9:07 a.m. Monday, November 30, 1998

[Mr. Friedel in the chair]

THE CHAIRMAN: Well, I think we have enough people that we can call the meeting to order.

The first item of business is the approval of the agenda. It's essentially the same as the last time, with the date change. Can we have someone move it? Moved by Ron. All in favour? It's carried.

Approval of the minutes of the committee meeting of November 23. Do we have a mover for that?

MR. STEVENS: I'm not necessarily the best speller in the world, but I think that there is a change that should be made on page 90, under question 33 in the moved portion. There's a reference to the "principle" amount of the loan. I think that type of principle is an "al" not an "le."

MRS. SHUMYLA: It is. I checked the Blues, and I'll make that change.

MR. STEVENS: Well, with that change noted, I move that the minutes be accepted.

THE CHAIRMAN: Okay. Discussion? All in favour? It's carried.

Detailed Review of Outstanding Issues. That sounds familiar. I've got two handouts here. One of them is a letter from the IPC office with an update on the federal privacy bill, Bill C-54. The second one is a document that I prepared just before the weekend.

There are several outstanding questions that we have to deal with. All of these have been discussed at some time or another, and these are in some cases controversial and some less so. For the ones that I have referred to as a recommendation, it doesn't mean that this makes it either less controversial or that I expect agreement on it, but I think that to expedite time a little bit, it will maybe get us to the heart of a matter quicker. I was really hoping that we could finish the outstanding issues today - we have two hours - and that following this, we could get into reviewing some draft recommendations.

Essentially, the draft recommendations will be putting the answers to the question in the form of a recommendation. If possible, I'd like to see us be at that point for next Monday. So this note is simply my effort at getting us to the heart of some of the answers a little more quickly. They're in the order that they appear on our discussion sheets, but they're not the only ones. There are still a couple of unresolved items. We actually stopped after the end of question 33, and the first one we would be dealing with is question 34.

There was a recommendation made by the IPC office that section 16 might be simplified in some fashion. The recommendation was withdrawn, but I have a suggestion. I'm tossing this out for reaction as much from the technical people here in terms of this being a change. I don't believe it changes anything in the act. If you look at section 16 - as I was going through a lot of the recommendations, the public recommendations and also the responses by the commissioner's office and various comments, sometimes I was trying to understand what they meant. I found myself, when I was interpreting section 16, having difficulty with how it was laid out. To me it would read better if the order were 16(1), which is the introductory paragraph, 16(2), then jump to 16(4), followed by 16(3), just reversing the order of subsections (3) and (4). It may mean - and I'm not sure it would have to - leaving the words "under subsection (1) or (2)" out of the first line in sub (3).

From a legal perspective or from someone that's working with the act, is there anybody who has some observations on that? As a layperson who doesn't live and breathe this thing everyday, it seemed to be easier to follow the sequence of first describing what is an unreasonable invasion and then saying what isn't, and then the following thing would be an interpretive document. Would that change the intent of the act in any way?

MR. WORK: Mr. Chairman, I don't think that would alter the way section 16 works or doesn't work. I don't think it would have any legal effect on how the section operates either.

THE CHAIRMAN: As I say, I'm putting myself in the place of someone who doesn't deal with the act. The meat of the section is (2) and (4).

MR. GILLIS: If I might say, Mr. Chairman. Having taught this to a large number of people who have to apply the act, the way I found it most satisfactory and they understood it the most was to do 16(1), which is your prohibition, do 16(4), which tells you what isn't covered, then do (2) and (3) as the balancing test for that information that falls in. So just a little variation of what you were suggesting. People seem to understand that when you present it that way.

THE CHAIRMAN: So you found the same awkwardness of the presentation?

MR. GILLIS: Yes, very much so.

THE CHAIRMAN: Would anyone have any problems if we recommended changing the order of the subsections?

MR. WORK: Again, Mr. Chairman, I don't think the Information and Privacy Commissioner's office would. Although a petty point - and maybe the information management branch might want to comment - they're going to have to change all their teaching materials.

MS KESSLER: That's fine. That's not a problem.

THE CHAIRMAN: Could we have consensus on that? Let's leave the proviso that if the legal people feel this might have some effect other than what we're intending for simplification of presentation, we could revisit it when we do the recommendations, if we approve it at this point.

MR. DICKSON: I guess one observation, Mr. Chairman. You've often reminded us that we're not here drafting legislation, that we're talking about principles, and our report is going to be one of principles. You know, we've wrestled with section 16 a lot. It's consumed a lot of the committee's time. At the end of the day I'm not sure that the change you suggest - I don't have a problem with it - is necessarily going to resolve the concern and the confusion that people have in terms of trying to understand it. Maybe simply the best we can do is to make a recommendation that there be further analysis done in terms of other ways to streamline, simplify, make it clearer.

My concern would be if we simply say: change the order. I wouldn't want the message to be that that's all we think has to be done to make section 16 understandable. I don't have the answer, but I think it's clear that this is a section that causes a lot of people

great difficulty understanding it, comprehending it, using it. So maybe the most important thing is to simply say that there's going to have to be more thought given to clarifying the entire section.

So I'm not disagreeing with your proposal; I'm simply anxious that that not be seen as the end of the day.

THE CHAIRMAN: I have no problem with what you're saying, Gary. I wasn't suggesting that rejigging the order was the solution to some concerns about clarification. We were talking about a recommendation which was withdrawn and might otherwise have been passed over at this point, except I was going to toss this in anyway. I'm not sure at this point what we would do to go in and start looking at clarification without ripping the whole thing apart and trying to rebuild it. I think we're treading on some complicated territory here if we did that.

9:17

MR. WORK: Mr. Chairman, in fact I think Lisa Wilde probably told you the last time you discussed this that that was why the commissioner abandoned his position on changing setion16. Exactly as you said, we tried to give it a tune-up and wound up almost having to rebuild the engine. It seemed that the tune-up might have caused other problems elsewhere in the structure. So it's a problem, but as Peter Gillis said, if the reordering somehow makes it more comprehensible for people, that's fair enough.

THE CHAIRMAN: That was just a minor step.

The other thing I could suggest is that before we finish the final recommendations, if there is an obvious step or two, it could still be included. From our discussions so far, it seemed like anytime we came up with a clarification, we also caused an offsetting new problem, and there wasn't a simple, easy answer at this point. It does serve the purpose, and although we're trying to clarify and make it easier for the user, we might cause content problems if we did that.

MS MOLZAN: I was just going to say, Mr. Chairman - and I think we've talked about this in the past too - that 16(1) really is the rule, sets out the test. Other than (4), which tries to omit certain things from the test, the rest of it is really intended to help people to understand how to apply it. The difficulty we have, especially with this section, is that personal privacy is so important and is such an important principle of the act that if we try to restrict this area or perhaps fine-tune it, we may be losing situations where most people would agree that, you know, it would be an invasion to let out certain information. Because every case is so fact specific, it becomes very difficult to change the wording of it and hope that you're going to capture everything. So I think the attempts to make it clear are important, but it's also difficult, as I said, to restrict it, in the fear that you get that one case that falls outside the lines and everyone would go: oh, gee; this is one that we intended to be captured by it. I guess that's always the problem with legislation.

MR. DICKSON: You know, there's an alternate thought on this in terms of a recommendation. I'm impressed, if you look at the last report for '97-98 from the Department of Labour on FOIP, that the number of times that section 16 has been used is 594. The next highest exception is section 19, at 86 times. So if it seems to be too difficult to rewrite the section, can we maybe make a recommendation that there be some instructional material, some explanatory notes, some information made available to members of the public and would-be lay applicants which would help them through this? In other words, if you can't make the rules any simpler, then maybe we should be focusing our energy on trying to come up with some tools or explanations or examples or booklets or something so that people wrestling with section 16 can easier understand it and get some sense of it. I mean, there are things you can't write in a statute, but you can offer examples so that somebody looking at section 16 can have some things to help them navigate through. So that would be a recommendation I'd urge us to consider making as a committee.

THE CHAIRMAN: Would that be something difficult for the department and the IPC office to collaborate on?

MR. WORK: The short answer to the question is no. It wouldn't be difficult to collaborate on. The long answer, which I'll make short, is as Donna Molzan said: it's evolving. You know, we're still sorting out what the section means as we get cases. There will be an order publicly released either today or tomorrow which will give the public bodies fits over section 16. Briefly, the order of the commissioner is going to say - and this may help you with your deliberations a bit, so maybe it's worth a couple of moments.

If you look at section 16, 16(4) says that these things are out; right? It says that if you get a hit here, it doesn't come under this section. Section 16(2) says that these are presumed to be unreasonable invasions, but it doesn't say that these are not unreasonable invasions. It says that they're presumed to be unreasonable invasions. A presumption must be something different than a "this isn't" kind of thing.

The commissioner's order today or tomorrow is going to say that when public bodies apply section 16(2), when they're applying one of those presumptions, that presumption can be rebutted and not just by the applicant. The public bodies have to say: well, does this presumption stand up, and does this presumption I'm about to make about this information withstand the scrutiny of common sense?

A public body that thought they applied a presumption found out last week that they didn't apply the presumption properly, and the commissioner has said that the presumption didn't apply. Now, that's going to cause the public body probably some aggravation, because they probably thought that if they found something under 16(2), they were home and dry; right? You know, they had the comfort of saying: "Oh, it fits under section 16(2)(d), employment or educational history. We're okay. We don't have to give it out. We don't have to think about it anymore." In fact, they're now going to be told: well, you still have to make sure that it does fall under section 16(2)(d). They can't just take a glance at it and say: oh, yeah, that's it.

So what's the point? The point is that we'd be happy to work on preparing stuff, as we can, on what section 16 as a whole means, but it seems to kind of be like trying to nail Jell-O to the wall. It seems to be changing on us constantly.

Mr. Chairman, having listened to you and Gary Dickson talk, maybe it's just one of those things that has to be left to discretion, has to be left to judgment, and is not capable of definition in five or six rules. People are just going to have to live with a certain degree of uncertainty because each case is so unique and each case is so general. Maybe as time goes on and more cases accrue, we might develop a better understanding of where the line of an unreasonable invasion lies, but at the moment I have some sympathy for the public bodies because they must feel that the line of what is an unreasonable invasion of personal privacy is all over the map, and I'm not sure there's any relief in sight for the next while.

THE CHAIRMAN: I agree with you, Frank, but it seems to me, without getting too specific in the recommendations - because we don't want to get into interpreting, which is the job of the IPC

office – some kind of a simple handout that particularly the MASH sector public bodies that are coming into this act might have available that helps them interpret some uniformity into it but stays clear of things that might give a prejudgment of something that the IPC office rightfully would have to deal with on its merit when it comes up. Maybe a simple handbook of some sort.

9:27

MR. WORK: Yeah. IPC, Mr. Chairman, would be happy to collaborate on that. Sure.

MS KESSLER: We could certainly work on that.

MR. DICKSON: Do you need that in the form of a motion, Mr. Chairman, so that it's recorded?

THE CHAIRMAN: I don't think so. I think we discussed it as recorded. We can deal with both issues, then, by consent.

MR. DICKSON: Okay.

THE CHAIRMAN: There were two suggestions: the one looking at changing the order of the subsections – and the recommendation would be open as to how people could best see that – and your suggestion of an information bulletin that could be prepared and used for helping to clarify.

Okay. Question 100:

> Should a new paragraph be added to section 16(3) that directs the head of a public body to take into consideration when determining whether disclosure of personal information about a third party is an unreasonable invasion of privacy, whether the personal information about the individual had originally been provided by the applicant?

My understanding of the suggestion was an example of a student attending school. Information was provided by a parent when the student was a minor, and when the student reaches the age of majority, there might be reasons why the head – I'm presuming this might be the principal or the school board or whatever – of that public body could say, "This is something that I can consider when making it available," that there might be some common sense to that. It doesn't say that it must be available but that this was a consideration. On the grounds of that, I thought it wasn't a bad recommendation.

Comments?

MR. ENNIS: Mr. Chairman, if I can just understand this. Are you suggesting, then, that if an applicant made a request and the information about that applicant had actually been supplied by another person at a previous time, there might be a possibility for a public body to shield or refuse that request in the case that you offered?

THE CHAIRMAN: I didn't understand it that way. I understood that it was more that if a third party provided the information, the third party could have access to the information they provided.

MR. ENNIS: Thank you.

THE CHAIRMAN: Am I correct in assuming that?

MS WILDE: That's correct.

THE CHAIRMAN: I think it's the individual's right under the rules of the act to have access to their own file.

MR. WORK: Mr. Chairman, what would happen if you don't know who provided the information, if a third party said, "I provided it," and there was a dispute over that?

MR. GILLIS: You default to the individual who the information is about.

MR. WORK: Okay. That's not a bad solution then, because that would be our concern, that we don't wind up with a bunch of inquiries in front of the commissioner with people arguing about who provided the information.

MR. GILLIS: No. It's specifically to address those situations where you've got all the parties sitting at the table. You've given them these documents, and they're all blotted out. But the guy knows who his son is; you know, it's clear. In the cases where it's not clear, you've got to default to the individual.

MR. WORK: Would the default be explicit?

MR. GILLIS: Hopefully, yeah.

MR. WORK: Okay.

THE CHAIRMAN: Do we have enough consent here? Do we need a motion, or are we just agreed?

HON. MEMBERS: Agreed.

THE CHAIRMAN: Okay. Question 35 is the first one that I've addressed on that handout I gave you just at the beginning of the meeting. The question reads: (a) "Should section 16(4)(g) be eliminated as proposed by the Information and Privacy Commissioner?" My understanding there – and that's the first little one and a half lines on my note – is that to me it still serves the purpose of defining one of the intents of the act. So eliminating it would change the intent.

I go on to suggest – and this is subject to correction here by the people from the office – that the purpose of the concern would be that there need to be some restrictions on the type of information that could be revealed about the applicant. So my suggestion was covering it by correcting that as far as the applicant is concerned. Only the name, address, and telephone number and no other personal details would be permitted. This does not preclude the information that's in the licence or the permit, which would be available. This would just protect any individual personal supplementary information that is applied as part of the application. Am I somewhat correct in making the assumption that that was the concern of the office?

MS WILDE: Yes, that was the concern of the office, that there would be too much personal information that would be released or disclosed. But also I think there might be an issue as to whether commercial versus private licences should be disclosed. An issue was brought up by Labour that those licences that are purely private in nature perhaps should be withheld, that it should be specified that those licences should be withheld from disclosure, or that there should be some distinction between certain types of licences.

THE CHAIRMAN: We did discuss this. I particularly addressed 35(a) in that notation I handed out. The (b) part of the question, removing the term "discretionary benefits," came at my suggestion much earlier in our meetings. I've noticed since then that the term "discretionary benefits" is in at least three places in the act; it might even be more. I think it would therefore be difficult to remove it,

particularly since in a couple of discussions I've had with other people, we couldn't come up with a better term that might be easier to understand.

As far as the difference between commercial and personal licences and permits, we've had several discussions in and out of this committee. Each time there was a recommendation – this was another one of these where there were other problems. There are some kinds of personal licences which shouldn't be shielded. There are some commercial licences which very much are issued on the basis of an individual, even though that individual may be the principal of a corporation; say, a fishing licence. There's very little difference between a commercial fishing licence and a private fishing licence. I also used the example of getting a permit to discharge explosives. I mean, if you get a permit for that – as a matter of fact, that act or the regulation under it is being amended right now. It isn't the company but the individual who's qualified to detonate explosives.

So I honestly believe that it isn't possible to segregate on the basis of commercial and business licences. My suggestion is to leave the rest of it as it is, that a licence is a licence, a permit is a permit, and that we protect the individual's ancillary information on the application. The details of the licence are just going to have to be made public.

MR. ENNIS: Mr. Chairman, we've had a few cases involving licences come through the office, and it strikes me that generally the applicants are looking for name and locality but not down to the point of street address and telephone number. One of the concerns that the third parties have in this case is that they're going to be put on somebody's list, be it a catalogue list for a fish-and-game outfit or be it a list used for harassment by some group that's against whatever hobby these people happen to have.

So the concern seems to be that a home address and home phone number would appear as part of that request. I think for a lot of purposes the listing of name and locality, which may be an old-fashioned way of approaching this, might be enough in a response to a request for licences and permits. We might have the case of two people having the same name in a large locality, but in Alberta that's not often a problem.

9:37

THE CHAIRMAN: My problem is that we're talking licences and permits. I think permits generally – and I'm going to use the word "generally." I think in earlier comments I've suggested that permits more often are for the purpose of protecting people other than the applicant or providing information to people other than the applicant. I'm talking particularly about, say, building permits, development permits and such so that the people who own property or live around them have access to information they need to protect themselves.

In terms of a licence I think we've gone through the discussion of what would happen if we restricted the availability of the name and address to law enforcement or quasi law enforcement authorities. The example is the parking lot attendants or the private investigators that needed the name and the address to be able to carry on what has traditionally been their role; otherwise, we don't know how we would find a suitable alternative. So how do you get into separating one from the other without causing problems?

MR. ENNIS: I think in the latter case that would be something handled under section 38 as a form of disclosure, disclosing to law enforcement or quasi law enforcement type organizations. That would be a section 38 matter. In a section 16 case where someone's actually made an access request, we wouldn't see law enforcement authorities using that route.

I think in the matter of building permits especially – and this has come up in the city of Edmonton and the city of Calgary – it's the address of the land in question that's more topical than where the person who took out the permit happens to live. I guess that's the point of privacy. The person could live in a particular domain; what would be of interest to the readers of those permits is what piece of land is being developed. So the physical description of the land I don't think would be a matter of personal privacy, but the address and phone number of the individual who took it out arguably would be.

MR. DICKSON: It's unfortunate that we can't make that distinction between sort of commercial and uniquely private, because as I think we talked about before, the intention, the thrust when the act was first written or when the panel reported in 1993 really was, you know, timber licences and those kinds of things where there were major issues involved and some environment dollars, that sort of thing. I hear your comments, Mr. Chairman, but if we can't distinguish between the two, I'd have a problem with the suggestion that you couldn't identify an address. The reason, to use the example of HRG, the private hospital in Calgary, is that it becomes hugely important knowing an applicant, in terms of identifying who's behind making the application, to be able to cross-reference. As a legislator you need to be able to get some of that information. If you weren't able to get addresses and so on, you'd have some real difficulty in terms of ensuring who is involved in terms of getting a licence on maybe something that had a huge impact from a public policy perspective.

MR. WORK: Well, the committee has my sympathy, because this is where access and privacy once again smack headlong into each other. I think there's a lot to what Mr. Dickson says about knowing who government is allowing to do certain things, knowing who's being allowed to take grizzly bears, and knowing who's allowed to build big buildings and so on. At the same time, I shouldn't be able to pull up beside an attractive person in the car beside me, jot down their licence number, and then go and find out where they live. So privacy and access run headlong into each other.

One thing you can do or you could think about is that if you recommend the deletion of that provision from section 16(4), what happens is that it gets thrown back under the general rule in section 16(1); right? It gets removed from the list of things that aren't unreasonable invasions, so it would default under the general rule in 16(1), which would mean that in every given case – the public bodies will go nuts – the public body would have to say: "Okay; bear hunting licence. Is it an unreasonable invasion to release this? No, it's not an unreasonable invasion; out it goes." "Driver's licence: is it an unreasonable invasion to release this? Yes, it is; it doesn't go out." It's probably not a very satisfactory solution in some ways, but if you're struggling with the issue of commercial and private, what is really personal and what is less personal, what is the public right to know as opposed to what the public shouldn't be able to know, I don't think you can come up with a rule for that. So if you deleted 16(4)(g), it would fall back under 16(1) and become subject to ongoing discretion.

MR. STEVENS: Do you want a motion for your suggested amendment?

THE CHAIRMAN: Well, I wrote it that way, but I also intended it to be debate.

MR. STEVENS: Well, we've been having some.

THE CHAIRMAN: I'll leave it up to you if you want to make a motion..

MR. STEVENS: Well, we can always debate a motion after it's made. I'll move that

> section 16(4)(g) be amended by adding words to the effect that "other than the name, address, and telephone number, no personal details of the applicant unless otherwise permitted in the act."

MR. DICKSON: Just speaking to the motion. So in the HRG example, if people wanted to know about somebody applying for a licence to run effectively a private hospital, is it important from a public-interest perspective to know whether those principals are involved with a health management corporation in the U.S. or whatever? That might be one of the things that would have to be disclosed in the application. As I understand this, if this were accepted, that information wouldn't be available. There's the caveat of unless otherwise permitted in the act, but assuming it's not. And that would be an example where I think there would be a compelling public interest to know that.

MR. STEVENS: If I might just respond, the way I see this particular issue is that there was a concern raised relative to the existing wording, and this was an attempt to narrow it. From my perspective, what should be available is whatever the licence or permit is about, the detail of that particular transaction together with the name, address, and telephone number. I'm quite happy to leave it as is – that is, the wording of this section – and people can carry on and do whatever they have to do. However, it seemed to me that the chairman had put forward a suggestion which moved somewhat towards addressing the issue that had been raised, so I'm supportive of that if the rest of you are. But this is one of those ones where from my perspective we can leave it as is, carry on and look at it in three years or whatever, or we can try this amendment and see how that works.

9:47

THE CHAIRMAN: Gary, I'm going to use a comparison. You could have a reason for wanting that information, but one could argue, then, with a driving licence that if someone had an impaired driving infraction 15 years ago and they've made their restitution, they've had 15 years' clear driving and things like that, I don't think that's the kind of information about the applicant that has any business being given out. Unless you're going to start getting into splitting hairs, who's then going to decide that, well, maybe this should; maybe this shouldn't? I mean, you have to draw the line someplace. I can appreciate that in certain instances it's going to be embarrassing for people to know they're the applicant, but how do you determine from the one where it's fairly essential that other people have the right to know that? And since you're getting a licence from the government, you're getting a discretionary benefit. There are some strings attached, and I think you have to do the best you can around it.

MR. DICKSON: It's a tough one, Mr. Chairman. This is why I was attracted, I remember, when we talked about it a couple of meetings back, to distinguishing between a noncommercial – I mean the hunting, the fishing licence, that sort of thing, even the driving licence. I see there that the overriding interest should be protecting the privacy of the individual. With a commercial application that impacts more than that individual, then I think maybe the balance shifts the other way.

We've heard that it seems to be too tough to distinguish between the two. I wish that were otherwise, because to me it would be much easier to distinguish between a commercial application and a noncommercial application. In a noncommercial application privacy should be paramount. In a commercial application I'd lean to greater disclosure.

THE CHAIRMAN: Well, I wish I could remember the number of examples over the period of the last two months from conversations with individuals, either here or outside of this committee, where it just didn't fit into the cut-and-dried commercial versus private. There were way too many examples of where one might fit and the other one wouldn't. There's an overlap that we can't do anything about, and I don't think we could describe it.

MR. WORK: Mr. Chairman, I should probably have said this before you got into debate on the motion. I'm going to raise the issue of telephone number with you. If the committee wants to make the recommendation as moved, is telephone number critical? I don't know if it is or not, but what I'm thinking is that if someone does have an unlisted number for whatever reason, if telephone number were excluded from this list, you could still have name and address, but people would be able to preserve their unlisted number. I'm wondering if that would serve the purpose of openness. You know the name and address of whoever got the permit, but you still allow them to keep an unlisted number unlisted.

THE CHAIRMAN: Peter, you were going to respond to that question?

MR. GILLIS: Yes. I was just wondering if it had to be address. In most circumstances, given what Gary was talking about, it seems to be business address, where appropriate, rather than name and everybody's address. It's name and business address where appropriate, because then you capture the situations where it's a corporation or whatever, whether it's somebody getting a licence for explosives or whether it's a private health care facility.

THE CHAIRMAN: I think that would depend on who the applicant was, whether it was a business.

John, go ahead.

MR. ENNIS: Thank you, Mr. Chairman. As I think you can see, I've been anxious to jump into this one. I think we have to be careful here that the kinds of examples that are being talked about, especially in the area of commercial licences, are generally handled under section 15, not section 16. Section 15 deals with the commercial interest of third parties. If we have a person who is not an individual – that is, a juristic person, a corporation – making application for a licence, that wouldn't be a matter that would come under section 16 at all.

The approach that we've taken in the office is that the names of individuals who are the public face of corporations are part of that corporate information and aren't treated as personal information under section 16, and that's worked fairly well. So if the officers of a corporation were to sign under, for example, ABC Corporation looking for a licence to build a bridge or whatever, that would be a matter under section 15, and it wouldn't come as a section 16 request. That is, when a public body got the request, section 16 wouldn't be the exception that they would invoke.

The difficulty comes when you have someone who's a sole proprietor. This is a headache in the act in that if someone is a sole proprietor and is applying for a licence, obviously for business purposes – let's say they're a farmer or some other kind of operation – is that something we would handle under section 15 as the business confidentiality interest of a third party, or is it

something we'd handle under section 16 as personal financial information?

You'll recall that the chartered accountants noted that in section 16 there is no specific provision for financial information, and they'd like to see one there. I think that's what they were hinting at, the difficulty of dealing with sole proprietors and just where they fall out. In the examples that Mr. Dickson mentioned, normally our public bodies would deal with it under section 15, and we would be fielding it that way in the Information and Privacy Commissioner's office, so it wouldn't be a section 16 issue. I just thought I would throw that in.

THE CHAIRMAN: But it wouldn't change the intent, though, of clarifying that there would be limited information available to the applicant.

MR. ENNIS: No, it wouldn't. But I hope that alleviates some of the concerns Mr. Dickson had about the ability to get to information that's from corporations versus information from individuals.

MR. STEVENS: John, did I understand you correctly when you said that section 15 is used for corporations and section 16 is used for individuals?

MR. ENNIS: Yes. Generally that's the breakdown.

MR. STEVENS: Could you tell me what the basis for that distinction between those sections is?

MR. ENNIS: Yeah. It isn't sort of clear in the words.

MR. STEVENS: I guess that's why I asked.

MR. ENNIS: It talks about the business interests of third parties. Clearly, a business has no personal privacy rights under this act the way it's set up, because personal privacy rights always attract to an individual, which is defined as a human being. If a business interest isn't the interest of a specific individual, then it's handled under section 15. If it's the business of an individual, it could be section 16 – if it's, for example, someone's bank accounts relating to their business – or it could be section 15, dealing with the actual dealings of that business, and that's an area where the act is somewhat unclear.

MR. STEVENS: Well, if section 16 deals solely with individuals – is that what you're saying?

MR. ENNIS: Yes.

MR. STEVENS: Why wouldn't we make that clear? Because I must say that in reading it, that would not be an interpretation that would immediately come to my mind.

MR. ENNIS: Make it clear that it deals only with individuals?

MR. STEVENS: For example, the introductory words in section 16 talk about "an applicant." If you put "individual" in front of "applicant," then it would be clear that you're talking about, to use your terms, a nonjuristic person.

MR. WORK: Can I try to . . .

THE CHAIRMAN: Okay. Answering that question.

Gary, I've got you on the list.

MR. WORK: Answering that question. Section 16 deals with personal information exclusively, and as John said, a corporate entity can't have personal information. I suppose it's within the realm of possibility that section 16 could apply to a company, but 99 times out of a hundred a company isn't going to be able to have personal information such as would fall under 16. So if someone asks a public body for more corporate or commercial information, I think what John is saying is that chances are that it's going to get dealt with under section 15, trade secrets, commercial/corporate information which could be harmful to a company. Only one time out of a hundred or maybe a thousand would there be personal information involved such as would bring section 16 to apply. So I think that's the saw-off on it.

MR. ENNIS: If I can add to Frank's comments there. It goes to the issue of how personal information is defined. In the act it's defined as information pertaining to "an identifiable individual." I've yet to see a case where corporate information is handled under 16, but I have seen cases where people have argued that their information as sole proprietors should not have been dealt with under section 16 but should be dealt with under section 15.

We saw a case in the city of Edmonton where they were operating their right to information bylaw under the Municipal Government Act, and they had a request for all the business licences held in the city of Edmonton, most of which are held by individuals working out of their homes. In the end they did disclose all of the business licences – I don't know about telephone number but certainly name and address – arguing that it was not personal information in that case, that it was information about people as at least sole proprietors, and therefore it was business information. So they went with sort of a section 15 interpretation on that But the issue of how we deal with sole proprietors is one that is difficult in this act in that it's difficult to separate a sole proprietor from an individual.

9:57

MR. DICKSON: I just want to be clear. I may have misled some by referring to the HRG. I appreciate that's a corporation, but it could be a sole proprietor, and I was simply using it more as an example of why some background information on the applicant would be important to be disclosable in the public interest. It seems to me that you've got some tests in section 15 that may not be appropriately invoked if you're simply asking for some basic background information on the application that would be disclosable under the other. So I'm mindful of the difference between a corporate applicant and an individual applicant, and I still have that concern.

MS MOLZAN: Mr. Chairman, as has been indicated by John Ennis, the definition of personal information requires it to be an identifiable individual. It's pretty consistent with the other provinces. Justice has looked at this, and we have provided legal opinions on it, that corporations don't have privacy rights; only individuals do.

The problem is, corporations are fictions. They don't exist without people behind them. That's where you get into some of the difficulty in dealing with them. Someone will sign as president on behalf of a company. Well, that's a person, but when they're in their capacity as president of ABC corporation and they're holding themselves out that way and the business all pertains to the company and not to them, their personal bank accounts or driver's licence or whatever, then they don't have privacy as far as that transaction goes. I think one of the problems, as you've already pointed out, about commercial and private is that a private individ-

ual can have certain driver's licences to drive their semi truck so that they can conduct their business. Someone may hunt certain animals and stuff them, taxidermy or whatever, and sell those. So you get into a real difficulty.

Part of the reason even that the act is set up on an applicant, as opposed to the federal legislation, where you must be a Canadian citizen to apply under the act - and I think that may have been amended now - is that there's always difficulty in that if you restrict it to a corporation, people then may ask an individual to put in the application to get around the rules. As I said, there's always some way to sort of get around it. If it has to be an Albertan that makes an application, then someone from another province could just come here and ask someone to do it. So I think that when you look at trying to fine-tune this section, it is very difficult because it is so specific again to try and approach every situation. But I think the IPC office is correct in stating - and that's certainly the way Justice has viewed it and the way other provinces have viewed it - that a section 16 and its equivalents is not intended to apply to businesses and doesn't really protect those types of licences anyway, that those would be under 15, and that's the way they have been dealt with. So it may not be that important to distinguish between commercial and private under 16 in any event.

THE CHAIRMAN: Well, that was my sense, that as we got into this, it got bigger and bigger and more complex. It convinced me that we're not really going to improve on what we've got without building a section that's as big as the act itself and then probably still have some deficiencies. My suggestion is to leave it as it is and clarify that there are certain limitations on the release of personal information on the applicant. I haven't forgotten about the concern about the telephone thing. We raised it earlier - and I'm talking much earlier, at an earlier meeting - when we talked about being able to block personal information in the registry office for someone who's being harassed or stalked or anything like that. I'm not so sure that we could write it into this act, but we already have a recommendation that the registries people make provision that they can, on request, block information for an individual's protection. I'm talking personal physical protection. Even in the case of a motor vehicle registry where an individual, say, is caught speeding or illegally parked, the bylaw enforcement person who's laying the charge would not have access to the information but through registries could pass on the ticket. So there are mechanisms that could be put into place within the registries operations that I'm not sure we could describe in here because they apply differently to different permits and licences.

MS PAUL: Mr. Chairman, now that you've brought that subject up, it is unfortunate it can't be put in and a qualifier put on. When I registered my car and changed my driver's licence - I have three different addresses. I requested when I registered the car and did my driver's licence that I don't want that information to be given out. There are a lot of people in the same situation that I'm in. If I fill out a permit, I don't want my address put on that permit and to be accessible. I also don't want my phone number. I'm not the only one. There are lots of us like that. It is too bad it can't be spelled out, because it gives you sort of that comfort level. Right now I have to go and register my car again, and I don't know where to register it.

THE CHAIRMAN: I certainly appreciate this. As a matter of fact, it was the example I was thinking of when I was writing this out, but then how do you stop someone else if you make it general? How do you stop someone, say, who gets a licence to hunt wolves - and I happen to be someone who wants to protect wolves at any cost - simply because the applicant then tells the licence issuing office: well, I might be harassed if they know that I hunt wolves; I'd like my name protected. We get into the problem: how do you describe harassment?

MS PAUL: Well, it's very difficult, now that you've brought that topic up. As I've already stated, there are a number of us right across this country that have that same fear.

THE CHAIRMAN: I couldn't sympathize with you more. That's why I'm suggesting, even though we already have, that we might even go on record as suggesting that the registry or the licence offices that hold this information build in the safeguards that can be used on request by an applicant to protect themselves in the event of potential physical harm. These things would then be subject to evaluation or judgment by the IPC office if someone is using it simply because it's convenient as opposed to a situation where it's a real threat.

MS PAUL: That, Mr. Chairman, is also another difficulty that would be encountered. You may not want your address and your phone number given out because, let's say, you owe a lot of money and you don't want somebody banging on the door looking for coin, as opposed to somebody stalking you with a deadly weapon. It's going to be a very difficult situation to police.

MR. ENNIS: Mr. Chairman, the drivers' licences are especially sensitive. But I think it's probably worth noting that these would not be the subject of a section 16 request. Drivers' licences are excluded from the act at this point, so a person can't make an access request for a driver's licence or for personal information from a licence through the Freedom of Information and Protection of Privacy Act. So whatever is done to section 16 at this point has no impact specifically on motor vehicle operator licences as they're excluded under section 4 in the act.

MS PAUL: What about car registration?

MR. ENNIS: Similar.

So those rules are with the business that we had from registries a couple of meetings back. They're currently redoing the rule book for disclosure of that information. They do currently provide it to some limited persons, and that came up in the audit that was done jointly by our office and the office of the Auditor General. But they aren't subject to a FOIP request and wouldn't be responded to under section 16.

THE CHAIRMAN: Does that mean we've gone far enough that we can maybe vote on this thing?

10:07

MR. STEVENS: It's all been very interesting, but I don't know that I'm further ahead in knowing what the answer is. I'd very much appreciate it if you could just, in a yes or a no, say whether you folks think this advances the cause. I mean, in my mind, that's why this proposal's been put forward for the most part.

MR. ENNIS: What it does for me is make it clear that the things that are on the licence that pertain to a person, such as height, weight, eye colour, state of health, eye glasses, and all the rest of it, are personal information, but that's not going to be disclosed to an applicant who's looking to see what licence I have. So those are things about me. They'll get my name, address, and possibly phone number, as a result of this amendment, but they won't get my WIN

number, for example. If I'm a hunter, I have a wildlife identification number, and it's probably important that I keep that confidential. So things like that would not be disclosed about me, whereas my basics, name and address, would be. So looking at it from that perspective, I think this amendment does clarify it quite a bit.

MR. STEVENS: I have one other question, if I may, Mr. Chairman. Will we be able to accommodate those who have the kind of concern that Pamela's put forward with respect to protection of information that is important to their well-being?

MR. GILLIS: I think so. I was actually searching around for a copy of the B.C. legislation, which I don't have, which has something at the back of this provision which I think goes somewhat to what is being discussed. So I think we could recognize it.

MR. STEVENS: I think it's important that that be put in place in conjunction with this amendment if we in fact approve this.

THE CHAIRMAN: Okay. Now, the observation that John made before, that motor vehicle registry is outside of this act . . .

MR. STEVENS: I understand that, but if Pamela goes and gets a hunting licence . . .

MS PAUL: Exactly.

THE CHAIRMAN: Oh, I see what you're getting at.

MR. STEVENS: You know, that's the point. I appreciate that it doesn't deal with motor vehicle, but it deals with hunting licences, for example, or fishing or whatever.

MS PAUL: Anything else.

MS MOLZAN: Section 17 of the act currently and I think in the situations that have been described talks about refusing disclosure of information "if the disclosure could reasonably be expected to (a) threaten anyone else's safety or mental or physical health." Certainly if the public body is made aware at the time that the information is given, that may be a section that could be utilized by them to refuse access to that information, if they are aware, as I said, that someone has a concern about their health, and it could be mental or physical health.

It's come up in B.C. where individuals are afraid of being harassed by someone over a telephone even. It doesn't have to be someone physically going to harm them or shoot them or something. It could even just be not wanting to get harassing phone calls. So there have been different women's health clinics that have utilized that section, even a case where a doctor was concerned with an elderly patient who'd had an enormous amount of motor vehicle accidents in a short time and had contacted the licensing bureau saying: "I've got a concern. I think this man really shouldn't be driving anymore. He's having all these accidents, and he's not capable of driving anymore." Ultimately, the motor vehicle registry there asked the man to come in for a physical, checked him over, and determined that, yes, he was no longer really capable, didn't have the ability, sight or whatever, to drive properly. The patient then tried to get the name of who had squealed on him, I guess, or who had turned him in. That section was used in B.C. successfully, and the commissioner upheld it there saying, you know, that perhaps this man may harass this person and affect their mental health if the name was given out.

So that section does exist currently, and it certainly does recognize – the only gap is that the public body has to be aware of the situation and that there is a potential – you know, when the individual gives the information or is involved in something, they have to explain why there is a threat, or when there is an application for someone else's personal information, they can contact the applicant and find out if there is a situation like that. That's one of the areas that's very fact specific.

Some people don't have a concern with anyone harassing them. Other people clearly do. There are a lot of spousal issues and licence issues. Maybe someone has been harassed in the past by certain people if they hunt a certain animal or something. So they would legitimately be able to claim section 17 if they have been harmed in the past.

THE CHAIRMAN: Well, why don't we cut this short here. There has been concern expressed. There is the possibility or even the probability that that section 17 covers, but why don't we in our recommendations question whether there might be a way to ensure that legitimate concern would be more adequately covered by some improvement in either section 17 or an equivalent to cover the issue of a threat, whatever the proper description might be, and danger to an applicant by releasing certain information. That way we wouldn't have to be overly specific as to which section it goes into. It could be investigated in addition to the change we're making here. Would that be satisfactory?

SOME HON. MEMBERS: Yes.

THE CHAIRMAN: Can we vote on the motion? All in favour? Opposed? One opposed. The motion is carried.

We'll find a way of writing the recommendation to cover this other discussion. The essence of all of this discussion is that the three remaining bullets in 35 are covered as part of the two decisions.

Question 69: "Does the Committee wish to make recommendations related to the release of building permit information for commercial purposes?" I've made a note on that as well. In my background checking, if information is publicly available or in the public domain, I don't think it is a concern in the act or should be spelled out what that information can be used for unless it's illegal, which then some other statute is going to cover. Discussion on this?

MR. DICKSON: I agree with your thesis. I'm just curious. In the submission we got from business prospects, as I understood it, the problem was that municipal governments deny a lot of licensing data under their own bylaws or the Safety Codes Act. Those are the two things that the business prospects fellow was concerned with. Did we ever get some amplification in terms of those reasons? I mean, I'm with you in terms of publication, but I also want to be fair to the municipalities. Have we researched the reasons why municipalities currently have legislation, you know, bylaws or provincial safety codes, that prevent the release of that information? I wasn't clear on the concern that had been expressed by the business prospects fellow.

THE CHAIRMAN: Well, I think the big difference is that up to this point they're not included in the act and they've been able to make their own determination of what they want and don't want to give out.

MR. DICKSON: Did they have good reason? Is there an ongoing good reason why they try and shelter that? That's my question.

THE CHAIRMAN: Probably a lot of the discussion we just had around this table.

Diana, go ahead.

MS SALONEN: Well, it's primarily because right now the Safety Codes Act has a provision that all the information compiled under that act is confidential. It's a blanket provision that not only will capture permits but all of the other material that goes into getting a permit or a development permit. It could be designs of buildings that are confidential until they're approved and this sort of thing. The Safety Codes Act right now is under review and under consultation.

That provision does not prevail for FOIP, so if that material is now in the custody of a public body such as Alberta Labour, it's going to be going out under 16(4)(g). It's where it's in the custody of municipalities that it's not routinely going out until they're subject to the act.

THE CHAIRMAN: I believe that if we concur with the suggestion, no action is necessary.

10:17

SOME HON. MEMBERS: Agreed.

THE CHAIRMAN: Question 36: "Should provisions be made in section 18 to allow post-secondary educational institutions the ability to withhold . . ." I won't read the two things in detail. It's another one that I've made a suggestion on. The issue is historical practice. The universities have asked that when they're evaluating courses, which indirectly, I guess, also has some bearing on the professor, this information should be allowed to be gathered in confidence. I've changed the wording slightly from what you see in (a) on the document on the advice that appraisals and references from supervisors are in a category where the individual should have the ability to find out what the supervisor is saying about them. So I've deleted the word "supervisors" and suggested that it wouldn't be unreasonable to allow universities to continue with that practice but to the extent of the information provided by peers, subordinates, and clients.

MR. WORK: Mr. Chairman, I guess our concern is that - I suppose we can see the rationale for universities in particular saying, in the same way that health institutions say: "We need peer review. We need to be able to have full, frank, and open evaluations of people that work for us and the way they do their job. We can't have that if these things are fully accessible." On the other hand, where I don't think we are terribly sympathetic to the universities would be, for example, with student evaluation of courses. They started that when I started university a long time ago, you know, where the students at the end of the year fill out an outline about how the course was and how the instructor, professor, or otherwise, was. Why shouldn't those things be available? Why shouldn't those be accessible? I don't know how you saw off between the two. I suppose what I'm saying is that I think there's some concern about universities or any institution being able to shut down, refuse to disclose evaluations that are necessary or of value to the public in order for the public to make decisions about their education or anything else.

THE CHAIRMAN: I hear what you're saying, but to me this looks like one of those things that's designed to help others, presumably the next group of students that's coming in, make an informed decision. We have other cases of where, you know, the individual is protected, and in essence that's what this is. Certainly if I'm a student in the first year of a course and I'm going to be meeting that same professor in my next course, I'm going to either decline or be awfully innovative in how I'm going to make any recommendations if it happens to be negative. How do you get around that?

MR. WORK: Well, Mr. Chairman, let me ask you a question on what you've written here. Would you see this as operating to prevent the disclosure of, like, course evaluations?

THE CHAIRMAN: No. Just the information that's given in - how did I word it? - "references and evaluative opinion." Now, it goes on to say: "as part of a proper evaluation process carried out by the institution." There's a major clarifier in there. It couldn't just simply be an individual making a comment about a professor that they particularly dislike. This could only be in the context of an evaluation process that's carried out by the institution, and the information protected would be the reference and evaluative opinion. I was going to get into whether or not you could withhold the identifiable part of it. I mean, if you can do it anonymously, that would be one thing, but it may be getting a little too intricate to try and build something like that into it.

MR. DICKSON: I was just going to make the observation that when universities do that sort of thing, it seemed to me - and I don't know whether it's still a practice. They send out forms so that every student gets a form for every class they're in. There's a series of questions that enable them to evaluate the instructor. Clearly students participating in that expect that there's going to be publication of the results. I mean, it's to assist first-year students and students who are considering taking a course. Presumably what they want is their name to be protected because that may be a faculty adviser or somebody they are going to take a course from next year. So in a case like that, where people willingly participate in a process, there's an expectation that their information is going to be reflected in an aggregate assessment of the prof. All that has to be protected is the identifiable information of the people that contribute to the survey; isn't it?

MR. WORK: But our concern, Mr. Dickson, is that the universities might use this to refuse to disclose course evaluations at all, even in the aggregate form. There has been, I believe, some ongoing negotiation between the universities and various student union groups in the province over this issue in the past while. We don't want the universities to be able to say: no, we're not going to tell you that Professor Work was bombed in every class he taught; we don't want to disclose that. When I asked you that question earlier, you did clearly say that that is not something that should happen under this wording, and I agree with that.

THE CHAIRMAN: In light of your comment, Frank, I could even see inserting the word "individual" in front of "references." That makes it clear that it isn't the aggregate information that would be protected.

MR. ENNIS: Mr. Chairman, this is like many things we're dealing with here. This is a small "p" politics issue with a third side to it. I noticed that in the submissions we had, the University of Alberta was going one way and the University of Alberta staff association was asking us to disregard and move the other way. I think that both parties are probably looking to the Freedom of Information and Protection of Privacy Act to settle a dispute over whether or not student-evaluated information should be brought into the performance appraisal process for faculty. I think that the expectation perhaps from the universities is that this committee and the

Legislature would favour the publication of evaluative information in an aggregate form, nonidentifiable, and as a way of helping students make informed consumer choices for courses.

The staff association is, I think, expecting that the commissioner's office would put a fence around some of that practice if it wanders into the area of formal performance evaluation. If those statistics are referenced in a professor's performance evaluation by the university, then the professors would say that that disclosure of evaluative information to the students should not be made: that's my personal information because it deals with my performance as an employee.

So this is a prickly problem, with both sides looking to the FOIP Act for relief on the issue. But I think that the suggestion you're making of striking supervisors from that list of groups is a particularly good one, because then it clearly takes us into the realm of people who don't have particular power as individuals over other individuals making references and not being responsible for those references. In an earlier letter from the commissioner's office the commissioner made the point that supervisors should be accountable for how they treat subordinates in that kind of an environment, and your amendment of striking supervisors is very helpful in that regard.

THE CHAIRMAN: I can see us even going one step further if there's any doubt that we're not talking about an individual's performance appraisal, that we would talk about a proper course evaluation. We could even clarify that in here.

MS MOLZAN: Mr. Chairman, I was just going to add that I think in addition to those situations – and again, this is just part of the balancing act – one of the issues that certainly Justice has been aware of in the past is cases where it's highly competitive, where individuals are seeking grant money. Certain individuals in high-level positions in the university may teach a certain amount of time, but also their main function, I guess, is trying to pursue research and so forth. There is a lot of competition for the grants, and it often can determine whether high-class people will stay in certain universities or not or really make and break people's futures. My understanding is that in very specialized fields there may only be one or two other people in the world that can actually evaluate someone's performance or a project that they're attempting to get grant moneys for. So that, I guess, just adds another wrinkle as to whether those types of performance evaluations would be protected or prohibited from going to the individual that it's about and may affect their grant and so forth.

10:27

THE CHAIRMAN: But here we're talking about if we amend it to read: course evaluation. We've put a couple of fences around this. Now we're talking about individual references; we're not talking aggregate. We're talking about course evaluation, so it isn't going to wander into performance appraisals.

MR. ENNIS: Mr. Chairman, if I can just ask: Donna, are you suggesting that grant applications be added to course evaluations for this kind of peer commentary?

MS MOLZAN: Well, I guess I'm not suggesting it necessarily be extended to that. I'm saying that that adds another wrinkle then: whether someone's grant is not extended or whatever. They teach courses as part of their responsibility as a tenure professor, but let's say their main function is – and it's quite common, you know – to do research in medical areas or whatever. So they teach a couple of courses. Would this somehow allow really their performance appraisals or an appraisal of how they would conduct a project or deal with their grant moneys to be somehow sort of kept secret from them or be withheld from them so that they really don't know the case that's being made against extending their project or whatever?

I guess if it's limited to courses – I'm just wondering, again, where that line is. It becomes difficult to ensure that it's not being used in a way that they can't know what's going on behind the scenes.

THE CHAIRMAN: I'm going to interrupt you. I have sympathy for the course evaluation, because its primary purpose is to help other students who are coming into the institution. When you're talking about grants and things that are to the particular benefit of the individual, I think we're talking about a different category of protection of information. We're using historical activity plus the fact that there is value to others in making this recommendation. I wouldn't go so far, at least at this point, as agreeing with you, Donna, on that, that we should extend it to that purpose.

MS MOLZAN: Actually, Mr. Chairman, I'm sort of putting out the option, not suggesting that it should be extended. Rather, if it's interpreted that way, is it going to do something that it's not intended to do? So I'm actually sort of suggesting that it may not be a good idea to extend it, I guess, to that point.

THE CHAIRMAN: Well, we'll leave it up to the legal beagles to make sure that when it's actually written, it covers our intent.

MR. STEVENS: Mr. Chairman, I'd like to move that

> section 18 be modified to allow postsecondary educational institutions the ability to withhold individual references in evaluative opinion that has been submitted in confidence by peers, subordinates, and clients as part of a proper course evaluation process carried out by the institution.

THE CHAIRMAN: All in favour?

HON. MEMBERS: Agreed.

THE CHAIRMAN: Carried.

The (b) part of it is similar. Just based on the request, I don't have strong feelings one way or another, but we do allow references for employment, for example, to be dealt with in confidence. My understanding is that these requests are for students who apply for graduate work and such and that there is a reference or a background check involved.

My first opinion was that if you're applying for this, you could probably do the same thing as you do when authorizing the employer to get references, but I think in an institution they may wish to check institutions that you've previously attended. If you have a not so brilliant history there, you might decline to give that information, and this would put the current institution in a precarious position. I don't know how big a problem that is, but this was the university's request.

MR. DICKSON: I don't know how we can accept that and still respect principles 2(c) and (d) of the act. If somebody is trying to get into med school or law school or nursing and they're torpedoed because of a bad reference, what if that information is inaccurate, incorrect? We're talking about potentially a career path being foreclosed on the basis of erroneous information. We know those things happen from time to time. This one, you know, is such a key element in the life of a young person. To simply say that stuff

is closed and you can't access it could be hugely, hugely prejudicial. That's my difficulty with this proposal. I see this admission to a university program as being a lot different than just a job situation.

THE CHAIRMAN: I have to admit I'm somewhat sympathetic to your view there. If the institution wants the information badly enough and they're concerned that it's going to be withheld, they always have the option of saying: well, either you sign this declaration form or you don't get in; we can find other reasons to keep you out. I'm not sure this is the be-all and end-all.

MR. GILLIS: I'd just say that in another jurisdiction, in Quebec, any graduate student can walk into the registrar's office and reference their own file and get all these letters, with no restrictions whatsoever.

MR. STEVENS: I think that there is another side to this, and that is that if I know that a reference I'm going to be giving is available, I'm going to have that in mind when I'm writing. If I happen to err on the side of being less critical, less accurate in the event that what I say is going to be the subject of review by the person who has asked for it, then so be it. That's the other side of this. So on the one hand I understand what Gary is saying, but on the other hand I'm also satisfied that the information that people will receive by way of reference and evaluative opinion is going to be less critical and perhaps of less value. But I also am not particularly driven on this particular point.

MR. DICKSON: I'm just going to make an observation. A lot of young people that I've known have asked for letters in applying to law school, for example, because you often ask for two or three letters to get into a lot of graduate schools, law schools. What if I'm writing a less than salutary letter? I mean, I share the letter with the people because I think they're entitled to know what I'm saying. Usually people are applying to three or four, in some cases dozens of different schools, and if they don't think I'm giving them the kind of letter that they think they want to have as part of their case, then they're not going to ask me to do the next one.

I guess I'm just looking at it. I understand Ron's comment, and none of these things are ever one-dimensional, but my inclination is to err on the side of the applicant.

MR. STEVENS: I, too, have been asked to write reference letters for people and, upon being asked, have often not understood why. So let me share that observation.

THE CHAIRMAN: The other point I wouldn't mind making. We consented to (a) because we felt – at least, it was my recommendation – that there was sufficient benefit to other people involved to make that disclosure. Item (b) is a fairly closed loop. It's about the individual and an arrangement between that individual and the university. I'm not sure it's going to hurt the university one way or another to find other ways of getting the information. So the argument is certainly a lot less than it might have been in the other case to protect that information.

10:37

MS MOLZAN: I was just going to refer to an individual from the all-party panel in '93. I'm not sure if Mr. Dickson himself will recall, but I remember this man because he appeared before the panel, sent in a written submission, and phoned Justice as well. He had a situation where his sister was a hairdresser, I believe, and had left one shop and was going to others and could never seem to get a job. Every time she went to the next place, they thought she was great, and then after the reference check they were not interested in her. The previous employer they were calling for a reference was telling her that he thought she was great, yet when they would call for the reference, he was telling them that she was terrible; don't hire her. So sometimes you get that situation, where this young man felt that for his sister it was very unfair that she could never find out the truth, that this person was telling her something different to her face than what was happening behind the scene. Of course, maybe the individual that was giving the reference felt sorry for this person, and they weren't a very good hairdresser; I don't know what the situation was. But certainly that was one of the things that was submitted to the all-party panel in considering how this section should be applied or what it should say originally. I'm not sure what happened in that situation.

THE CHAIRMAN: I'm not sure, though, that we can determine how people are going to give references. I think what we're doing here is some guidelines as to what may not be available, and that would be an employment reference anyway. I don't think that's what we're talking about here. This is a specific reference for someone applying to attend a postsecondary institution. I know there's another section that deals with employment references.

MR. ENNIS: Mr. Chairman, the section that we're dancing around here is the employment reference section, but at this point you're correct in saying that this situation is not at all covered, because the condition on that is that it be an employment reference for employment purposes.

THE CHAIRMAN: And the universities were in fact asking that it be expanded to include this.

MR. ENNIS: That's right. Yeah.

THE CHAIRMAN: Right now we're about equally undecided.

MR. ENNIS: Mr. Chairman, as I recall, there's a letter that came from the commissioner's office that went into this point a bit. I'd like to refresh people on that, the idea that when someone is hiring, there is a greater reliance being put on that kind of decision-making than when someone is admitting a person to a university program. The act now provides some discretion in releasing reference information to an applicant, presumably about that applicant. That is because there has to be a sort of qualified privilege for reference givers because the decision is so vital to the employer so that they hire the right person. They rely on that decision.

The parallel doesn't seem to hold up with a university program. The university is not as reliant on the individuals it selects for the programs it runs as an employer would be in hiring a staff member, and I think that was the distinction that came in that correspondence from the commissioner's office on that particular point.

MR. WORK: Just to underline that, Mr. Chairman, I don't think admission to a three- or four-year university program or even possibly a postgraduate program carries with it quite the significance that an employment situation does. So I guess what we're saying is that we're not that sympathetic to the universities on the issue of admissions.

THE CHAIRMAN: That was my feeling too. Well, why don't we just put it to a vote and see where it falls, because I think we've talked around it and we've got arguments for both sides. Who would favour expanding the definition to include, as in (b) here,

postsecondary institution references? By show of hands, who would be in favour? That's pretty easy. Assuming that everybody is opposed, then, we drop (b).

Okay; question 39. There is a recommendation made in the paper that was attached. There is a suggestion in regard to ongoing or unsolved investigations that there be a specific exemption from disclosure. The suggestion made here is similar to what is used in Saskatchewan. It reads:

> The head of a public body may refuse to disclose information to an applicant if the disclosure could reasonably be expected to reveal information about an incomplete or unsolved law enforcement investigation or proceeding.

Are we going to go into a lot of debate on this one?

Go ahead, Lisa.

MS WILDE: I just have a quick comment on that. Order 96-019 of the commissioner basically interpreted the term "law enforcement" as including a potential or ongoing investigation. In that order it stated that an investigation must have the potential to result in a penalty or sanction. In other words, an ongoing investigation would be included in the interpretation of law enforcement.

I'd like to point out that 16(1)(b) also excludes personal information that was "compiled and is identifiable as part of an investigation into a possible violation of law." So that would also seem to indicate that an ongoing investigation would be covered. Now, I don't think the commissioner's office would be opposed to an amendment that would make it more clear, but I guess for the record I'd just like to point out that we think it's already covered.

THE CHAIRMAN: That would be my point. I mean, if we want to continue to work with the commissioner's recommendations that have taken a stand on an issue, it would be quite appropriate. But I think if we're trying to spell out in the act those things that have been decided to make it easier for the general public to read, it would be appropriate to include something like this in the act.

MR. DICKSON: The difficulty I have is that I look at things like the Air India bombing and how many questions have been asked in the House of Commons around that, how much interest there's been, or even in what we've seen up north. In some respects, sometimes there's a public interest to be served to know that there's an investigation under way. The difficulty I have with what's put forward on the attachment, Mr. Chairman – I mean, I'm sympathetic to the objective, but if you look at Saskatchewan, Manitoba, Ontario, and Canada, in each of those cases there's a test. It's got to be injurious to the investigation; it's got to interfere with the investigation.

What's put forward here doesn't appear on page 4 of what we're working our way through, but if you look at the attachment for question 39, you see the wording in italics just above the box, where it says:

> The head of a public body may refuse to disclose information to an applicant if the disclosure could reasonably be expected to reveal information about an incomplete or unsolved law enforcement [matter].

I mean, that's a pretty low threshold. Some of that information could be disclosed without doing any injury or compromise and may be in the public interest. If we're going to go this route – and I'm not opposed to that – surely we should import the specific harm's test that's in the other four examples that were looked at, because in each one of those it has to reasonably interfere with or be injurious to. The Alberta threshold would be that you could just disclose anything but an ongoing investigation. That's verboten; that goes too far. I think that's an unreasonably low threshold.

So I support the notion, but I'd want to use wording that talks about interfering with or being injurious to.

THE CHAIRMAN: I think that's a fairly reasonable point too. I'd hate to start a trend here, but I'm agreeing with you.

MR. DICKSON: Mr. Chairman, if we look at the balance of the votes, this is no trend. This is no trend.

THE CHAIRMAN: I think we could cover that, if you look at that clause you've quoted, by after the word "information" inserting the phrase "that could interfere with."

MR. DICKSON: Right, and I'd so move, with that qualification. I'd move that

> we recommend that this be covered in the act with the wording change you've just suggested.

MR. WORK: Just on that, I know this committee doesn't like to nitpick about specific words, but I'll just point out to you that the harm test in section 19 uses the word "harm" as opposed to "interfere with." So if you either leave that up to the drafters or just take note of the fact that it's harm, not interference, in section 19.

10:47

THE CHAIRMAN: I've got no problem with that wording. Do you, Gary?

MR. DICKSON: I'd be happy to go with the "harm," the same harm test.

THE CHAIRMAN: Okay. Discussion?

MR. STEVENS: Well, why don't we let Gary make a motion?

MR. DICKSON: I did. I tried to.

MR. STEVENS: That's wonderful. One we can agree with?

THE CHAIRMAN: I think this is the second one he's gotten so far.

All in favour? Opposed?

Question 41 talks about giving consideration to "reducing the time frame of 15 years after which mandatory exception to disclosure" for a local public body confidence no longer applies. In an earlier comment on this, I suggested that the word "confidence" be changed to read "in camera discussion" so it's more clear what is intended.

Now, the wording in the actual legislation might get a little bit fuzzy around this, but "in confidence," as far as the MASH sector of public authority, leaves me a little wanting at to what that could mean. That isn't really the essence of this discussion, but I think it clarifies what we're talking about. The discussion really is: should it be 15 years or something less, up to maybe five years?

MR. STEVENS: The information that was provided persuaded me, for the most part, that five years might be appropriate. However, there was one part that said:

> Changing the time frame to 5 years could result in the release of information affecting matters which are still pending, or are still sensitive within the local public body or community.

What I would like someone to comment on is: if we reduced the time period to five years and there was a situation as outlined in that portion of the paper, are there rules here which someone could avail themselves of to protect that information at the end of five years, or is it simply that at the end of five years it's releasable?

THE CHAIRMAN: Does anybody have an answer to the question?

MR. ENNIS: Well, here we're dealing with a discretionary exception and a situation that removes the discretionary exception after a certain period of time. But the five or six mandatory exceptions for section 16, I believe, and sections 15,19, 26(2), and so on would still be in play, so you would likely get a fairly good picture perhaps of what the in camera session was about but maybe not who it was about or some other specifics relating to it.

MR. GILLIS: Well, I would just argue that if it was five years and you were in the sixth year, it lists the section 22 exception on another exception. Whether it's mandatory or discretionary might well apply to the information.

THE CHAIRMAN: In other words, if there was reason to withhold it past the five years, the public body could make the application?

MR. GILLIS: If they have another exception. I mean, they would have to have another exception.

MR. ENNIS: The dynamics of those exceptions are a little different too. For example, in the section 16 exception if the individual that the information is about consents to the disclosure, then the public body wouldn't have a section 16 exception to invoke. So different things come into play. Once the third party gets involved, they have some say in the matter.

MR. DICKSON: My difficulty is that as I go through the list of things that might be covered, I think virtually every one of them can be the subject of an appropriate specific exception. I just think it's bad practice to sort of make blanket exceptions rather than putting them to a harm's test and to find a specific exception. There are lots of opportunities for law enforcement, for labour negotiation, for those matters to be appropriately covered under an exception. I think this is a kind of layering on that frankly is the sort of thing that tends to give the act a bad name and suggests this is more about secrecy than openness. I'm just not persuaded. I've listened to the arguments that have been made by the municipalities, I've read the material, and at the end of the day it just seems to me that the case hasn't been adequately made that this is necessary to go beyond five years.

THE CHAIRMAN: That, I think, is the essence of the discussion, that five years is adequate and that there are other sections of the act that would protect ongoing sensitive information if it was necessary.

MS MOLZAN: Mr. Chairman, I think the difficulty here again is not knowing exactly which facts you're trying to deal with. If it's a litigation of law enforcement matters, unfortunately these things can take a long time. Five years may be a drop in the bucket timewise. When you look at some investigations of gangs or mafia-related matters or whatever, these may go on for years and years and years, as well as litigation. It really depends on what exactly the subject matter is. It may be covered by another section. It may not.

THE CHAIRMAN: Well, we did talk about law enforcement, ongoing investigations and such, dealing with them specifically. That was my purpose in suggesting we use in camera because we're talking about a local public body. We're talking about a public body in the MASH sector, and their concern was that things that might be discussed in an in camera session should be protected for a certain period of time. If we fence it in to mean that term, there are five years with provision to protect after. If it's other issues that that public body is dealing with, I think they would have to look at other sections of the act to protect it.

So I don't think we're into the area of ongoing investigations and that. I think we're talking more negotiations for development deals, land purchases, the kinds of things that a council would discuss in an in camera meeting.

MS MOLZAN: Yes, Mr. Chairman. Because we're covering all the MASH sector, there may be some bodies that don't actually have in camera sessions per se, but they're still in confidence. I'm not sure if all the boards of universities or all these entities actually have in camera sessions. So it may be something that could say "in camera" or "in confidence," depending upon how that body functions. They may have sessions that, as I said, are not necessarily considered in camera but still are confidential. Not having experience with all of the MASH sector governing bodies but having some experience on private boards in the past, I know sometimes they are not considered in camera per se, but they still are in confidence. A body or a board is asked to look at issues relating to potential litigation or law enforcement matters involving actions of employees and so forth. So it may be helpful for specifically municipalities with in camera sessions, and some bodies, but maybe not all bodies, would fall into that.

THE CHAIRMAN: Well, I know for a fact that municipalities, health boards, and school boards can hold in camera meetings. My understanding was there was just provision made that a university board of governors can do the same thing in anticipation of them coming into this act. So that would cover the administrative boards of these local public bodies.

MR. WORK: Mr. Chairman, just so I understand what you're saying. In order to get the benefit of this exception, first the information would be less than five years old, and, second, it would have to have been information that was produced during an in camera session?

THE CHAIRMAN: Produced or discussed.

MR. WORK: So you have to satisfy both, less than five years old and in camera, and then you can withhold it.

THE CHAIRMAN: Right.

MR. WORK: Okay. Thank you.

THE CHAIRMAN: Anything other than this that wasn't dealt with by the governing council or board would have to be dealt with by one of the other exceptions that's injurious to a public interest.

10:57

MR. WORK: I was listening to what Donna Molzan said, and most of what she mentioned I think would probably fall under other exceptions: 19, law enforcement; 26, as Mr. Dickson was pointing out, privilege. That's been expanded by commissioner's orders to cover public-interest privilege, legal privilege. Parliamentary privilege is already there. The bottom line is that I think the commissioner's office would be sympathetic towards the kind of limitation you've suggested on that section.

THE CHAIRMAN: I believe this was a bit of a parallel to what we afford ourselves - you know, caucus, Treasury Board, these sorts of things: a much shorter limitation.

MR. DICKSON: Just the one comment, Mr. Chairman. You were referring to reports. There are already exceptions in 23(2)(d) and (e) and that sort of thing for background papers, technical papers, statistical information. Now, if I understood you a moment ago, you were thinking that anything considered in an in camera meeting would then be clothed or coloured by that and would be inaccessible. If you look at the subsection (2) part of section 23, my hope would be that at least that sort of thing would still apply. In other words, even if it's an in camera meeting and Calgary city council is looking at a survey or something, I'd hope that the test wouldn't be higher for municipalities than it would be for a provincial government department, that we'd still be able to access background papers and statistical information and that sort of thing. That may be what you intended when you made the observation, Mr. Chairman, about any documents considered in a closed meeting. I've got a problem with that.

THE CHAIRMAN: Simply because the document was produced and happened to be discussed at a public meeting, you mean that we wouldn't license that to be protected?

MR. DICKSON: Well, if you look at the existing section 22, the focus there is on discussions, draft resolutions, draft bylaws, deliberations, which is quite different than - and maybe you didn't intend to expand that.

THE CHAIRMAN: No, I didn't. The intent was only those things that were a matter of confidence within that meeting, and documents that simply happened to be tabled or anything else that found its way there wouldn't necessarily be protected.

MR. DICKSON: Excellent. I misunderstood where you were going.

THE CHAIRMAN: I wasn't sure which section numbers, but it would be within the confines of the section.

MR. DICKSON: And not broader?

THE CHAIRMAN: Not broader.

MR. DICKSON: Fine.

THE CHAIRMAN: The question is: is everybody satisfied with five years?

HON. MEMBERS: Agreed.

THE CHAIRMAN: Okay. Are we including the words "in camera" in place of the word "confidence"?

MS KESSLER: I don't believe we can. Where we're referring to in camera "deliberations" is in section 22(1)(b), and it actually speaks about the holding of a meeting "in the absence of the public." I think that's implied, but we're not actually using the term "in camera," and local public body confidences is covering more than the deliberations in camera. It's also including draft resolutions, bylaws, and other legal instruments. So that section is broader than just the deliberations of in camera meetings.

THE CHAIRMAN: Okay. I would accept that as long as it's clear what the limitations are.

MS KESSLER: Okay.

THE CHAIRMAN: Then we don't need to answer the second question.

MR. STEVENS: Just so I can tag along after the fact, could somebody tell me where the word "confidence" is that I'm supposed to be looking at?

THE CHAIRMAN: On the working document.

MR. STEVENS: Oh, on the working document. I made the mistake of looking at the act.

MR. WORK: As a lawyer that would sort of be a natural mistake for you to make.

THE CHAIRMAN: Okay. Is everybody in favour, then, of the five-year limitation?

HON. MEMBERS: Agreed.

THE CHAIRMAN: I think we've just run out of time. So unless there's anything really urgent, I will call the meeting adjourned.

[The committee adjourned at 11:02 p.m.]