing audits and that sort of thing. So the access request portion of that is something less than $3 million. Some FOIP co-ordinators seem to be in the mill all day doing access requests. Others are more in the Maytag mode. They'll do a fair bit of educating. The odd request comes in, and that's very exciting, but it isn't a huge part of their work. So the $3 million fee that is quoted does include a lot of other elements related to the freedom of information and protection of privacy function other than just access requests.

MR. STEVENS: Thank you.

11:24

THE CHAIRMAN: Before we get to the next item, I was just going to mention the plan for lunch. When the caterers arrive with the sandwiches, it gets kind of clattery and noisy, so we can break at that time – it'll likely be about 10 to 12 – for a stretch and a brief adjournment to the washrooms or whatever one wishes. Then perhaps in about a 15-minute time period we could sort of re-collect, get the sandwiches, and maybe keep working through in the interest of getting done today.

Mike Cardinal has indicated that he has a meeting out of town as chairman of NADC. You have to leave at about 1 o'clock, did you say, Mike?

MR. CARDINAL: At 1:30.

THE CHAIRMAN: Pam Barrett has indicated that she has a luncheon speaking engagement, so she wants to leave for three-

quarters of an hour or thereabouts. So as long as everybody is still comfortable with the idea, we'll continue to go through these presentations.

The other thing I'd like to do, particularly because there's going to be some time loss with not having the departmental or government positions, is make a continency plan for an additional meeting, insert it into the schedule sometime. Maybe we should do that before Mike leaves. Would it be okay if we did that just briefly now? Look at your calendars, if you have them with you. This would be some time perhaps in the middle of October.

MR. CARDINAL: Is it possible to do it after lunch so I can grab my daytimer?

MR. DICKSON: I vote for that too. I don't have mine.

THE CHAIRMAN: Okay. Let's do this right after Pam comes back.

SOME HON. MEMBERS: Agreed.

THE CHAIRMAN: Also, I think everyone has received the note from Diane that our schedule for times of meetings had to be changed slightly for access to this room. We found that there were some other commitments, and this is by far the most ideal room for this kind of purpose. With apologies to those of you, I think particularly Denis, who we were trying to accommodate with a 10 o'clock start, you are going to have to get up, I guess, at about 4:30 on a couple of those mornings where we have to start at 9. Maybe we can send a note home with you that says that you can go to bed at about 11 o'clock that evening.

Okay. If we can then move on. Clark is going to give us everything he knows about exclusions and exceptions.

MR. DICKSON: Is there a paper on that, Mr. Chairman?

MR. DALTON: I was just going to say that there isn't a paper on this. I wasn't asked to do one, so I didn't. I suppose I should have. There are pros and cons to that. You won't have another thing to read, but at the same time it's always useful to have something to follow along.

What I thought I would do today, ladies and gentlemen, is go through in a broad sense the exceptions in the act and the atmosphere in which we created them and some of the background material to the exceptions themselves. Then if we need to get into detail, we can certainly do that, but I think the object here is to brief you just generally on why they're there, what they're about, what kind of concepts we were using and that kind of thing. That gives you kind of a foundation upon which to build further discussions in this area.

In the act itself there is, as you all know, a purpose clause. That sets out one of the purposes of the act, and that's to allow a right of access to records in the custody and control of public bodies subject to limited and specific exceptions. So that's the first point, limited and specific exceptions to the right of access.

The second point is that in section 6 of the act – and we talked about this a little earlier – the right of access doesn't extend to records subject to exceptions under division 2 of the act, but it does extend to information that can be reasonably severed from that information. So there's the concept of limited and specific exceptions, and there's the concept of severance. Of course, severance incorporates, then, a line-by-line review of each record. I may say that at times people get confused; they think a record might mean a file. Actually – and I think this was said earlier – each particular document is a record. If it's a sticky or something like that, that's a record. A telephone note, that's a record. So each document in a file is a record, and each one has to be looked at in the context of the exceptions.

Another aspect to it. The all-party panel of which Mr. Dickson was a member said: look; we want the exceptions to reflect a harms test. I'll have some comment on the harms test. Some harm has to result as a result of the application of the exception.

Another aspect to the exceptions is that some are mandatory and some are discretionary, and we'll talk about that. In addition, the exceptions are associated with third-party notifications under the act. There are two exceptions that have a notification process associated with them; that is, one, commercial information and, two, personal information. So we have to keep that in mind.

I should say that the exceptions are not sort of little pigeonholes you fit in. Actually, some of them overlap, so you'll find that some of the exceptions can overlap one with the other. It's designed that way, and most jurisdictions have the same kind of thing. There's overlap of exceptions.

Finally, also related to the concept of exceptions is the public interest override. Section 31 says that whether or not an application has been made, the following must be taken into consideration. That therefore incorporates an access request. There may be some exceptions, but they can be overridden by the public interest override.

So, again, it's limited specific exceptions, a harms test associated with them, mandatory and discretionary types of exceptions. There are third-party notices there, public interest override, and there's an overlap amongst all these things.

To begin with, every freedom of information regime recognizes that there has to be some exceptions to the right of access to information. Most of them reflect the same kinds of exceptions that we have in our act at the present time, so the same kinds of things like cabinet confidences, advice from officials, personal information, commercial information, and so on. So most of these regimes have the same kinds of exceptions to disclosure.

Now, I said to you that we have mandatory and discretionary exceptions under the act. When it's mandatory, you must take it; you have no choice. The act was designed, I think, to try and restrict the number of mandatory exceptions that exist under the act. Those are probably four in nature, and there's a hybrid. The first one is a mandatory nondisclosure as a commercial information, so if you meet the tests in section 15, you must make that exception.

The second one is personal information, in section 16. If you meet the test in that exception, you must take that exception.

11:34

Then there are some others that are a little obscure. You have to look for them a little bit. One is that if it's an offence of federal law to release law enforcement information, then you must refuse to disclose that information.

Finally, where we happen to have a legal record that belongs to someone else, solicitor/client privilege, then you must refuse disclosure of that particular record.

There are some hybrids. Information may be disclosed only with the consent of the Minister of Labour in consultation with cabinet for information that may harm relations between the government of Alberta and other governments. So that's sort of semidiscretionary. He can do it, but he has to consult with cabinet. Finally, information supplied by another government – let's say a municipal government or a federal government or another province – supplied in confidence by that other government, may be disclosed only with the consent of that other government.

So, as you can see, there are mandatory, and then the rest are

discretionary. That involves an actual putting your mind to the exception and applying discretion as we know it in law. You know, I look at it and then I make a discretion. You can't just sort of say: "Who's the applicant? It's so and so. Well, let's not give it out." You have to actually go through the process of making a decision based upon the records.

Now, I indicated to you that the exceptions try to be limited and specific and have a harms test associated with them. To illustrate that, I thought I'd go through some of the more important ones just to show you how there is some limitation, specificity, and harms tests associated with them. Some of the harms tests are actually drafted as such. Let's take, for example, commercial information. Section 15 sets out the exception – and it's a mandatory exception – for the disclosure of commercial information. In that section it is essentially a three-part test. Number one, is it a commercial, scientific, or trade secret, something of that nature? Number two, was it supplied in confidence? Number three, could one of the following four harms occur as a result of disclosure of that information? It actually uses the term "harm." So that's the harms test.

The limitation and specificity are that it's limited. It's not every piece of commercial information, number one. It has to meet the other two tests. It's also limited in the sense that it has to have been supplied in confidence. There are some circumstances where the government will have gained the information from someone other than, say, the commercial enterprise itself, and there have been a number of cases that suggest that that's not supplied in confidence.

Now, supplying in confidence can be specific – in other words, I tell you that it's supplied in confidence – or it can be inferred from the sort of nature of the information itself. You know, financial information that a government happened to have of a particular corporation may well, just by its nature, become stuff that's confidential. So in that particular exception you can see that there's a three-part test: not all of the commercial information is exempt; it has to be supplied in confidence; and then one of four harms must result as a result of that.

Now, to illustrate another kind of harm, let's use cabinet confidences, for example. That's another mandatory nondisclosure. You cannot disclose cabinet confidences except some background information and if the cabinet confidences are over 15 years old. That illustrates two things here. One, it doesn't say that it's a harm, but what that particular section reflects is what's called – and all of you folks will know this – collective ministerial responsibility, where there's a collective requirement not to disclose what takes place in cabinet. That also reflects, I believe, what the common law is. Primarily, cabinet members, for example, can't go out and publish their diaries about cabinet on their own. Cabinet confidences are really confidences of the Queen, and only the Queen or the Queen's representative can really consent to disclosure of cabinet confidences. That's the harm. In other words, the harm would be the disclosure of the confidences of cabinet, which is recognized as collective ministerial responsibility.

Another illustration is section 23, that deals with advice from officials. That's another aspect of ministerial responsibility. Even though it's a discretionary exception, what that illustrates is the other aspect, as I say, of ministerial responsibility, and that's individual ministerial responsibility. Essentially, that is that the minister is the person who speaks for the department and no one else does. So any advice and recommendations that are given to the minister should remain within this cloak of ministerial responsibility, and it's for the minister to either take the praise or the flak for whatever particular decision is made. So it reflects, again, what common law is there, and the harm there is in releasing that kind of thing.

So what we tried to do with the exceptions is tried to reflect harms tests. We've tried to make them specific. I've illustrated the commercial exception. Another one of importance is personal information. The exception isn't just that if it's personal information, you can't get it. It says: if the release of personal information "would be an unreasonable invasion of a third party's personal privacy." That tells you that this is limited in the sense that it has to be an unreasonable invasion of personal privacy. So it's not just an invasion; it has to be an unreasonable invasion of the privacy of a person. It is not enough for people to say: you know, this is about me; you can't release it.

But the section does try and set out some specificity to it. It sets out, firstly, a section that says: here's where we're going to presume an unreasonable invasion, things like medical, psychiatric, or psychological history, personal information related to employment or educational history or something of that nature. So there's a presumption that that is an unreasonable invasion, and to overcome that, the applicant has to show that, yes, that might be presumed to be the case but can show you why it isn't an unreasonable invasion. They have an onus on them to do that.

The other aspect to this particular section is that there are provisions in the exception dealing with personal information where it says that this is not an unreasonable invasion of personal privacy, and they set out a number of things. One is where they consent to it. Consent is usually something that negates the exceptions anyway. One of the interesting ones that comes up from time to time is the information about a "third party's classification, salary range, discretionary benefits or employment responsibilities" as an employee or officer of the public body. That's not an unreasonable invasion of your personal privacy for that information to come out.

I thought I'd just touch upon a couple more exceptions so that we can maybe have a broader discussion. One of the other ones that comes up from time to time – and it's an important one – is an exception for law enforcement matters. That's section 19 of our act. What the act does is it sets out about 11 exceptions, so it's specifying the situations in which you can use this exception only. For example, "harm a law enforcement matter," "reveal the identity of a confidential source of law enforcement information," and so on. So there's a listing of exceptions where that can be applied.

Privileged information is the final one I want to talk about. Our act is a little bit different than that of most other jurisdictions in the sense that most jurisdictions only have an exception for solicitor/client privilege. Our particular act deals not only with solicitor/client privilege; it deals with any kind of legal privilege. That was meant to deal with privilege that exists at law. For example, as you'll see, one of the examples is parliamentary privilege, which most of you folks have a good feel for. But there are others, and many of them are, for example, where a privilege is created in a statute. This is privileged information and may not be released and used for any other purpose. This particular section was meant to incorporate that kind of exception to disclosure. So any kind of legal privilege is subject to an exception, and note that this particular exception is a discretionary exception.

11:44

So in the broad scheme of things we've tried to set out exceptions that are limited and specific. I think virtually all of them have a harms test associated with them even though they don't say "harm." The limitations on mandatory exceptions are as much as I think you can do. In other words, most of the mandatory

exceptions are really what have to be mandatory. Again, some of these exceptions can overlap each other. So you'll get a particular record and you'll say: gee, that's privileged, but it's also something that went to cabinet. So they can overlap like that, and it's meant to do that.

I guess all I really wanted to do today was just sort of introduce the topic, and maybe there would be some people, obviously, that have some specific questions. Perhaps I could leave it at that, Mr. Chairman.

THE CHAIRMAN: Okay. Diane advises me that the caterer is here a couple of minutes earlier than we anticipated. It might be not a bad idea just to break here. I'm assuming that anybody who has questions will have made a few notes. It is probably better than getting into questions and then interrupting it halfway through. It's a quarter to 12. Let's adjourn the meeting now.

[The committee adjourned from 11:46 a.m. to 12:09 p.m.]

THE CHAIRMAN: We'll call the meeting back to order. Clark, since we forgot everything you said before lunch, you can start over and make your presentation. [laughter] Okay. We are at question time. Comments? Ron.

MR. STEVENS: Thank you. One of the papers that we have relates to paramountcy, and one of the problems that is discussed in a couple of places there relates to voluntary information that goes along with mandatory information that arguably is important, if not necessary, for establishing a good relationship with the industry in question and making good long-term decisions, particularly with respect to forecasting. I was wondering, Clark, if the part that you discussed with respect to the confidence exception would relate to that, to protect the voluntary information if it was either expressed that the information that was provided that was not mandatory but voluntary was provided in confidence or if, as I understood it, the circumstances under which it was given would reasonably lead to that conclusion.

MR. DALTON: The characterization isn't one of whether it's voluntary or mandatory. This is generally what the cases say. The real characterization is: is it something that in the circumstances is confidential or that you explicitly provide in confidence? Often, though, mandatory requirement of information is so important that it could well just by its nature be the kind of information that has some confidence associated with it. For example, drug companies under the federal act are required to produce, must give out certain kinds of information to the federal department responsible. So I think the characterization – I'm sorry to be a lawyer here for a moment – is more: can you objectively say that this is something that is confidential in nature? So I tried to use the illustration of financial information, which would be useful to your competitors in the same industry, that you've given perhaps to facilitate something, either licensing or something of that nature. So, again, I think it's the characterization as to whether it's objectively confidence or not, not necessarily whether it's voluntary or not voluntary.

MR. STEVENS: The only reason I used those terms is that it struck me that under the paramountcy paper they described some of the information as voluntary or nonvoluntary in nature, and a problem arose with respect to the voluntary part of the information that went along with the mandatory. That's the reason I used those terms.

MR. DALTON: Yes, quite right. Of course, the confidence matter that I'm talking about is commercial confidences. You know, there would be other situations where confidential information may well be given.

MR. STEVENS: Thank you.

THE CHAIRMAN: I have a question that might be similar to Ron's. This is an area of the act where the intent when the act was originally designed is quite critical, you know, whether or not people might agree that certain things should be excluded or accepted, the intention designed, that part of it. Is the wording of the existing act such that it remains quite clear – and maybe this is a question almost to John – in the interpretation that what was intended is precisely what it says and that there aren't any problems by people who are working with the act or trying to access information in getting around the wording, that what we have is there by design?

MR. DALTON: One area that you may hear from time to time that maybe has been interpreted differently than what we thought it would be is the law enforcement exception. Law enforcement, although the concepts of law enforcement are used, was meant to be broader than that in terms of enforcement. Law enforcement is defined in the act as

> (i) policing, including criminal intelligence,

which we'll set aside for the moment.

> (ii) investigations that lead or could lead to a penalty or sanction being imposed, or
> (iii) proceedings that lead or could lead to a penalty or sanction being imposed.

It was viewed that what we meant by law enforcement was really something broader; for example, an investigation of an elevator operation, you know, the certificates you see in elevators.

THE CHAIRMAN: Department of Labour inspectors.

MR. DALTON: That's correct. So not strictly sort of criminal type of law enforcement. I think there's a tendency towards it being restricted to more like law enforcement that we generally think of; that is, police and that kind of thing. It wasn't meant to do that. A lot of the other exceptions I think have turned out the way they were designed, and a lot of the reason for that may be because they are fairly specifically defined.

THE CHAIRMAN: To the same question, John, from the perspective of the commissioner's office. Working with this, do you find the same kind of thing, that it is reasonably understood, or are you running into areas where there might be some clarity preferred?

MR. ENNIS: Well, I'll just pick up from Clark's comments. Initially, the FOIP community had been trained to look at the law enforcement section as an issue of being able to invoke that exception for a whole range of things that fit into a law enforcement mosaic. What happened as the commissioner made his first few orders: he weighed in on that issue and determined that law enforcement had some pretty stringent tests to it. In order to invoke that exception, to be able to use that exception to deny someone information, it had to be a specific set of circumstances.

Another case where that has happened is with section 23, the advice from officials section. That's probably the place where people had very broad expectations – I'm thinking of administrators and the people that work in public bodies – about how they could use that section to keep from giving information out. So it's seen as a bit of a comfort blanket, I think. What's

happened in a number of the commissioner's orders is that he has narrowed the advice from officials exception to be used only in certain circumstances where certain factors are present. Those tests are well known in the public bodies now as a result of orders.

I think that the process hasn't been a very jarring one though. It's been a case where the commissioner has helped people to read words in their ordinary meaning and often down to their narrowest sense since what is at stake is the right of access that applicants have. The idea of getting down to very specific exceptions has been a bit of a theme there. So I think that section 19 on law enforcement and section 23 on advice from officials have been the two sections where a lot of pruning has been done.

THE CHAIRMAN: I'm thinking those are areas where this committee does have a job, when we originally talked about our terms of reference and scope of what this committee has to do, clarification and making sure that the act works the way it was intended. I think this is an area where we're going to have to spend at least some effort – I don't know how much time it's going to need to take – in making sure that we help or make recommendations toward it so that it does follow the intent and that it becomes as clear as possible.

Are there any other questions to Clark?

12:19

MR. DICKSON: I just want to be clear. Is Clark going to be around when we deal with the paramountcy thing? I don't remember who was presenting that. There are some linkages there. I guess I wanted to ask a more general question: what happened in 1995 when by order in council the statutes and elements of statutes were said to prevail over FOIP? I'm thinking of some of the energy statutes and the environmental protection act, where there were sections that were taken out. The message I took from that is that there's a sense that the exceptions don't go far enough or that there's a lack of confidence in the commissioner making the appropriate decision. Otherwise, why take these out altogether? I mean, you've got a number of exceptions, I think very comprehensive exceptions. It may be more of a policy question, and it may not be fair to ask you about this. I'm wondering: why do we do so much of that by way of taking them outside the act altogether rather than simply saying that protection already exists: the good judgment of the commissioner and a whole range of exceptions. Why not leave it at that?

MR. DALTON: If I may say, Mr. Chairman. One of the difficult things of dealing with a piece of legislation that's all-pervasive like this, that covers virtually every record in the government, is that it's extremely difficult for a person like myself or my colleagues here to say whether this is something that will fit within the exceptions or whatever. We have to really rely upon the people who are in that particular industry for what's going on. I don't think there's anybody in government, at least I'm not aware of anyone – perhaps Peter is as close as anybody to this – who really knows how the whole thing works. So in those circumstances it's difficult to say: why don't we just bring everything under the particular act? We have to rely upon the particular departments to tell us: no, this won't work for us. Hence we have these exceptions to the act.

You know, it's a long way of saying that I don't think I can answer that question because I just don't have a feel for that, the whole scheme. It's very difficult to know everything that's going on.

THE CHAIRMAN: We are going to be dealing with paramountcy just a little bit later on. There's a bit of an overlap here.

MR. DALTON: Yes, there is.

THE CHAIRMAN: So if we need to, I can broaden the discussion, but if we have questions on paramountcy, maybe we could save them till after Diana has made her presentation too.

MR. DICKSON: I wonder if I could just make one observation, Mr. Chairman.

THE CHAIRMAN: Go right ahead.

MR. DICKSON: I take your point. The thing I wonder about: when I go through the submissions, you know, most of the submissions are from local public bodies, school boards and councils. I see an awful lot of people who simply say: "Just take us out. Just put us in section 4. Take us out of the act altogether, because there are things unique to our area, and we're just not sure it's going to be protected." Sort of from a public policy perspective, at some point you've got to say – the safeguard is either going to be that we just take people out of the act or we're going to ensure that there's a proper balance within the four corners of the statute and, I guess, others, if you read through the submissions. This isn't much of a question, Mr. Chairman. I'm just expressing a comment, I guess, that we sort of have decided the act addresses these things. I guess this would be the question: what else would we have to change in the exceptions to be able to provide people with a reasonable measure of comfort that their legitimate confidentiality concerns can be accommodated within the act as opposed to just leaving them out altogether?

MR. DALTON: Do you want me to answer that now, or do you want to delay it? Well, I could give you an answer. I think it goes back to what I said earlier. My experience with the act is that a lot of people are fearful of it because they don't know what's going to happen. It's new. It's different. It's something they've never done before, and it makes people nervous.

Often, once you start working with something, you find that it's not a problem, and hopefully that will be the situation here, that people will say: well, look; this isn't that bad to work with at all, so why don't we just do it? I can't say to you, "Yes, the exceptions will apply to their fears," because often they're not particularized. We're going to have problems with this and problems with that. Again, often people like myself and my colleagues here don't know enough about how it really operates to make the kinds of decision like that: exceptions covered, that we need some changes to the exceptions, and so on. So it's a learning experience. As we move along, we find out we can perhaps do things or make changes, something of that nature.

THE CHAIRMAN: Ron.

MR. STEVENS: Yes. I was wondering if there have been decisions that help with the interpretation of section 23, dealing with what constitutes advice to the ministers, for example.

MR. DALTON: Yeah. There has been a fairly important decision of the commissioner, and it's a three-part test. I happen to have it here; it's almost as if this was scripted. I'll just tell you that the Information Commissioner gave a decision in 96-006, where he said that the criteria that advice should be are the following: that it "be sought or expected, or be part of the responsibility of a person by virtue of that person's position," "be directed toward taking an action," including making a decision, and "be made to

someone who can take or implement the action." So there has to be some action associated with it, and it has to be somebody that can make that decision, and so on.

So if it's no decision – for example, if it's a briefing, just simply a factual briefing – then it wouldn't fit within that exception according to the commissioner's ruling on that matter.

MR. STEVENS: I take it that the person that offers the opinion has to have as their job description the responsibility of offering an opinion of that kind.

MR. DALTON: That's correct. That's the first part of the test.

MR. STEVENS: So gratuitous opinions are disclosed, gratuitous in the sense that they're outside the job description.

MR. DALTON: I would think so, but I would think that would be a rare occurrence anyway. I think most of us in government that have done any of this kind of thing are not giving gratuitous opinions. We've got too much else to do. But the plain fact is I doubt if it would happen that often.

THE CHAIRMAN: Following up on Ron's question, would it be fair to assume that the primary concern by the ministers and department officials would be the problem of chain of command? Where does the advice become part of a circuit, and then where does that fall apart into maybe other duties of, I'll say for lack of a better word, a lower ranking official? Which would be advice to the minister, and which would be otherwise?

MR. DALTON: Maybe I didn't quite understand what you asked. I think it doesn't matter where you are in the organization. If at some stage on something you advise someone's made a decision that can make the decision, that's good enough. So if it goes up a chain of command and you can follow that, then that fits within that exception. Does that answer what you were asking me?

THE CHAIRMAN: Sort of. I guess my concern is a little about whether or not that kind of advice has to be requested as part of the decision-making process or is, as Ron suggested, gratuitous. A lot of times there may be ongoing activity within a department and simply an official who knows that there is a proposal or the desire to have some changes made, who does the field work and everything else, passes it on to a supervisor who then passes it on to a director, to an ADM, to the deputy, and to the minister. At what point is it easy enough to tag that this is in fact intended to be advice to the minister for making a decision, or does it fall apart somewhere in there? Is the writing of the act too ambiguous to decide what is or what should be advice?

12:29

MR. DALTON: Actually it doesn't just have to be to the minister. It's advice, proposals, recommendations, et cetera, developed by or for a public body or a member of the Executive Council. If you're developing it for your own department, I'd say that kind of thing that you've talked to me about is captured by that. Incidentally, I do that all the time. Part of my job is, for example, to sort of bird-dog what's going on in the world, and it's gratuitous in the sense that I give it to someone further up the line who is responsible ultimately for it. But, again, it's within my job description to do that kind of thing, and mostly that's what you'll see in government.

Supposing though, for example, I go over to Agriculture and tell them, "I think you ought to do something about this stuff that's infecting canola," you know, that's really not part of my job, and it's really gratuitous advice. I don't think you'll see a lot of that in government. So basically, yes, it can be gratuitous as long as it's related to what you do and someone makes a decision as a result of it.

THE CHAIRMAN: Is any part of the interpretation sorting out the difference in stating facts in a report or a backgrounder which then evolves into a recommendation for action? I've discussed this a couple of times with individuals, and the example I had used was where, say, a wildlife officer goes out, inspects a stream where there is a proposal to make a crossing for temporary use of an industry, and says, "Well, according to our estimates there are 300 fish in this stream that would be trapped," which would be a statement of fact. He'd go on to say, "Putting this stream crossing in is going to block their access and is going to be somewhat detrimental to the fish," which is still likely a statement of fact. But if he goes on to say, "We should disregard the harm but dam the stream off anyway for three months," that is now a recommendation. Is there any problem with the fine line between the first part of the information, which is factual, and the other part, which is a recommendation to even the person above him in seniority?

MR. DALTON: There is always, I believe, a problem with determining what's fact and what's advice or recommendations and so on. Your own illustration seems to show that as well. Now, the fact is that there are so many fish. That's a fact, and I think that's pretty clear. Putting something across the stream may do something to these fish: is that a fact, or is that opinion? What is it? Next, "I recommend that we go ahead and do it": I think that's clearly a recommendation. The more specificity you use sometimes, the more difficult it is to find that defining line.

MR. ENNIS: The defining line is built into that section. Section 23 is a large section. In 23(2) it lays out those cases in which you can't invoke 23(1). That would include the scientific background to a recommendation, the statistical studies, that sort of thing. They're laid out in 23(2). So what we end up with often is public bodies looking at a document and saying: well, this part, which is the background to the recommendation, is accessible because 23(2) takes it out of 23(1) and takes the exception away. But the recommendation itself is something that the public bodies have to think about and apply their discretion to. It's probably worth noting that they often do give out that information. It is a case where they may refuse to disclose or they can disclose, and very often they do disclose that information.

THE CHAIRMAN: I sort of jumped in on Ron's question. I'm not sure if I gave you time to finish your line of questioning.

MR. STEVENS: That was fine. I do have one question, if I might. It sounds like from time to time the information that is provided is edited, meaning that some part of the information is deleted. From a practical point of view, do you provide the document black lined so that the information that is not to be provided is obviously deleted, or is it reconstituted?

MR. GILLIS: No. You always get the document with the deletions very clear, whether it's a black line through or whether someone has taped it so it's just blank. There are also fancy xerox machines that will do it all for you if you type in the grids and so forth.

MR. STEVENS: It's sort of like the private-sector data protection

resolution.

MR. GILLIS: That's right.

MR. STEVENS: I knew there was a reason you gave it to us that way.

THE CHAIRMAN: Gary, you have another question.

MR. DICKSON: Yeah, I do. This came up in one of the submissions. What I want to ask is: why do we have a higher standard in terms of the threshold test for harm in section 15 when we're dealing with third-party information than the one we use when we're talking about government interests in section 24?

MR. DALTON: I can only answer that, Gary, by saying this. Section 15 was almost virtually in its entirety when the all-party panel report was recommended. That's from British Columbia. When we got to section 24, there was virtually nothing said about it at that time. So, yes, that's why they're different.

MR. DICKSON: Okay. I wonder if you can suggest, aside from the historical reason, now with the benefit of more than three years' experience with the act, any reason why we wouldn't harmonize the threshold so that whether you're a third party, it would be basically the same kind of threshold as if it were government information that was to be protected.

MR. DALTON: Well, I suspect that's a policy decision to be made by you folks. Technically you can do on this one I think pretty much what you want. You could probably import a harms test. There is a harms test in here, as you know, for what may be expected to harm the economic interests of the public body. Trade secrets and financial information are included. I think what you're getting at is the confidence part maybe.

MR. DICKSON: Yeah.

MR. DALTON: Often, though, they don't receive it in confidence. That's the problem with that. They generate it themselves; that is, government bodies. I'm not sure that it's possible. There is a harms test in there. It's the same kind of information. The only thing that's missing is: received in confidence.

MR. ENNIS: Another distinction too, Clark, is that in section 15, which deals with the rights of third parties, especially commercial parties, there is a requirement that it be significant harm, which would require a head of a public body to turn his attention to what kind of harm and whether the harm is significant or not, whereas in section 24 it's simply a question that there is a harm. There's that distinction between the two sections.

MR. DICKSON: Well, that's exactly my point, and I guess I'm querying now, just leaving aside the historical reasons for those different thresholds, whether a company, corporate third parties, should have a different threshold test than government public bodies.

MR. DALTON: Just an observation. I'm not sure that it makes any practical difference. I recall the old cases on negligence and gross negligence, and frankly, I never saw the difference between the two of them. The use in section 15 of the terminology "harm significantly" – I've often wondered if there would be any difference whether "significantly" was there or not. In theory there is. But in practice, is there? Similarly, is there any difference between "harm" the economy of Alberta and "harm significantly" the economy of Alberta? I'm not certain that in practice there's any real, particular difference. I just draw that from the experience we've had with negligence and gross negligence. I wonder if practically there is really any difference.

12:39

MR. DICKSON: Okay.

Another question, Mr. Chairman?

THE CHAIRMAN: Go ahead.

MR. DICKSON: Then the other comment that had been made to me was that section 15(3)(d) has the 50-year release rule. Is there a particular reason why section 24 doesn't have a similar 50-year release rule?

MR. DALTON: Again I think it's historical.

MR. DICKSON: Thank you.

THE CHAIRMAN: Okay. We've used up about half of our time, and while some of it was in the opening of the meeting, we have five more issues. We're not dealing with item 3, Registries, as I mentioned earlier, simply because with the short notice we couldn't get someone from the Department of Municipal Affairs to come over and do the briefing. But we will do that, hopefully, for the next meeting.

If we can go on to item 4, Criteria for Inclusion of Public Bodies, Peter is going to take us through that one.

MR. GILLIS: Yeah. Thank you, Mr. Chairman. This seems like old home week for some of us on the health steering committee – who is covered and who is not? – but we'll go through this again.

Basically, most FOIP legislation, not just in Canada but around the world in the countries that have it, doesn't contain specific criteria for determining which organizations are covered. They have definitions. For example, in the United States it just says the Executive Branch is covered. In Canada it talks about public bodies or government bodies or whatever, and it describes generally who will be covered. The Alberta act is typical. It's got the public bodies, and it goes on to talk about local public bodies, educational bodies, health care bodies, and so on.

There was some observation that more detailed criteria should be set out in the act, and I think that's being taken from British Columbia, where they did set out some criteria as to which types of public bodies would be covered under that legislation. Now, that doesn't mean that there has not been a policy up till now for determining who is covered and who is not. There has been a set of criteria used. That criteria is basically that if the government appoints a majority of members to the governing body of the organization, it's covered; if the body is wholly financed through the general revenue fund, it's covered; or if the government holds a controlling interest in the share capital of the organization, it's covered.

Now, that set of criteria has been tweaked a little bit here, but they weren't just pulled out of thin air. They have a long background with the Williams task force in Ontario that studied freedom of information and protection of privacy. They came up with something similar to that. The Williams criteria were then picked up by the federal committee that reviewed the federal Access to Information Act and Privacy Act, and they again came up with something very similar to the current Alberta criteria.

Now, British Columbia sort of moved ahead in 1992 beyond the

criteria that we're talking about. They moved ahead by putting their criteria in the act. Their criteria, in section 76(3) of the B.C. act, read: whether any member of a body is "appointed by the Lieutenant Governor in Council or a minister," that body is covered; whether "a controlling interest in the share capital . . . is owned by the government of British Columbia or any of its agencies," it's covered – well, that's similar to the one that the Alberta government is using – or whether the body "performs functions under an enactment," again broadening the base for coverage.

Then we have Great Britain. When the Labour government was elected there, they published a white paper on the freedom of information act they intended to put in place, and they pushed out the criteria somewhat. They pushed it out to private organizations insofar as they carry out statutory functions and then added privatized utilities.

So we have some movement in the last five years, I guess, as to what criteria might or might not be used to determine who is covered under freedom of information legislation.

Now, the public submissions made a number of suggestions for criteria, but in looking at them, we couldn't come up with any I guess discernible trend or something you could determine. There were suggestions, some good, but generally looking at publicly funded. If something was publicly funded, they thought it should be covered. There were specific suggestions regarding private schools and licensed private vocational schools, private health care bodies, and so forth coming from particular interest groups involved with or in some cases competing with those organizations.

The other thing I think it's necessary to bear in mind is that none of the criteria up till now really tackles the local area. In other words, the criteria were developed for government as opposed to local public bodies. There's I guess a decision that has to be taken there as to whether we should only be dealing with government, that that's the only criteria we should be talking about, and let the local bodies be defined in the legislation, be very carefully defined. Would the set of criteria cover both? Could it cover both, or would it have to be a different set of criteria? So that's another issue.

If you went to something along the line of British Columbia or the Great Britain proposal about whether or not you would cover every body that carried out a function of government, since they put it that way, I don't think anyone sitting at this end of the table has any feel for exactly who that would cover and set down. But certainly you would be pushing out into some private entities that carry on work; I mean, there's no doubt about that. How far that would push out we can't answer, because the criteria would have to be very carefully defined. You might be able to do that, but at this point we can't make a guess.

One of the other item that has come up in a public submission is concern that in municipalities – in particular, in Calgary and Edmonton with the power companies – there may be some competition with the private sector. Should public organizations that compete with the private sector be covered by the legislation? The federal Access to Information Act, which is a fairly old document now – it's been out, I guess, looking at 15 years – chose at that time not to cover the competitive Crown corporations from a freedom of information point of view. From a privacy point of view they covered many of the competitive Crown corporations and would have covered more had there not been privatization.

12:49

B.C. has chosen, in the case of one Crown corporation, not to cover it because it does compete directly with the private sector. On the other hand, in Ontario you have some organizations like the SkyDome and so forth that are in open competition across the country for venues and so forth that are covered. Ontario Hydro, for example, and Hydro-Québec are covered. They don't compete directly, but certainly they have a lot of competitive information, and some of it has been released; for example, the Ontario problems of managing the nuclear facilities. Probably not something a private corporation would necessarily want to have released, but it was released under the freedom of information act in that province.

So I guess some options there: cover them and see if section 24, I guess it's going to be, would work well; or don't cover the competitive part of the operation and still cover it by privacy; or exempt them entirely from coverage. Those are some options there.

There were also, in regard to private schools and private colleges, a number of submissions that suggested there should be some extension in that area. There are others around this table who could talk more to that issue than me, so I'll just let that go and flag it as an issue.

Finally, should the criteria be in the act, in FOIP regulation, or remain part of policy? There are really two sides to that question. To put it in the legislation, you bind yourself very carefully. I mean, this legislation is not going to be changed every year, so it's there, it's locked in, good or bad. The regulation we've got more scope to change if you find that there are some difficulties with the criteria you selected. The policy has, I suppose, flexibility, which has both a positive and a negative side. The positive side is that you can deal with unique organizations and complex sets of records and so forth perhaps a little bit more, but it's also not setting down the criteria in any regulated manner, and that's the downside of it.

I think I'll stop there. Questions?

THE CHAIRMAN: Gary indicated he had a question.

MR. DICKSON: I guess in wrestling with the question of whether the criteria should be explicitly included in the act or not, what's interesting to me is that right now, as I understand it, groups like AUMA, the Alberta Association of Municipal Districts and Counties, and the Alberta Senior Citizens' Housing Association have all been told the act will apply to them, and they have that expectation. But when I talk to groups like the Alberta Library Trustees Association and the School Boards Association, they're convinced that the act does not apply to them. I think by being more explicit as to what the criteria are, it removes that sort of confusion, so I think that's a compelling reason why we should cover it rather than just leaving it as it is now. I think it's important that Albertans should be able to look at this statute and have some sense of whether an organization is caught or is outside. It seems fairly ambiguous now.

THE CHAIRMAN: I haven't got anybody else here. I have one thing that came to mind. As you started out, Peter, you mentioned that the criteria were developed for government, I guess the initial concept of freedom of information, and other jurisdictions involved, to include other sectors. I suppose we knew this, but it just hit me, as you said it, that that might be one of the problems that we've got. Because it was developed for government, where there's an expectation of accountability and responsibility, and because the beneficiaries of that information in a lot of cases are really shareholders of government anyway, there might be a different connotation or a different expectation of how you deal with other bodies, whether they're Crown agencies, who have a

similar but not the same level of responsibility, or the private sector, which includes self-regulating professions and such. The element of accountability and responsibility is significantly different, yet if you measure them by the same criteria, you are asking them to use resources that they have put together for other reasons but to manage information, make it available, and do all those things that we set up.

With respect to what you said, Gary, about the legislation being fairly definitive, if it's in the act, it's very clear as to what the criteria are. But by doing that, do you not also set up the cookie-cutter type expectations, one size fits all? Maybe that's one area we have to give some serious consideration to, what are the criteria and where are they set out, and maybe a differentiation of how they apply. Because certain of the submissions that were made were in defence of a particular group or organization who had a concern about coming onboard with the act, saying: well, you know, we believe in the concept, but the rules you set up in the initial act dealing with government don't totally apply to us. So if there was some other area or some other way that those criteria could be – what's the word I'm searching for? There could be a very distinct difference in the criteria, which may head off some of the concerns of these groups that are coming onboard and maybe down the road help alleviate the concerns about involvement. I'm not asking for an answer. This is just something I was observing as you made the presentation, Peter.

Mike.

MR. CARDINAL: Yeah. Just a question in relation to agencies and boards, specifically agencies. When I was minister of social services, for an example, the department I think had contracts with over 300 agencies – and that's just one department – some nonprofit delivery systems and some for profit. I just wonder, if we did move in that direction and where we should be going, does anyone know the potential volume and financial implications that would go further into all agencies and boards. What are we talking about in Alberta? Are we talking about thousands of agencies and boards, or are we just talking about a few?

MR. GILLIS: No. I think you're talking about a large number.

One of the examples that's used was not specifically used on agencies and boards. But even within that, you could have one type of agency which is specific – in other words, it's doing one job – and you may say: well, yeah, it's a public function; that seems logical. Then you switch over to the other side and another agency is doing a similar job but is also doing 12 other things which you shouldn't want to deal with. So it gets quite complicated. And to the extent that you would want them either covered by the act or you say you want to bind them by contractual agreement or whatever to carry out similar requirements to the act, it becomes then the question that you have to pose, because it may well be much more palatable and economical and effective to bind them contractually. There's got to be a balance, and this is where the criteria get so difficult to come up with, because you don't want to end up with exactly what he was talking about: this cookie cutter, where you catch everybody by the toe.

12:59

MR. ENNIS: If I could add to that, Mr. Chairman. One thing that these agencies, especially the ones that are working with the Department of Family and Social Services, are coming to recognize is that for a significant proportion of their operations now, they are effectively under the act in that they're operating as a contractor to the department, carrying out some kind of a function for the department. The freedom of information act regards them as an employee of that public body for purposes of the freedom of information act by virtue of the definition section. The department, as I understand it, has taken the view that when an agency is carrying out a departmental function, the records the agency works with are still under the control of the department and therefore would be accessible under the act and would require privacy protection under the act. So to some extent much of that has already happened, the agencies being effectively brought under the act for purposes of their operations done for the department.

THE CHAIRMAN: Mike's question was about numbers, and just by coincidence several years ago I was involved in an exercise where we tried to determine how many of those agencies there were. After about three months of searching – and this is using the resources of the Auditor General's office – we came up with about 230-some that were connected through the Financial Administration Act. Those were readily identifiable, and there were probably as many that had either a very short lifetime existence or were involved with the department in one way or another but very loosely associated. We finally gave up because trying to categorize them was about as productive as trying to herd cats. They were in every which direction, every concept, and if there ever was an exercise that says there cannot be a one size fits all rule, that certainly was it. We basically came up with the idea that there are a lot of them. It probably reinforces my concern that we have to be very careful how we bring each of these into the act or not, as to however these recommendations are going to come about.

Pam.

MS BARRETT: Thanks. I think I got lost, Peter, in your last set of comments. Were you suggesting that agencies under discussion in this paper could come onstream on a contractual basis?

MR. GILLIS: Basically, if you had an organization that's running a day care for you and you were financing it or partially financing it, you may well say to that day care, from both an FOI and a privacy point of view, that in our contract with you we're going to set out some stipulations as to how you will operate. For example, if we get an access request for records relating to our relationship with you – I'm a contractor; it's in my contract – you've got seven days to produce the records to the department, which will then deal with it on a privacy point of view. You may set up some standards that mirror the privacy standards in here. For example, if you're collecting personal information from parents, you will be telling them what you use that information for and so forth. So you set your standards, but you put it in the contract rather than subjecting the day care itself to all of the – it may only be the privacy things. Say there are seven privacy requirements. You may only want them to meet three. That's the thing. So you're able to tailor it a bit for them.

MS BARRETT: Now, presumably that would only be possible if the scope involving such organizations was set by policy as opposed to regs or changes to the legislation. You need that fluidity.

MR. GILLIS: You could, though, say in the act. I mean, it would be possible. I haven't seen it in law, but I've seen it in modern drafts of freedom of information legislation, where they've said that – in fact the British do it – we will bind contractors to the Crown, in a similar manner to what's required by this legislation but bound by contract as opposed to the act itself.

MS BARRETT: Gotcha. Thanks.

THE CHAIRMAN: In that respect we're probably going to touch on it a little bit in paramountcy, because I think a lot of these things happen occasionally and a lot of areas are very specific. That might be the area where we want to deal with how we handle it.

Okay. It looks like we're done with counting hands here, so we can move on to self-governing professions.

MR. CARDINAL: Gary, is it possible to do the scheduling?

THE CHAIRMAN: Oh, I'm sorry. Yes, we agreed that we would do that before you had to leave. Everybody's brought their diaries? What we're looking at here is a time that we can fit in. We're looking at a date. We have a meeting scheduled for the 5th of October, which is a Monday. What is the next meeting after that? The 9th of November?

MR. STEVENS: The 2nd of November is the next one and then the 9th.

THE CHAIRMAN: Yeah, the 2nd and the 9th. Somewhere in October we're going to have to fit in another meeting. My sense is that it will finish what we haven't been able to complete in today's agenda plus the registries item and the information that we will be receiving hopefully by that time from the government departments. That may well be the 5th of October meeting, and the date we're going to choose now would be to do what we had otherwise expected to do on the 5th. Does that fit into the strategy? I guess I'm sort of looking at Sue and Diane. Somewhere in this stuff that I have here I had a list of what we were expecting to complete at those meetings. At that 5th of October meeting we were going to look at some kind of a draft document, which would be essentially a staff-prepared document. Since we don't have the essence of all the material that would be necessary, perhaps the 5th would be a continuation of today's meeting, and sometime a week or so later we would then look at a draft.

MR. STEVENS: The next Monday is Thanksgiving.

THE CHAIRMAN: The 12th is Thanksgiving. That makes it a short week.

MR. STEVENS: How about October 20, which would be the day following the civic elections? It would also be two weeks following the previous meeting, which I assume would be appreciated by the people who are drafting.

THE CHAIRMAN: That's kind of the criterion we had set up for the 5th, that there was a two-week gap in between. How does Tuesday the 20th fit with everybody?

MR. CARDINAL: Good for me.

MS PAUL: Good for me.

THE CHAIRMAN: Okay. We'll have to see whether we can get this room again. Is 10 a.m. to 4 p.m. the first option, with a little bit of licence to Diane to be innovative with the time? Would that be acceptable?

MS PAUL: Uh-huh.

MR. DICKSON: Sure.

MR. STEVENS: It's okay by me.

THE CHAIRMAN: Okay.

Now we're moving on to Self-governing Professions, paper 2, and Diana is going to lead us through that.

1:09

MS SALONEN: Thank you Mr. Chairman. I'm a person of much fewer words than Clark or Peter, so we won't take nearly as long, I think.

We were asked to put the paper together to serve as a background for information in deciding if additional legislation should be in place to cover access and privacy provisions in self-governing bodies, and if that's so, how we should go about doing it. Unlike the other bodies that Peter was just discussing, we know exactly who the self-governing professions are in Alberta, and we know how many there are. Appendix 1 lists them; there are 51. Self-governing professions become that because they are defined in legislation, although the legislation differs and they have different powers and the access and privacy provisions in each of their legislations differed somewhat.

We can cover them in basically two broad categories. There is one group of self-governing professions that have exclusive right to practise. So in that case, unless an individual is registered as a member of the profession, they don't have a right to practise the profession. Those in the appendix are denoted by asterisks; we're talking about physicians, dentists, engineers. Safety issues are there. The other general group are those that have protection of title. So there is a registration. There is a standard of practice that they have met and have become registered in the profession, but they aren't exclusively those that can handle that profession. There may be others that practise but can't use the title.

To try and get a handle on what FOIP would mean to these organizations, we looked at what the general powers of these organizations are and what kind of information they would hold. So first of all, there's the body of knowledge and qualifications. That would include the standards of practice, the code of ethics that the members subscribe to. The next would be the registration type information. Almost all of the governing legislation requires that the professions maintain a registry of members, and they're usually open for inspection. Thirdly and what seems to have been more of interest to the public is the complaints and discipline process, where the professions would receive complaints from the public. They're generally handled through public hearings. Sometimes the governing legislation allows them to have some of those hearings in private, whether that information is available or not. Appendix 2 of the document explains how that's treated in every one of those professions based on their governing legislation.

THE CHAIRMAN: Diana, can I interrupt you for a second?

MS SALONEN: Yes.

THE CHAIRMAN: I browsed through that, and just relating to appendix 2, you have in the columns a bunch of Rs and some RCs and some RCPs. What do the two and three initials mean?

MS SALONEN: Sorry. I have a replacement for that: C is a complaint; P is public; R is respondent. So that tells you whether there is a general openness or that there was a complaint and who receives it, whether it's just the respondent or whether it's made

public.

THE CHAIRMAN: Yeah. I'd figured out what the R meant, but I wasn't sure what the other one was.

MS SALONEN: I apologize.

MS KESSLER: The code got taken off the bottom of that page.

THE CHAIRMAN: Sorry about that. Go ahead.

MS SALONEN: We've also added on the bottom of that the proposed Health Professions Act because that was tabled last session and expectations are that it's coming back and will replace a number of the health disciplines.

The paper also includes a list of factors – I guess you would call them pros and cons – to consider what the impact would be on these bodies and what your assessments might include. We've summarized the decision of other jurisdictions that we know have considered the matter, and so far only B.C. has included self-governing professions in their legislation. Ontario did consider it; no action has been taken. Manitoba has put their mind to it and specifically recommended not including it in FOIP. Quebec, although it has privacy legislation for all of the private sector, somehow in the definition of the private sector the self-governing professions were never captured, so they just included an amendment in the last session – it hasn't been passed yet – that would include them in the private sector private bill.

Of the 50 professions that were invited to make submissions to the committee, 11 chose to submit, and those submissions and their comments are outlined in this paper. The other paper, the thick one that has all the summaries, includes all contributors. If you look at those, it's a 50-50 split whether they should be included or not: 19 yeses and 20 noes. It's not really conclusive.

We've often offered a few options for consideration, if the status quo is considered not appropriate, on how legislation might be dealt with. The first one is to include any additional policy for access and privacy in the specific governing legislation of each self-governing profession. The second would be to allow the access provisions to reside in the legislation. As we can see in the appendix, often it is, but you have another kind of global privacy code for these bodies. It could be similar to, say, the CSA code, or it could be similar to an act like Quebec's. The third, of course, is a complete extension of the FOIP act to these bodies.

We've attempted to raise the advantages and disadvantages of each of these options. We may not have been exhaustive, but we tried to be impartial at the time. As well, in the last option we did a little bit of research on the self-governing bodies in B.C. Basically, the three largest ones get the vast majority of the requests – the College of Physicians and Surgeons, the Law Society, the dentists' society – and the number of requests are often more than some government departments get. They have found, in their comments to us, that it has been a costly process to implement. Generally they see there are some benefits. They've certainly improved their record-keeping processes and their records management practices but don't see a lot of benefit to the public, but obviously that's maybe a partial comment. Most of the other bodies had a negligible number of requests.

That summarizes the paper.

THE CHAIRMAN: Okay. Gary, you had a question.

1:19

MR. DICKSON: Well, in terms of the range of options, it seems to me there may be a fourth option. Maybe it would be just modification of one of the three you put in front of us, Diana. There's clearly a good deal of resistance from certainly some of the larger self-governing professions to FOIP being rolled out to include them, but looking through the submissions, I didn't hear anybody argue against the fair information practices, argue that Albertans shouldn't be able to enjoy the benefit of fair information practices.

I'm not sure whether the organizations, in terms of the legal profession, the medical profession, and the smaller ones, have been canvassed in the sense of saying to each of them, "If you don't want to be part of FOIP, tell us how you would propose to meet the five or six elements in terms of fair information practices, particularly the one that provides for some independent arbitrator, adjudicator, in the case of a dispute." It seems to me that there may be some creative way of achieving what I think people would like to see achieved without necessarily going the B.C. route and formally making them subject to the act. It seems to me that there has to be a message to the professions that because of the very important public mandate and public responsibilities they have been delegated with, they've got an obligation to make sure that at least they follow fair information practices. Have we done that already? I mean, am I talking about anything different than what's been done? I'm not sure all of these groups have considered specifically, you know, the elements in terms of fair information practices and come up with either saying, "Yes, we do it, and this is how we do it," or "No, we don't do this now, but we could." Does that make any sense?

MS BARRETT: Can I jump in for a sec? I think that in a way that's been addressed, because what they proposed under option 2 is this legislative implementation of a privacy code such as the CSA model for the protection of personal information. So it would be outside of the scope of this act. Have you seen that?

MR. DICKSON: I did.

MS BARRETT: Okay.

MR. DICKSON: But what I'm thinking of – let me give you a concrete example. The council of the College of Physicians and Surgeons on October 2 is going to be making a decision that's as important as any decision that we make in this building.

MS BARRETT: That's right.

MR. DICKSON: It's invested with huge public policy consequences. That information, you know, is not – as a citizen I don't have a right to access the source documents that the college council is using in making their decision. I think when they make those kinds of public policy things, there are some access interests as well. So it's not just the privacy code; it's also public access and some of those documents you're dealing with. So that's why I was thinking it goes a little further than that.

MS BARRETT: A little further than that, yes. You're right. You're right. Good point.

THE CHAIRMAN: Gary, along those lines, I've had this conversation with several people, and I may even have had it with you at one time. What we're talking about here with the self-regulating professions are organizations that get their authority by virtue of some legislation. Whether or not they have an exclusive scope of practice or otherwise, there is more to it than simply

voluntarily belonging to an organization and you can take it or leave it at will.

I think this goes back to the comments that I made before to Peter's presentation about criteria. In government the criteria is fairly all-encompassing. My reading is probably similar to yours, where there are some expectations or certainly some wishes that would be applied. I think, relating to hearings and disciplinary procedures particularly, that there needs to be a requirement for this process to be open, that there might be some desire that there be public participation in the group or the committee that actually conducts these hearings so that it doesn't become a closed shop, and thirdly, that there is a public report of the outcome. There may be others, but those are the three that come to mind to me, that there is a desire to have that kind of accountability.

Now, whether or not it should be in the act that we're dealing with or whether there could be a suggestion that it should be in some other legislation, whether it's in the enabling legislation that creates these bodies or whatever, if we deal with them, I think we have to be extremely careful that we don't turn this into an open-ended thing, because there are a lot of components of those professional associations that really have no bearing on what the bulk of this act is about. In some cases if the findings of Ron Stevens' report on privacy and health care – some of those organizations are going to be affected by that anyways as far as privacy is concerned. I think what we're talking here is more access to information and how we might deal with that.

This was a bit of a touchy subject when we started out this particular review committee because we weren't really sure whether we were going to get into it in a very broad sense, and I've been wrestling with how we might deal with some of the outcome of it. There certainly was a desire that we should be looking at it. I know that you, Gary, were quite concerned about expansion into the area. We could address it without going overboard, without setting criteria or setting expectations that are beyond what the general public really expects, and maybe – and I'm just sort of thinking out loud – the recommendation might be for other ways outside the act that it could be handled so it could be more specific, but it would ensure that every professional body that is given legislative authority to be self-regulating would match that limited criteria. So I'll leave that open for discussion along with the rest of the paper that we're talking about.

MR. DICKSON: Mr. Chairman, I appreciate your comment. It just seems to me – I'm trying to be pragmatic. It may be that if you were to go to the professions and say: look; you don't want to be rolled into FOIP and named as a public body and have all of the costs that go along with that; you have an opportunity in the next short time to come back as a profession and tell us how you propose to ensure that Albertans interacting with your agency would have the benefit of fair information practices – it's a little bit in the health committee context. It seemed to me we've talked about New Zealand, where the notion was to allow individual sectors to sort of come up with a customized approach to the way they were going to deal with information and privacy concerns. We talked about it quite a bit in the health committee. It may not be ideal, but it was a way of trying to address flexibility and particular issues and particular professions, but it still gets it. We all sort of get to the same point, which is what I mentioned before. Anyway, it just seems to me we have an opportunity here as a committee if we were to say to those professions in the next couple of weeks: please tell us how you propose to deal with these things. It gives them a third option, if you will, to simply be left alone, which I'm not sure is acceptable to Albertans, or to be roped in and formally become part of this huge structure with all the costs attendant with it.

THE CHAIRMAN: It could well be something along those lines, where there is maybe even a directive where you can do it in your own bylaws and as long as it meets certain criteria, you will be left alone. Otherwise there may be some mandated areas where this has to be accomplished. I actually believe from looking through the list that most of the self-regulating professions already do that. It's just that there are some that haven't, and maybe a few haven't quite reached the plateau that is being talked about. But the reason most of these got the authority to be self-regulating is because they demonstrated that they had earned the trust and the right to do this, and if it's handled in the right way, they'll continue to take the step that is generally expected, I guess, by society of today, that they will likely do that. Maybe the odd one needs a nudge, but I would much prefer to have it handled in that way – and this is a personal opinion, I should emphasize – than to actually bring them under the act, because invariably when you do that, you always leave it open for someone to try and interpret it differently. Should other criteria then apply? Do we open a whole can of worms that isn't necessarily needed to be opened?

MR. STEVENS: Certainly I agree with the direction that you're indicating this go as opposed to the FOIP application to these particular bodies. From my perspective, the Law Society of Alberta submission is an extensive one which outlines a high degree of sophistication with respect to dealing with these issues and I also think demonstrates with some experience the outcome of FOIP application to the parallel body in British Columbia with, according to the submission – and I would agree with it – some cost and not an obvious benefit.

What I'm interested in, if someone could comment, and taking for example the Law Society of Alberta, that does have a submission here, is what types of things under the fair information practices list would not at this point in time be addressed that a body like the Law Society would have to.

1:29

MR. GILLIS: I'm shooting in the dark here, but I would think that right now in their collection of personal information they're probably not indicating, except in a general way, how the information is going to be used in its life within the society. They probably don't have a consistent policy on informed consent. They may have it, informed consent, but they may not have articulated it in the right way, about the use of the personal information. I doubt that they have some sort of access procedure, other than to the documents at the time of proceedings or whatever, that one might exercise for finding out information about yourself and correcting that information.

I would doubt, other than in a very general way, they would have a policy of when they would disclose information about you to others. Again, they would have some general policy, but whether it would be tailored directly to the privacy aspects – they probably, other than in a very general way, don't have something governing research. So those would be the general areas that it would fall in. I find with most organizations, public or private, that they have an idea how they do these things now outside FOIP, but they're not articulated in a way that deals with privacy.

Then I think, taking a point that Gary has taken, there may well be a need, which is a little different than fair information practices, to say in some instances that we entertain inquiries from the public about things that we do and we have a certain policy as to when we release information and when we don't and what we release and what we don't. That, I think, would be sort of a corporate

package which you'd be looking at.

MR. STEVENS: Just one supplemental. Could you just comment on the other 50 and whether they have a similar kind of regime to the Law Society of Alberta or whether, generally speaking, it's not as developed? I personally don't have any familiarity with any of the other 50.

MS SALONEN: The privacy side of the fair information practices side is not really in the governing statutes. It's really the access side that is. It's likely they're very diverse.

MR. STEVENS: Thank you.

MR. DALTON: Perhaps if I could comment, Mr. Chairman. Over the course of the years I've had lots to do with professional organizations, and I'd say that most of the sort of mature professions have fairly similar legislation. That's because of a policy that was adopted by the government a long, long time ago. So a lot of their legislation is pretty similar in how it looks. I'm talking doctors, lawyers, dentists, accountants, that kind of thing. Now, of course, there's some divergence here and there, but it's pretty much similar.

One further comment. Having some familiarity with the Legal Profession Act, there are some provisions in there that do govern the disclosure aspects of these kinds of things; in other words, the confidentiality of the information that's used in the context of this plan and also in the context of taking over practices and so on of someone who has been suspended or is taking some kind of treatment for something. So there is sort of a process for confidentiality at least in respect of clients' records and so on. In the legal profession they also rely quite heavily on solicitor/client privileges, being something that they have to deal with, and that's an important element for lawyers in particular.

MR. DICKSON: Well, I was just going to make an observation. When I was listening to Peter sort of enumerate the areas where there might be deficiency, actually I think from looking at not only the Law Society's submission but some other stuff in terms of their governing statute and so on, it seems to me, actually, they probably come quite close to meeting most of the practices. The biggest problem I think would be independent review. That would be the one that isn't currently contemplated.

You know, we've got pretty creative people in this province, and I'd like to think that if you gave professions the opportunity to show us either how they're currently constituted to meet fair information practices or how they would modify their practice to meet fair information practices, they'd jump at the chance and work really hard to try and do that. I think that if as a committee we were to say: look; one of the things we've decided is that Albertans should have certain access and privacy rights – and that should apply to these agencies, but we're going to be flexible enough to give these groups an opportunity. It's not prescriptive, it's not directly coercive, but it may get us where I'd hope we'd want to be without having to bludgeon anybody into submission.

THE CHAIRMAN: Okay. When you say independent review, what kind of a process are you envisioning? Like a judicial review or something like that?

MR. DICKSON: Well, currently if you can't get satisfaction from a public body, you go to the IPC, the independent commissioner, who makes a determination, the idea being that sometimes it takes somebody independent for people to have a sense of confidence that their complaint is being dealt with fairly and impartially. Sometimes that appeal has got to be to somebody who's not directly linked with the decision to refuse information in the first place.

THE CHAIRMAN: This isn't necessarily a review of the content of the hearing but whether the process followed some kind of an expected format. Again, though, do you envision something as extreme as a judicial review, or is there something else?

MR. DICKSON: Well, a judicial review would be my last option because of the expense involved. I mean, they may have some notion of a different way of doing it. The model is the IPC office now, and either they use that, or they come up with some other suggestion: the Ombudsman or some new thing that that organization might be involved in and create. There are lots of suggestions, but I think my thesis is to see what they can come up with, to give them that option.

THE CHAIRMAN: Okay. The only way the IPC office can become involved, though, is if it's distinctly a part of the act. So we would have to be concerned whether or not – and I guess my question is sort of around my earlier comment that we have to be careful. Do we really want this in the act, or is there another procedure? If there happens to be another procedure for achieving that goal, we have to be aware that there would be such a mechanism available. This is a rhetorical kind of question anyway. It's just raised so that we have to consider it.

Pam, you're next.

MS BARRETT: Thanks. I'd like to canvass the government members and yourself, Mr. Chairman, on this to see if you would feel comfortable writing to the self-governing professions and occupations, as per what Gary was getting at, to see what they would come up with, including what they might come up with in terms of external monitoring or having that external agency or person that one could appeal to if one were not satisfied with either privacy not being protected or access to information from those professions. I mean, would you be open to at least writing a letter saying: hey, what do you think? To me it sends a signal that we don't really want to FOIP you guys, but, you know, we're looking for some kind of consistency, some kind of formula so that the public has a standard they can expect would be met.

1:39

THE CHAIRMAN: Well, just as an observation, I wouldn't have any problem with that course of action, but I don't know if we have enough time to get more than maybe the administrative component feedback because there wouldn't be any opportunity to poll members. I'm sure various organizations and the membership would feel differently, so there would be a risk that we might be misinterpreting what we get back. The other thing is that it does presume there is in fact going to be a recommendation to make one of these changes. Or if we make the recommendation, will it in fact be picked up and enacted in some way by the Legislature? As far as getting information, if we can do it in such a way that it doesn't presuppose the outcome, that it just flags to those organizations which didn't respond that it is under discussion, and if they had a really quick way of having a straw poll and getting that information, it might be an advantage to the committee. But I'll see what other members think.

MR. STEVENS: Well, my comment would be that given our time lines, it's likely that we wouldn't receive much back in the way of

practical information. There are 51 organizations here, and if I recall correctly, 11 of them responded to the process which now has been ongoing since spring. My experience to date with fair information practices is that if you aren't familiar with them to start with, it takes some time to get up to speed. The kinds of things the Garys have been talking about have some precedents in B.C., and I think also the experience in the private sector and with the CSA code provides some guidance and some process options that we can consider. So from my perspective, I think it would be better to continue on as a committee to review the alternatives available to us, and if in fact that's one we recommend and that is ultimately adopted, there will be a process of consultation that's put in place.

MS BARRETT: Okay. Fair enough.

THE CHAIRMAN: Pamela or Denis, do you have observations on any of those points?

MR. DUCHARME: Well, Mr. Chairman, with the regulations that are in place and the acts that are in place, I believe they are professional enough in terms of being able to address a lot of their concerns within themselves without having to, you know, put them inside the act.

THE CHAIRMAN: Okay. So I am reading that we aren't going to go out and write the letters but that we will continue sort of along these lines. The committee will continue to address the issue, and if we come up with some kind of a recommendation, it would have to be with further involvement of the professional associations that are self- regulated. I think there is some general understanding, because we weren't extremely specific about whether or not the act was going to be included but we were considering it, that there has to be at the very least some time lines if there are going to be recommendations and that they would, again at the very least, be along the lines of incorporating the MASH sector, which was given lots of lead time. You know, you just don't pull the rug out from under an existing institution and say that as of the 15th of June next year you're included. There would have to be some leeway, some expectation that it would be not only a process with some time but further participation and involvement in designing the rules.

MR. DICKSON: Mr. Chairman, we talk a lot about trying to give advance notice to people and give them an opportunity to be involved and give input. I wonder if it would be useful to at least share with them, with those self-governing professions, our discussion around the issue. Some of the larger ones – I don't know – may monitor *Hansard* on a regular basis. But if there's some interest among the committee in seeing this sort of thing, then at least the more sophisticated self-governing professions may seize on the opportunity and in fact surprise us with some further suggestions before much longer. Would that be appropriate at least?

THE CHAIRMAN: I can't see anything wrong with that. I'm not sure how you're going to get the essence of the discussion or the intent without perhaps frightening some into the expectation that we're doing more than some of us are planning on doing. As long as it could be done in such a way that it sets out the parameters of the discussion: you know, the limits of what the authority of this committee is in the sense that whatever we do is only a recommendation to the Legislature and that there are a series of steps that have to be taken. As long as it isn't misleading.

MR. DICKSON: Mr. Chairman, you might point out in a covering note, if I could be this presumptuous, that there's been no vote on this but that there was some extended discussion around this issue and of course the presentation and that you wanted to make sure they were alive to some of the concerns and suggestions raised. To me that does it, and that doesn't presume to indicate what way the committee is going, but it simply keeps them involved and gives them, most importantly, the opportunity.

THE CHAIRMAN: Or we could simply send a note, since they're easily identifiable, send them a copy of *Hansard* or at least the relevant part of it. I'm sure not everyone is going to want a 40-page book, but if we could do that, it might be a courtesy. But, as I say, we'd have to be very careful that it doesn't either set up an expectation or a message of some dire consequences that they should be on standby for.

MS BARRETT: I think a covering letter could do that, and of course the contents of this meeting would make it pretty clear that this committee has yet to decide all kinds of things and may not even decide anything with respect to these people and may make different recommendations to the Legislature later on, as Ron said. So I'd be happy about that.

MS PAUL: Yeah. I would be happy with the covering letter. I'd be a little more comfortable with that. I think, if I can use the KIS philosophy, keep it simple, and just include *Hansard* as well.

MS BARRETT: Well, the relevant portions.

MS PAUL: No. The whole thing.

MS BARRETT: The whole thing? You want to put these people to sleep?

1:49

MR. STEVENS: I think, if I may, Mr. Chairman, it's clear that our report is anticipated by, say, the end of November or thereabouts, so the fact is we're on a tight time line. Anybody who receives this should understand that and that we're not in a position to wait and necessarily receive and fully comprehend what people would respond as a result of this initiative.

Might I suggest that we might also wish to send a copy of the briefing paper that we received if that's appropriate. I'm not sure what the protocol is with respect to that, but the fact is that in addition to the verbal briefing, we obviously had the benefit of that particular paper. I don't see anything about it that would say don't share it with people who have an interest in this area. I think it would give them the background that we received and would also perhaps make them understand better the discussion that we had here today.

THE CHAIRMAN: I think that would be a good idea, because virtually the minute any of this paper hit the table, it became public information. So that, with a copy of *Hansard* and maybe a brief covering letter, being explicit that it's there for information and that if they wish to respond, they can, that there is a very short time line so the response would have to be almost immediate, and that whatever best they could come up with, if they so chose, would be appropriate.

MS PAUL: You know, sometimes when you have that tight a time frame, you get a lot more action if necessary. Mr. Chairman, you kept mentioning that the covering letter could sort of excite some

semblance of fear in these associations. Well, sometimes with fear people react.

THE CHAIRMAN: As long as it's not the Big Brother fear more than the fact that it's being discussed and we want them to be aware. Okay. Along with your other duties, can you do the covering letter?

MS KESSLER: We can put that together.

THE CHAIRMAN: It's a good thing you're at the far end of the room, Sue; otherwise you'd probably be tempted to walk out several times during the meeting.

Okay. The next item then is number 6, paper 4. Diana is going to lead us through the paramountcy issue, which I'm sure relates very closely to a couple of the other issues we've discussed. We've actually infringed on the question period for that, so we'll let you finish it off, Diana.

MS SALONEN: Okay. The paper on paramountcy describes what's currently in place and makes some proposals for some ongoing paramountcy in very particular instances. I'm going to speak generally about paramountcy today and what it is and how we got to where we are. If there are questions on particular provisions of acts, we can certainly make arrangements for the appropriate government officials to come to the committee from the particular departments.

Paramountcy hinges on section 5 of the act. That states that if a provision of the FOIP act is inconsistent or in conflict with another enactment, then FOIP is paramount unless the other act or a provision in the FOIP regulation specifically states that the other act is paramount over FOIP. That one section and that one sentence is the whole thing of paramountcy. Before October 1, 1997, it was the reverse. The other act was paramount over FOIP. On October 1 that piece was repealed, and FOIP became paramount. A review of all legislation and regulation was conducted across government in '96-97, and in September '97 the paramountcy provisions were set in the FOIP regulation. The essence of the FOIP regulation is in appendix 1.

In response to Mr. Dickson's comment earlier, the review was directed – and it was our intent – to ensure that paramountcy was very limited and specific. So while there are a number of acts that are removing pieces out of FOIP, it may be that in fact we have a much narrower exception and are pointing to very specific cases and various small pieces of information rather than capturing that in the rather broad text of an exception under FOIP. That was the goal.

The explanations of what the provisions and the regulation are is in appendix 2, where it outlines the nature of the information that's paramount and usually what's not disclosed and the rationale for that.

In '97 we established the paramountcy in the regulation really because of the time requirements of the FOIP Act, and it's certainly the expectation in future that paramountcy will be addressed in the applicable statutes. In fact, the paper notes that since that time there are three additional provisions that were passed last session, and those are noted on page 2 of the paper.

In the analysis of the other legislation, to identify what it means when an act is in conflict with or inconsistent with the FOIP Act, we wrestled with this, and we had half the lawyers in Justice working on it at the time, I think. It really came down to the fact that if another act restricts disclosure of information, that's really almost the only time when we have a conflict situation. So if another act specifically says that this information is confidential, that it must not be disclosed, then there's a conflict. Unless that act says this is paramount over FOIP, that information might be accessible through a FOIP request. Therefore, making that provision paramount serves as presenting another exception to disclosure.

To give you a feel for how much those paramountcies are used, we provided on page 2 some stats on how often section 5 was cited last fiscal year. You can add to that that the first quarter of this year there were only two more cases. So it's really not used very much.

When we went through the overall exercise in '97, the commissioner was asked to consider the proposed paramountcies, and he agreed with most of them but raised concerns with a few, and those are the ones that have a sunset clause on them. That was done to allow this committee to consider those that were contentious between the government and the commissioner and to determine whether there should be ongoing paramountcy. The sunset clause right now is set for October 1, '99.

Alberta Environmental Protection and Alberta Energy provided us with rationale, which takes the bulk of this paper, to present the case for ongoing paramountcy of the specific provisions of four acts. These are the specific provisions of the Environmental Protection and Enhancement Act, the Mines and Minerals Act, the Natural Gas Marketing Act, and the Electric Utilities Act.

Besides those acts, the others that have sunset clauses include all of the health statutes and the regulations under those statutes, and that paramountcy was established simply because the Department of Health had focused all of their policy work to determine what the right policy should be in the health information act. They didn't address what the paramountcy should be over FOIP, so we anticipate that that will be dealt with in the pending health information act and that the paramountcy over FOIP will simply sunset next year as it's already there.

There are two other acts that have sunset clauses. They're Treasury statutes. One is the Credit Union Act, and the other is the Loan and Trust Corporations Act. The Credit Union Act is one of those that was dealt with last spring in statute, so it's no longer a paramountcy but became a clarification of the relationship with FOIP. So that will sunset. In the other case, the Loan and Trust Corporations Act, the analysis of the ongoing paramountcy has not yet been completed, so they have not submitted anything in this paper. We expect that should they decide they need ongoing paramountcy, that again will be raised as part of a statute amendment.

That summarizes what is in the paper. If there are any questions.

MR. DICKSON: I've got a specific question, and I think it illustrates the bigger issue. If you look at the Environmental Protection and Enhancement Act paramountcy, the sections are 33(4) through 33(9). Now, those sections just set out the power of a director and the procedure the director has to follow in responding to an applicant's request that certain information be confidential. To somebody reading the order in council, I'm not sure it's really clear once the director makes the decision – in other words, exhausts the power in those enumerated elements of section 33 – whether the decision is shielded from FOIP or whether once that director has made a decision, fulfilled that duty or that mandate, the applicant can ask the Information Commissioner to review the director's decision.

1:59

MS SALONEN: My understanding in discussing this with the department is that, no, it is the director's decision. First is the

process, and the intent is that if there's proprietary information, the applicant in the environmental assessment case can say: please make this confidential, Mr. Director. He will determine whether that's accurate. If he decides to make it confidential, then it is. So that decision has been made, and when it comes to whether it's paramount, well, that decision has been made.

MR. DICKSON: Okay. There may still be some ambiguity, though, in terms of somebody looking at it.

The other thing I was going to ask about. If we go back to '97, the paramountcy project that was developed by government had basically been done, it seems to me, by January of '97, and we went through, and the part of the plan that called for legislation to be introduced in the spring session didn't happen. Still we got the regulation at the end of the summer in '97. Given sort of everything we know now, is there a reason why we couldn't delete section 5(2)(b) and simply delete the power to establish paramountcy by regulation now? I think we've had the benefit of government looking at every Alberta statute and every regulation. We've been doing this for better than three years. Can't we say with some confidence now that if there's a paramountcy issue, we'd be able to address it in the Legislature, where they'd be an open debate?

MS KESSLER: That would require all the existing paramountcies to go back into the House though. The timing associated with getting the Child Welfare Act and all the various acts back into the House could be difficult. Is that correct, Clark?

MR. DALTON: I think that's right. If you get rid of the regulation-making power, you get rid of the regulation.

The other element to it that you have to consider – and I throw this out – is that you don't always really know which ones are going to require paramountcy until it happens. You want to have the ability to deal with those issues by way of regulation. That's primarily why it's there. You know, I appreciate your point. We've had the opportunity to look through all these things, but it doesn't necessarily mean that we're absolutely confident, 99 percent confident, that in fact we've got them all. So I think you have to have some wiggle room in relation to that, and that's why the regulation-making power is there. Just by explanation.

MR. STEVENS: Appendix 2 sets out the rationale for each of these provisions. I was wondering: is this a document that was prepared for our purpose, or was this extracted from some other place?

MS SALONEN: This was originally prepared when we did a regulation amendment in '97.

MS KESSLER: It went to the standing policy committee in '97.

MR. STEVENS: All right. So the rationales were created at that time?

MS SALONEN: Yes.

MR. STEVENS: So I take it, then, that as a matter of practice with respect to each of the paramount provisions, there is a rationale that is created and available beforehand.

MS SALONEN: Yes.

MR. STEVENS: Might I just inquire, as someone who wasn't here during the initial stage of this act, why it would be this committee that would determine the appropriateness of the paramountcy provisions with respect to the Environmental Protection and Energy provisions that are outlined in the body of the paper, given that it seems to me that it's in large measure a matter of some policy as to whether or not an exception should be made?

THE CHAIRMAN: Probably because we're the only committee that's remotely connected with working with it, not necessarily that we have any greater insight or a crystal ball as to what the outcome of the decisions or the original enactment even of the FOIP Act would have involved.

Again, I'm going to go back to an experience I had more as part of a meeting. Information is often provided by industry to the department, and this one related to the Department of Environmental Protection. The information that was required to be provided by the company was only a small part of the actual package that was submitted. The total submission was more of an interest by the group in the industry to be proactive in working with the department and getting feedback beyond what the original application was for. It came up in that particular meeting that a lot of this kind of thing would certainly be curtailed if industry didn't feel comfortable in voluntarily providing a lot of background that they are providing now. As a matter of fact, I think there are strong signals – and this is why the ministries have made the submissions – from the industry that while they want partnership and to be involved in a lot of the studies and various things that are going on, they can't continue to give that information if it becomes public domain.

So we do have to be very careful to recognize that whatever decisions we make in that regard, if we don't allow some flexibility, however that flexibility would evolve or continue to remain – we don't want to cut off our nose to spite our face, so to speak. I think there is a lot of interest out there as to just how this could be dealt with. I know your concern, Gary, is that maybe regulations are too easy to change, but I think the converse is that the legislation could be almost impossible to change in a time frame that would suit the needs. There may want to be a little bit more comfort than regulation, but I'm not sure how you do it. Ron's point is that as long as it's done openly and that there is very distinct rationale so that if someone has to make the case for why something should be paramount over the act, it's open to public scrutiny and critique and it's done up front. There has to be something along those lines remaining.

MR. DICKSON: Mr. Chairman, I agree with you completely. That's the problem with the process now. Standing policy committees are made up only of government members. I appreciate the argument in terms of flexibility. If we had an all-party committee dealing with regulations that had the chance to vet – because really what we're doing is we're suspending certain kinds of information and privacy rights. So when these are proposed, why not have them vetted by an all-party committee? That gives you the flexibility that you want so you don't have to wait for the Legislature to be sitting, but you ensure that there's a greater kind of transparency than exists with the way regulations and OCs are typically passed now.

I think you make an excellent point. One of the things we may want to recommend is that the Standing Committee on Law and Regulations be used as the vehicle to vet paramountcy proposals if we don't take out section 5(2).

2:09

THE CHAIRMAN: I'm wondering if I've heard a similar argument somewhere before this. This thing sounds vaguely familiar.

MR. ENNIS: Mr. Chairman, if I can just pick up on the question that Mr. Stevens had on why these things have come today to the committee. I want to credit Diana's description of events back in 1997. It very much happened as she described it in that some specific public bodies, particularly the Department of Energy in this regard, came forward with its list of things that it wanted to see paramount.

The commissioner will speak to this, I suppose, in his response to the government public body submission down the road, but just to leave him a place marker for that, the commissioner took the view then and expressed the view publicly that for some of these items the act could work to obtain the result the public body was seeking, which was greater surety for people providing information to it on a confidential basis. In cases where that didn't have to be, then the information would be accessible. That was one view of how the act would work to overcome the need for any paramountcy. The other was that some of the information being sought here may be a matter that there is a public interest in having access to and that that should be deliberated by the Legislative Assembly through this committee.

So that's how I recall it, and that's why it was reserved for this time with the sunset of October 1, '99, being put upon it.

THE CHAIRMAN: Just a question, and it's probably in the information relative to the acts which now have some paramountcy. Are they mostly dealing with information of third parties?

MR. ENNIS: They deal heavily with personal information. A good example would be the Maintenance Enforcement Act, where the government obtains personal information from a number of parties but for its own interests, and the Crown acts in its own interest in that case. So it doesn't want to give anybody any access to any of those records. The Maintenance Enforcement Act takes any information collected by the director of maintenance enforcement out of the realm of access because the interest that's being protected is a public interest on the part of the director of maintenance enforcement.

You have a similar situation with child welfare, which is personal information, and Alberta's adoption system, which has some fine balances in it, is shielded from the impact of the FOIP act through paramountcy so that people can't go after certain records that they couldn't get through the adoption system by taking a back door through the FOIP act.

That's the case for most of the paramountcies; they're like that. They're cases where sort of ironclad privacy protection is being guaranteed. The ones that are still on this list don't deal with personal information. They deal with essentially commercial information and how that commercial information is of interest to the public.

THE CHAIRMAN: But it is essentially third-party information.

MR. ENNIS: It is third-party information, yes.

THE CHAIRMAN: Again I'm going to use the argument that I did earlier. A lot of the fears that people have about an act like this is because of the all-inclusiveness of it. You know, whenever you put something in the act, it's deemed to apply to everybody and anybody, and unless there's some relief built into it – and maybe we don't always agree as to what that relief should be or sometimes it's too strict to access, and in this case you're suggesting that it may be a little too easy to access by virtue of, you know, simply a regulation. If it isn't there, if you don't have the pressure release valve built into it, you end up getting more suspicion of the act and an unwillingness to participate. I think this happens to be one of those where there is an essential release valve that allows people to do the business of government or work with government. Without it we would either be without essential information or you end up even worse, innovative bookkeeping and record-keeping. I think this keeps everybody on the up and up. As long as we build in the maximum safeguards so it's not abused, we have to continue to keep some kind of a section in the act.

MR. DICKSON: It just strikes me that there may be a better alternative, because every time you take something out from under the scope of the act, I think you erode your FOIP regime. The alternative would be to put in an expressed amendment in section 51, the general powers of the commissioner, not reviewing a decision but the general powers, to give an advance ruling.

We talked last time about section 9 of the Alberta Evidence Act concerning hospitals, and the reaction was to want to sort of go out because of concern. The concern expressed by some of these industry sources is because they're afraid of what may happen, and there's a lack of certainty with respect to how the commissioner is going to view something down the road. An option surely worth considering would be to give the power to the commissioner to do what Revenue Canada does and offer an advance ruling, if you will, that then gives those third parties and people in industry a measure of comfort. It strikes me that that would be a far better route to go than just going outside the act altogether. Anyway, just a comment.

THE CHAIRMAN: I'm not sure that would have the same level of comfort as a total exclusion would, but that's why we're here, you know, to look at options.

Pam, you were next.

MS BARRETT: All I was going to suggest, Mr. Chairman, is that after we finish this section, before we go on to the next discussion, could we take a five-minute stretch break, please?

THE CHAIRMAN: I think we could. Do you feel the need to be a little longer than you are now? [interjection] She missed it.

MS BARRETT: I did. I was gossiping.

THE CHAIRMAN: Because it was such a good one-liner, I'm going to repeat it.

MS BARRETT: All right.

THE CHAIRMAN: You said you wanted to stretch, and I said: do you feel you need to be a little longer than you are now?

MS BARRETT: No kidding. About a whole foot would do just fine. Now, don't threaten to get out a rack though.

THE CHAIRMAN: Other questions?

MR. DALTON: Mr. Chairman, I wonder if I might just make a comment on the last suggestion here. We're the only province that has this advance ruling provision in it. It comes generally from the Conflicts of Interest Act, and we thought that it would be a useful thing to have in the act. The downside to it is a legal downside, and that is a problem with bias in the context of a hearing later on down the road. If, for example, we do a preruling like they do in

income tax for some particular situation, the commissioner might find himself in a situation where he's found to be biased in relation to any later ruling that might need to be looked at. So I caution: if you're thinking of that particular kind of provision being used for a specific case kinds of things, we've got to worry about the administrative law issue of bias.

That's all. I just thought I'd raise that point.

THE CHAIRMAN: Okay. With that, we'll take this recommended five-minute stretch break. If we could keep it to the five minutes though, please, so we can make sure we get through.

[The committee adjourned from 2:17 p.m. to 2:26 p.m.]

THE CHAIRMAN: Okay, if we can call the meeting back to order. Item 7 is the Public Interest presentation. John, you're going to take us through that. There isn't a written document on this one, I gather.

MR. ENNIS: There's not a written document on this one. It's a short presentation, unless you stretch me on it, I guess. Questions came up during the previous meetings that we've had, especially I think the third meeting, around the concept of public interest, in quotation marks, being referenced in the act, and "Just what kind of play does it have?" I think was the kind of question that was on the table. Soon Clark and I discussed how we would address this, and I was nominated to handle this particular part of it.

I think it's worth looking at public interest in terms of who the arbiter of public interest is, who decides what it is, and how they do that. In the act it comes up in a number of places. There are three in particular I'd like to address.

One is in the delisting of a public body. That's a case in which one of the requirements for effectively delisting a public body is that when the cabinet moves to do that – and it is a cabinet power in the act in section 88 – they do so with the satisfaction on the part of the Information and Privacy Commissioner that it is within the public interest to do that. So there's a case in which cabinet moves when the Information and Privacy Commissioner is satisfied that it is in the public interest to delist a public body. No more definition is given to it than that.

The other two places where the public interest comes up in a noticeable way are on the issue of fees. We discussed that earlier today. In the paper that Peter presented on fees you'll find the 13 factors that the commissioner raised in Order 96-002. Those weren't meant to be exhaustive factors; it was an indicative list. So factors can be added to that. There are basically 13 questions that a head of a public body should ask himself or herself when they're looking at an access request to see whether or not the fees should be excused in whole or in part. Interestingly enough, in section 87 when the head of a public body is excusing fees, they don't have to be asked to excuse fees. They can move on their own motion through their own devices to excuse the fees without being pressed to do that by the applicant. The commissioner shares that same power in section 87(4), but the commissioner can only move, if he or she is asked to do so by the applicant, to consider waiver of fees.

So one of the factors in waiver of fees is the factor that the waiving of fees would be in the public interest. In that section as well as in section 31, which I'll talk about in a moment, the public interest is given a bit of illustration by being coupled with a series of phrases: environmental protection, public safety, public health. So there's some indication of what's meant by public interest in section 87 as well as in section 31.

Section 31 is the last of the sections where this concept comes up in a notable way. That is a section that's been referred to here as the public interest override, which is, I think, the marginal title given to it. Duty to warn is another description for that section. It's the section that requires that if a head of a public body, whether there's an access request on or not, is in possession of information that points to some sort of peril or some situation where the public must be warned, then the head has a statutory obligation and duty to warn the public or a part of the public.

We see that section used regularly now, not frequently but regularly, by the Minister of Justice through his delegation to the chiefs of police in the province. When someone exits a penal institution of some kind having served full warrant usually and not having been rehabilitated and is some kind of danger to the population, the chiefs of police have a protocol that they exercise that is actually a protocol designed to carry out the statutory duty of section 31 and warn the public or a part of the public – and often that's a very small part, families of victims or whatever – that there is a person present who might be a danger.

We've had applicants insist that they have a right to press ahead of a public body under section 31. The commissioner held a rather interesting inquiry in Calgary in 1997 on this issue. What the commissioner was inquiring into was whether or not he had jurisdiction to supervise how a head of a public body conducts himself or herself in this duty to warn. The issue there was that a group was claiming that they should have access to a particular report because the report contained information about an environmental hazard, that they had the right to press the minister to release that report under his duty to warn, under section 31.

The commissioner decided then a number of things. One is that only in the most extreme circumstances would he be reviewing how a minister behaves under that section, the decision-making that a minister does, and that he would expect that anyone who had a concern with how a minister had conducted himself under section 31 would first take it up with the minister, with the head of the public body. I should be using the phrase "head of the public body" from here on in because now that's a larger list than just ministers. So the commissioner's view was that the person concerned should take it up with the head of the public body first, and only if certain extreme factors were present would the commissioner look at how the head had conducted himself or herself in making that decision.

He also decided that an applicant doesn't have the right to press for that. It is not a right to press for that under section 31 just by virtue of being an applicant. It's an obligation that sits on the head whether or not an application is present. That was an interesting order that came out, and what it did was set the stage for a series of other cases that the office was looking at around section 31. So in terms of the use of the term "public interest" then, those are the three cases that really stand out in the act. There's no definition given to the term "public interest." What the commissioner did early on, in the case that involved an applicant who's sitting at this table, was put together that indicative list of 13 factors and, in doing so, referenced some of the thinking that was going on not just in Canada but elsewhere as to what constituted public interest. In the end it was not just things that are interesting to the public but things that are also in the interest of the public, and the public was seen as being not necessarily the entire public but something more than a special interest.

I think that's probably as far as I really should go with that. It's probably worth noting that *Access* magazine, which is sort of the *Forbes* magazine of the FOIP industry, in writing up the commissioner's decision, congratulated the commissioner for having gone as far as anybody can go in identifying how the public interest should be defined and should be treated in the handling of

requests under a freedom of information regime. So the Alberta orders have gone further than other jurisprudence in this area, as far as we can see.

I think that's the gist of how public interest plays in the act.

THE CHAIRMAN: Any questions? Gary.

MR. DICKSON: Yeah. I was just going to make the observation that section 31 is anomalous because it's information driven, not document driven. You know, every other part of the act is focused on records, documents. Section 31 is far broader because it relates to information.

MS BARRETT: Good point. I hadn't noticed.

THE CHAIRMAN: Others? You did a really good job of explaining that, John. Nothing left for questions.

MR. DICKSON: As somebody who has quite frequently tried to invoke section 31, it does strike me that there's got to be some room for some additional clarity. I just think that we ought to look at it being somewhat more specific in the act, if for no other reason than you may discourage people like me from invoking it. So it sort of sits there; it's such a tantalizing remedy. Keen applicants are going to invoke it quite frequently. It seems to me that there may be some value, even from the point of view potentially of discouraging some requests, to give a little narrower definition. I find that with the 13 tests, it covers so much that it tends not to be very discriminating.

2:36

MR. ENNIS: They do have the effect of keeping some requests from moving forward on that basis simply because they're very faithful on some point in there. I think Clark or Peter mentioned earlier on the case where someone would be using the information for strictly commercial purposes, for self-gain. It probably takes you out of the public interest kind of argument. It's a debate that goes on in every jurisdiction. In some cases there are accommodations made. In the case of the American environment authorities, they basically have an accommodation for people that says that photocopying is given at no charge on an environmental access request to the environmental protection authority in the U.S., the EPA. They have sort of a standing rule in one part of their freedom of information regime in dealing with environmental requests. So they recognize public interest in sort of a sectoral way in the U.S.

Most of the cases where we see public interest come up have to do with public safety, environmental hazards, or public health. It's been fairly consistent with those three types of cases, that are alluded to in the act.

THE CHAIRMAN: I have trouble believing, Gary, that you really wanted to tighten up this part of the act. What we could do is just put a sign on there that prohibits you from going to the commissioner's office.

MR. DICKSON: The commissioner has the power, you know, to disregard requests if he thinks they're frivolous.

THE CHAIRMAN: Okay. No further questions?

We'll move on to the last item. Clark is going to lead us through Legislative Assembly Office, MLA expense, paper 5.

MR. DALTON: Thanks, Mr. Chairman. I'm somewhat cowed because I'm speaking to MLAs, who know a lot more about it than I do. So I'm going to limit my comments to what occurred sort of historically and some issues in relation to this and perhaps leave it at that.

I think it starts with the all-party panel, which said, among other things, that we should cover the office of the Speaker of the Assembly. So in looking at that, one of the issues was: gosh, we've got a lot of stuff in the office of the Speaker that maybe we're going to collect indirectly that we shouldn't be collecting directly. One of them was that opposition party caucus documents and some other matters could have been accessed through that provision. Also included in that was the issue of expense accounts.

Now, certainly expense accounts of MLAs – forgive me; you'll all know better than I – at least in the political scheme of things are a little bit different than ministers' in the sense that ministers actually administer departments and are actually the government, if you want to put it that way, whereas an MLA's role in many ways is confined to the parliamentary process and dealing with constituents and things of that nature. So one of the arguments that was put forward was that in order to get expense accounts of MLAs, you're going to be getting people that have come into the office or you've gone out to lunch with various people or you've traveled to go see particular groups, and by accessing that, you see to whom the MLA is talking in a particular constituency.

Now, that might be an important thing as far as ministers are concerned, because remember, again, they're the government. But when you get down to MLAs, it may be a different kettle of fish. So what happens there is that a specific exception was made to the act to deal with records created by or for the office of the Speaker of the Assembly or the office of a Member of the Legislative Assembly so that these kinds of records wouldn't be subject to the act.

In addition, there was also the argument that perhaps some of this stuff might in fact be imbued with parliamentary privilege in some manner. Parliamentary privilege, as you all know, is a fairly broad concept and essentially covers everything that a member needs in order to carry out his duty as a member. It's a broad concept as generally recognized. So that's essentially why we have 4(1)(k), a record of

> the office of the Speaker of the Legislative Assembly or the office of a Member of the Legislative Assembly that is in the custody or control of the Legislative Assembly Office.

Now, you folks know better than I, but apparently the expense accounts are paid through the Legislative Assembly Office, and then from there a sort of bulk figure goes over to Treasury. There was an access request where the commissioner had to look at this issue, and essentially, I guess, the section turned out to do exactly as it was designed; that is, you can't get at members' expense accounts, but you can get at that bulk figure that is given over to Treasury. It was felt that that would eliminate the problem they were having with, say, particulars of expense accounts that would name particular persons or groups or whatever that MLAs were dealing with.

So I guess that's basically what the initial recommendation was, what the arguments were behind 4(1)(k), and then the decision of the commissioner essentially upheld what it was designed to do. Again, it was a difference between members and ministers, and in effect by putting the Speaker's office under the act, you indirectly got what you couldn't get otherwise, and that is members' records on various things that are in the office of the Speaker. So that's in a nutshell what the issue was about, how it was addressed, and I guess we can go from there.

THE CHAIRMAN: I think one of the reasons that this came up is that about every year it comes up when the annual reports are released, but in this case I think the media was looking for information in maybe a slow news period. You know, typically they're looking for something that might stir up a little bit of headlines. I think it was by coincidence that about that time I was meeting with the Ethics Commissioner, who also happens to be the commissioner we're dealing with under this act, doing my annual visit, and we chatted about it. I was at that time even forming an opinion, and I had no idea I was going to be chairing this committee. I asked him at the time: is there no reason why things like that, instead of under freedom of information, couldn't be better dealt with under the code of ethics, you know, which is part of, I think, what Members' Services, the all-party committee, is about? I'm going to emphasize and repeat that, because a couple of times today I've made the point – and I think this might be applicable again here – that if we try to be too all-encompassing under the freedom of information act, we're covering too many unusual circumstances.

I mean, first of all, you have 83 MLAs. The circumstances could be different. The reasons for the information could well be different, and by virtue of the original act, it was definitely intended that a lot of the documents that are in an MLA's office are confidential because of the types of information you deal with. Also, I expect that the offices of the MLAs aren't as sophisticated as they are in the department, who have, you know, all the legal wherewithal and everything else to make sure that records management and the kind of documents you prepare, let alone the kind you keep, would be in such a fashion that the public could have access to the correct kind and the kind that are intended to protect privacy of other parties and advice to the ministers and whatever else.

To make a long story short, the decision was made that MLAs' records and, in that case, expenses would be confidential, but it doesn't necessarily suggest that there might not be more information in the expense accounts than we would want to be available for whatever reason, if it's a fishing trip by the media or whatever. I mean, if that's the kind of information that should be available to the public and it's decided it should be, so be it, but my suggestion is that we should be careful about opening that through this act. If there is a need for additional information, there are other avenues that would be more appropriate and less likely to cause problems downstream.

So that's my opening comment.

SOME HON. MEMBERS: Ron had his hand up first. [interjections]

2:46

MR. STEVENS: Just once today. I'll be short though.

MS BARRETT: Never as short as me.

MR. STEVENS: Never as short as you, but shorter than some.

I guess what I brought to the position of MLA was an understanding of confidentiality that was built up as a result of practising law for 22 years. I have conducted myself as an MLA using the principles with which I practised law. They seem to work. I think, generally speaking, people who walk through the door expect confidentiality to be part of that relationship without expressly stating it. It was just two or three weeks ago someone came in and specifically stated to me for the first time that as a constituent they wanted the conversation to be confidential. So there are people out there who do have this present in their minds, and it's not just a matter of my assuming it, although I believe I am assuming correctly. I think while that is clearly something that is understood going into this particular discussion, my experience to date is that it's a valid assumption.

The one point I wanted to raise was with respect to appendix 1. I notice that you've got summaries with respect to other jurisdictions and what they do and so on and so forth. I was wondering whether you had actual samples of the publications of information where they publish or whether this is just simply a narrative.

MS KESSLER: It was a phone survey.

MR. STEVENS: It was a phone survey. Okay. Fine. Thanks. That answers the question.

MR. DICKSON: Mr. Chairman, I was delighted in 1994 when the first Bill 18 was passed when those expense records were going to be available and disappointed in '95 when it effectively came back out. I understand the concern about confidentiality insofar as it relates to constituent information. Section 16 of the act is all about protecting that kind of information, but it seems to me that when it comes to the expense information, constituents shouldn't have to wait until six months after the end of a fiscal year to be able to find out how much they paid for my accommodation in Edmonton or whatever. It seems to me, frankly, that confidentiality is a bit of a distracting issue, but I think it's wholly collateral to the issue of MLA expenses. I think that the Members' Services Committee has not been disposed to doing anything differently in terms of making this information more accessible than sort of the annual public accounts, and I don't think that's good enough.

I think there are ways of ensuring that people can have access on a 30-day turnaround the same way they can access information about another public body in terms of that spending in a way that doesn't infringe on the sovereignty of the Legislature, that doesn't infringe on the confidentiality of constituent information but addresses what I think is legitimate need. We had submissions from the Canadian Taxpayers' Federation, from the Canadian Association of Journalists, the Alberta School Boards Association. Each of those groups is saying in effect that when it comes to expense records of MLAs, they shouldn't be treated in some privileged or different fashion than records of public bodies and other public officials. I think that's a compelling argument.

MS BARRETT: Well, I'm going to disagree. I don't think, looking at this appendix, this observation of other jurisdictions – provinces, federal, and territorial – that in order to be forthcoming to the public, one has to make such expenditures FOIPable. At least half of these jurisdictions will provide, voluntarily it would appear – remember, all outside of the scope of FOIP – a fair amount of detail on expenditures, some even the nature of the contracts or the names even on contracts. There's a fair amount of information that an organization such as the Legislature can agree to provide to the public if they want it. I certainly don't see any need for FOIPing. We're all accountable at the beginning of the end of the day to the Speaker for our expenditures but ultimately to our voters. If anybody's not being clean about it, I've never heard of such a thing. So I don't think there's anything to be afraid of, but I don't think it needs to be FOIPable.

THE CHAIRMAN: That's along the lines that I'd think too, Pam. The argument that the MLA's office should be subject to freedom

of information: to me it sounds good, and I'm not disputing what you're saying there. As an elected person we all want to make sure to our constituents and anybody else that we are accountable, and anything that looks like we're doing things behind closed doors and being sneaky and, you know, anything that would look like that is going to cause us problems. In some cases the alternative is to do things more openly than you do in life. But like Ron said, the office of an MLA – and I'm not saying it's exclusive. I'm sure there are many offices that people come into where they feel as uncomfortable about baring their soul as they do. Often it's a last resort. Sometimes they're complaining about something when saying it openly could cost them their job. Sometimes it's fairly intimate family matters when you're dealing with social services. I think those people have to have some place where they can go and feel that there is the utmost confidentiality.

I recall – and this goes back, I think, to about my second year as an MLA – that I had a couple come into my office, and they were really uncomfortable about being in the office just because they were in a small community and they were fairly well known. The issue, in my opinion, couldn't possibly have been one where someone seeing them come in could have expected what it was, but in their own minds they felt it was. So I suggested: "Well, if you feel uncomfortable, let's go to a coffee shop or something like that and sit down and have coffee." It ended up being close to lunch. We extended it into a lunch break, and I picked up the bill and was going to buy it. The guy had the presence of mind to say, "Look; I would rather that you didn't for fear that you're going to put it on your expense account." It struck me that he wanted absolutely no record. There wouldn't have been, but he wanted absolutely no record of this meeting happening. It's probably an extreme example but I think one that we have to keep in mind and that there is a reason why this happened.

Certainly after making this little presentation, it maybe sounds like I'm being defensive. I think I'm being defensive to the sort of code that we have accepted. If there is a need to expand on expense accounts as such in terms of the amount of dollars, I've actually done what Pam is suggesting anyway. Anybody that comes into my office at any time as a constituent can come in and they can have the records, my monthly expense account. With all I've said, though, I would take off the names with the phone bill. You can see the amount I spend on the phone bills.

2:56

MS BARRETT: Absolutely. I do the same thing.

THE CHAIRMAN: You can see the amount I spend, you know, whether I'm hosting somebody to a meal or anything. I'm just going to take off the names. There's got to be another way that we can do it without exposing what I feel is a code of expected confidentiality in those offices; I think under a code of ethics or whatever way you want to do it. If Members' Services is being a little too cheap about giving the information, maybe we can comment on that, but I would be strongly adverse to putting it into this act where it could open up into fishing trips, into other kinds of information which I think deserve to remain private.

MS BARRETT: I have a suggestion, Mr. Chairman. Why don't I ask the Speaker if he can put it on the agenda for the our next Members' Services meeting? Maybe we can come to an all-party agreement through that meeting.

THE CHAIRMAN: Whatever the vehicle is, I think it should be outside of this act though.

MR. DICKSON: Well, Pam, you're welcome to try, and good luck. I recognize that it was the Members' Services Committee that spearheaded the move between the passage of the first iteration of FOIP in 1994, and in 1995 it was the Members' Service Committee that wanted to close the door.

Just to put this in a real-world context, you know, I hear from media not infrequently that they're trying to get information about costs. I mean, I assume all the MLAs from around this table are forthcoming and are happy to share those particulars in terms of their taxpayer-underwritten expenses, but not everybody in the House is so disposed. There are plenty of experiences where people have tried to get at information and been rebuffed. So when we're weighing the concern with the sense of confidence that our constituents have that information will be closely held, also recognize that there are people – and I don't have any problem with the media having a legitimate role in wanting to find out how taxpayers' money is spent on behalf of taxpayers. There are a lot of frustrated, unsuccessful attempts to access that kind of information, so that's reality too.

If the Members' Services Committee can resolve it, great, but the beauty of the FOIP act is that you've got 30-day turnaround, you've got some time limits and that sort of thing. We have a tendency, once we get outside FOIP and we get back into the Legislative Assembly Act and the Members' Services Committee, that those kinds of rights in terms of time limits and so on tend to get frustrated or ignored. If the Members' Services Committee is going to do it, that's one thing, but I'm pretty skeptical.

MS BARRETT: You're not holding your breath.

MR. DICKSON: I'm pretty skeptical, given past experience.

MS BARRETT: Okay. Well, I'll give it a shot. I'll give it my best shot.

THE CHAIRMAN: Okay. Other comments?

MR. DUCHARME: Mr. Chairman, I guess I'd just like to add my voice to the discussion in terms that I feel it should be away from the FOIP act. I believe that when we were elected as government officials, it was with the trust from the public that we were accountable in terms of being able to do our job, first of all, and also in terms of being able to run our offices. I have concerns if we're going to start FOIPing telephone records, as an example. All of sudden you've got numbers that can be traced back in terms of concerns where you could have been talking of, you know, a very personal issue with constituents. Maybe I'm exaggerating it to a certain extent, but there are those calls, and people are very concerned. I still can't get over how many of the constituents that come to my office or phone in, in terms of setting up an appointment, are not even willing to discuss any of the matters with my assistant, feeling that she has not taken an oath of confidentiality. I think it's the utmost – at our offices we basically have a role to play, and I believe that some of it is probably going to have to be kept secretive to the general public.

MS BARRETT: I don't want you knowing the phones that I'm using for research. Well, it's true. I'll give you the bill, but I'm going to mark out who it was I was phoning.

MS PAUL: I'll just make some comments. You know, everybody has stated that they're accountable and they're open and that constituents can come in and ask for the phone bill. They can ask for this; they can ask for that. So why not just let it be FOIPed?

I have no problem with that at all. There's nothing going on in my office that needs to be – well, there are a few things, I suppose.

MR. STEVENS: That's what you've got a shredder for.

MS PAUL: Exactly. I don't see what the issue is here. I mean, it's very simple. We're all accountable. If a constituent can come in and say, "Pamela, I want to see your expenses for whatever," then fine. So be it. It's open for interpretation.

THE CHAIRMAN: I think the problem though, Pam, is that when we talked earlier about criteria – you know, if this thing could be limited to a few criteria, then I don't think anybody around this table would be concerned and likely most of our colleagues. The problem is the criteria of the act is very broad. If you start getting into what can and what can't and who's going to manage this, there is too much of a risk. The other thing is that we're probably talking of a relatively small percentage too.

MS PAUL: Yeah, I would think so.

THE CHAIRMAN: The people who come in that I would consider are dealing with very confidential information probably rank at less than 5 percent. However, when some of those people come in, if you asked them if it was confidential, it would be probably be half of them or better.

MS PAUL: Mr. Chairman, I don't understand the paranoia about people coming into your office and everything being such hush hush confidentiality. I've had women from right across Canada in my office who are under the protection plan. Their identities have been lost. They've gone from one province to another, and they've been uprooted from their homes. They don't even have their own last name. They don't have their children with them. And talk about confidentiality, I mean that is just high-profile confidentiality, yet I don't have any paranoia about that constituent – they're not my constituents; most of them aren't – the paranoia about the confidentiality and worrying about this and getting this information out and not that information. I mean, I just don't see it. Maybe I've missed the . . .

THE CHAIRMAN: I'm not presuming that your office is significantly different than mine, but I'm going to suggest that a big difference in a rural community, a community, say, with a thousand or less people, is that it's very easy to identify the issue just by virtue of the person walking into a particular office. There's not that much anonymity. Maybe I'm being a little bit more . . .

MS PAUL: Well, I think you're being a little overprotective in that turf.

THE CHAIRMAN: Possibly.

MS PAUL: And I'm being a little bit maybe less protective in what I've encountered as a new MLA. I mean, I just don't see it.

THE CHAIRMAN: See, I represent constituents in about a dozen different communities, the largest of which is 7,000 people. I'm not suggesting that in 7,000 there isn't a little bit of anonymity, but when you walk down the streets in a town that you don't live in and you can address a quarter of the people by name as you walk past them, there's not much confidentiality goes on. If they have something that they consider a little bit sensitive, they want to believe that they're being protected. Maybe I'm being a little bit overly zealous, but I would sooner in a case like this defend that position than open this thing up and turn it into something that it was never intended to be to start with.

3:06

MR. DICKSON: Mr. Chairman, you make a good point. I grew up in a small community. I understand that concern for privacy and confidentiality. I'm going to suggest something of a compromise. Whether you view it that way or not, we'll see. Look at page 8 of the act now, section 1, the definition section where we define public body. It expressly does not include the office of the Speaker, the Legislative Assembly, and the office of a Member of the Legislative Assembly. So we start from the point of view that all of those records in our constituency offices are currently, in effect, outside the scope. Why don't we make an expressed exception, which means that save for the exception everything is cloaked in secrecy, anonymity, and there's no transparency to it? Why don't we simply say that we make a specific exception for expense records, the expense records in terms of concern about phone records and so on? That's what section 16 is there for. Section 16 ensures that people's phone numbers can't be shared. I mean, that's a third party. They have an interest in their privacy, and we should protect that. But what we can do is specifically focus – if people want to see how much money I spend on photocopy paper or highlighters or travel to Edmonton, they'd be able to access it. They wouldn't be able to get any other information about the constituents I talk to, Albertans I talk to, bill analysis I do, draft bills, that sort of thing. So we'd be able to carve that exception out.

Now, if in the meantime the Members' Services Committee is prepared to offer a better course than they have over the last six years, great, but absent that, that would be a narrow exception that I think would respect the privacy concerns that all of us have on behalf of our constituents and also respect the fact that there's a legitimate interest on the part of not just the media but of Albertans to know how their money is spent.

MR. DUCHARME: The examples that you drew up in terms of what your mileage is, your travel and subsistence, your annual remuneration, the extra income that you earn in different committees is all disclosed in the financial statement at the end of the year. I don't see what such a burning issue it is for a constituent to have it every 30 days.

THE CHAIRMAN: I think we're starting to go in circles here.

I'm not closing the door to any further debate on this. I think today we were doing background information, and we're starting to tread on making a decision on an issue. I'm probably as much at fault as anybody here because I got into a little bit of a tirade on it. I added to the debate, so I'll take the responsibility for dragging it out a little bit.

That is the last of the presentations. I should have a quick peek at the agenda. Is there anything else? We had the two items that were asked for information. They were dealt with actually at the beginning of the meeting. Do we have any other business? We've dealt with the schedule of meetings. Item 7 is interesting. What is it?

MS BARRETT: Adjournment. Motion so to.

THE CHAIRMAN: Okay. We've got Pam. All in favour?

[The committee adjourned at 3:09 p.m.]