Title: **Monday, December 7, 1998** Freedom of Information Review committee

Date: 98/12/07

9:07 a.m.
[Mr. Friedel in the chair]

THE CHAIRMAN: I'll call the meeting to order. The first thing we have is the approval of the agenda. It looks very familiar because it really hasn't changed from the last few. The only difference is that if we do get finished with the issues, we have a first run at some recommendations.

Could we have someone move the approval? Gary?

MR. DICKSON: Well, I'm happy to do that with one addition. You'll remember I had mentioned last time that we've now got the two reports from the IPC, the privacy commissioner, and there are a couple of things coming out of there that impact what we're doing, so I'm hoping we can put that in. I don't know where you suggest we put it, Mr. Chairman.

THE CHAIRMAN: Well, if we can get through all the questions today, we could maybe slip into that briefly. Would that be okay with you?

MR. DICKSON: That's super. So I'll move the adoption of the agenda, then, with that addendum, or addition.

THE CHAIRMAN: Okay. All in favour?

HON. MEMBERS: Agreed.

THE CHAIRMAN: Approval of the minutes of the November 30 meeting. Do we have a mover? Moved by Ron. Questions? All in favour?

HON. MEMBERS: Agreed.

THE CHAIRMAN: Okay. That's carried.

We left off last time at question 41. I have to admit that my own memory of it, also looking at the minutes, doesn't indicate whether we had certainly dealt with the issue of the word "confidences" in 41(b) versus calling it in camera. It seems to me, strictly from memory, that in camera didn't quite cover the necessities of it. Could someone refresh my memory on that? Anybody from the technical team?

MR. DICKSON: Do we have *Hansard* yet from that meeting?

THE CHAIRMAN: I don't believe so. Do you have some Blues?

MS SHUMYLA: From the last meeting?

MR. DICKSON: Yes.

MRS. SHUMYLA: I've got a set of Blues right here.

THE CHAIRMAN: Okay. Can you find them in there? That would be the very last thing.

MR. ENNIS: Mr. Chairman, I believe the last word on that belonged to Sue, the wording in the act not being very accommodating to in camera but requiring some reference to decisions or information considered in confidence.

MS KESSLER: That's correct. Section 22, local public body confidences, was designed to mirror the wording of section 21, which is cabinet and Treasury Board confidences. So the word "confidences" is in both sections. But you'll find that in section 22 the term "in camera" is not used. It actually is less specific than that. It uses the term "authorizes the holding of that meeting in the absence of the public." So the term "in camera" is not used in the legislation.

THE CHAIRMAN: Okay. Does that translate, then, into suggesting that the word "confidences" would be the appropriate one or the longer definition that you just read?

MS KESSLER: Well, confidences is the -- what do you call this, Clark?

MR. DALTON: The side bar.

MS KESSLER: And it's likely appropriate, given the fact that it's the same side bar that's used for cabinet and Treasury Board confidences.

THE CHAIRMAN: Okay. So no one interpreting the recommendation would have problems understanding what we were saying if we left the word "confidences" in there?

MS KESSLER: I think we could word the recommendation to ensure that it says that it's in the side bar.

THE CHAIRMAN: Okay. With that understanding, then we would have dealt with 41.

MR. DICKSON: Agreed.

THE CHAIRMAN: There is one issue that ended up on a note of confusion, and it's mostly my fault. When we dealt with question 36(a) last week, we got very specific with the wording of it, and we inserted the words "course evaluation." As I was going through this, it occurred to me that we had dealt with the same issue twice. In clearing this up with some of the staff members, it turned out that we didn't deal with the issue twice. It was just the background information that I had given you at this meeting that turned it into that.

Question 36(a) -- and you have a supplementary sheet with your agenda -- explains that, if you look at the very bottom,

> question 36 is intended to deal with the performance appraisal . . . The question raises the issue of whether the references submitted by others in a performance evaluation should also be included in the exception to disclosure in section 18 and therefore would be kept confidential from the individual.

If you move up to the middle of that page, if you look at the committee's decision, we had specifically made reference to "as part of a proper course evaluation process carried out by the institution." Including the word "course" would therefore change the intent of what the question was, because it appears that question 36 dealt with performance, not the course.

MR. DICKSON: Mr. Chairman, did you say that there is an attached sheet to the package that went out with the December 7 agenda?

THE CHAIRMAN: Yes, with your agenda.

MS BARRETT: Segregate the first section that's stapled, and it'll be the first paper behind there. It starts with question 67 and then 36(a).

MR. DICKSON: The first attachment I've got is 14(a), and the one before that is page 6 of the rolling summary. But before the conclusions, the recommendations summary; right?

THE CHAIRMAN: Right. Just in front of that.

MR. DICKSON: Okay. Just a second. Oh, here we are. Questions 67 and 36(a). Okay. Got it.

THE CHAIRMAN: Now, the easy fix to that is to just delete the word "course" in the recommendation. We inserted that word here at the meeting. It's an evaluation that could go beyond that.

MR. CARDINAL: Is that "proper course evaluation"? Delete "course"?

THE CHAIRMAN: Yeah. It would still say, "As part of a proper evaluation process carried out by the institution." We narrowed it at our meeting for clarification, and in narrowing it, I think we missed the point of the question. I see some puzzled looks at the far end of the table.

MR. ENNIS: Mr. Chairman, is the thought here that information gained in the progress of a performance evaluation for an employee would be shielded by the effect of section 18? Is that where this heads to?

THE CHAIRMAN: That's the way I understand the background information that was part of this sheet that came out.

MR. ENNIS: And that consideration would apply to all public bodies in all instances?

THE CHAIRMAN: This was limited to postsecondary institutions as part of historical practice.

MR. ENNIS: Thank you.

MS KESSLER: Mr. Chairman, I think we may have to make it applicable to all public bodies. It's our understanding that this 360-degree performance appraisal process is something that's coming into a number of different kinds of bodies, so I would expect that if we're doing it for one, we may need to do it for others as well. So we may wish to draft it generically.

MS BARRETT: I have no objections. I wonder if you could describe other institutions that this 360-degree issue might come into.

MS KESSLER: A number of the larger municipalities are looking at it, and even a number of government departments are looking at it as well. It seems to be a new trend in performance evaluation.

THE CHAIRMAN: Sue, I didn't have a chance to talk to any of the staff members, but am I correct in assuming that if we took the word "course" out, it would be more accurately reflecting the question that was asked?

9:17

MS KESSLER: That's correct, and I think it would probably be generic enough to include any kind of public body as well.

THE CHAIRMAN: But we would have to remove from the recommendation the words "a post secondary education institution" and substitute "a public body."

MR. ENNIS: Mr. Chairman, this would be quite a fundamental change to the act from a technical perspective. Performance evaluation information is something that employees now do have access to. That's even been clarified in the one judicial review the office has gone through. I guess it's been an expectation, not a troublesome one, that employees have a chance to see the process under which they're evaluated and have a chance to perhaps challenge some of the inputs to that process through an access request under the freedom of information act.

THE CHAIRMAN: My understand was that the information was available to the employee but not in the form of being able to identify the specific comments made by individuals. Could somebody clarify that?

MS KESSLER: Yes. That's correct.

MR. WORK: Mr. Chairman, let me understand. The intent of this change is to not impede the ability of the employee who is being evaluated to know what is going on but to allow the public body the option of not disclosing that to the rest of the world? Is my understanding correct? So the employee would still be able to have access to the evaluative material; right? You're evaluating me; I still get to see why I'm doing a good or bad job, but the rest of the world doesn't get to see that?

MS KESSLER: No. This was intended not to relate to the appraisal done by an employer or the supervisor. It's to protect the information that's provided by peers and subordinates and clients. So it's other than the supervisor. The concern of postsecondary institutions and others that are doing 360-degree appraisals is that they may not get a valid or truthful commentary about an employee's performance. That's my understanding of what the postsecondaries were asking for. Is that correct, Peter?

MR. GILLIS: That's correct. If you had a 360-degree evaluation -- and I lived in that situation -- you did not know who made the comment. You knew what the comment was, but you did not know who made it.

MR. WORK: So this would perpetuate that practice. In a 360-degree evaluation you would get the comment, but you wouldn't know the source of it even if it was about you? So that runs counter to the definition of personal information; right?

MR. GILLIS: Yes.

MR. WORK: Someone else's opinion about you is your personal information.

MR. GILLIS: It still is. You just can't get it.

MR. WORK: Still is. You just can't get it. That's quite apt.

I don't think we buy this stuff that if it's accessible, you get less good information. I mean, you hear it all the time about references and any kind of critical comment like that, that if it's accessible, people will hold back and they'll be mealymouthed and you won't get the straight goods. I just don't buy it.

MR. DICKSON: Just on a public policy basis. I worry a lot about the potential prejudice in terms of incorrect information, in terms of unfair information. I understand the employer perspective, but you

know, we had some mention before of that case that went to judicial review, the correctional officer, I think, with the Justice department. I remember attending the judicial review application in front of a Queen's Bench judge and reading the material. You know, that sure brought home to me the fact that when you're dealing with somebody's career, the prejudice is just enormous and the potential in this kind of a 360-degree appraisal for things coming in from left field that can cripple somebody's professional and economic future.

I guess I'm a bit concerned because what we've talked about here is withholding evaluative opinion, not just the sources and identification of the author but the opinion itself. I'm very uncomfortable with that, Mr. Chairman. I understand what the universities are trying to do, but now that we're talking about expanding it even further, I'm not sure. Maybe a case can be made that they're qualitatively in a different situation than municipalities, but if we're going to expand this concept to a lot of other public bodies, then there could be just irreparable injury done to individual employees, and those are the people without a lot of bargaining position, bargaining power.

MR. STEVENS: Two points. My recollection of last week is that when we had a similar discussion on a different point, people were saying: well, the employment situation is different; it's a special relationship between the employer and employee, and it's necessary to have some special rules. It seems to me that when we have the situation before us this week, that particular distinction is not being used. That's just an observation.

Secondly, from my point of view this particular matter came before us because there was an area that had an historical practice that was using this. The first I've heard that this is an area where others would like to expand it was today at the table. From my own personal perspective I'd like to support an historical practice in the area that has been identified, and should this be something that people wish to advance at a later date by way of expanding the scope, so be it. But we don't have any information with respect to what's happening outside of the secondary institutions. So from my perspective, I'm supportive of this in the context of the institutions that are using it today.

MS BARRETT: Well, if I'm getting the drift of this right, it seems to me that allowing postsecondary education and other institutions to withhold from the public the written evaluations made by peers, clients, and so forth is absolutely appropriate, provided that it's not withheld from the individual who was being assessed. Am I on the right track? Gary is saying that if the information is available to the public, well, it could cause irreparable damage to your future. That's true, but my understanding -- I want to make sure I vote the right way on this -- is that that would be the case.

THE CHAIRMAN: Okay. Question 67 is the one that releases evaluative information about courses and teaching to other students. It's specifically for that purpose, to evaluate. With the one we're on, 36(a) -- I hope I'm right; I'm subject to being corrected here -- it is the appraisal, including the source. It's -- what's the wording we used? -- the ability to withhold individual references and evaluative opinion. The way it's worded in there, the reference, the content, and the individual who made it would be withheld not only from the public but also from the individual. Ron made the point that this is historical practice.

I did hear, though, in conversation a couple of minutes ago that in fact the content, in practice, was available to the individual. Did I misunderstand that, or is that what is happening?

MR. GILLIS: I can't speak for the universities, but in the 360-degree evaluations I was involved in, I always knew what the comment was. I just didn't know the source.

9:27

THE CHAIRMAN: As we're discussing it, that does seem more appropriate, that the employee should at least know what's being said about them, at least to the point of being able to refute or correct it if it was necessary. But without the information about the source or if the source wasn't protected, there probably is going to be a problem in getting comments that are candid and not necessarily softened or fuzzified to make sure that there were no repercussions.

MR. CARDINAL: Unless you protect the people doing the evaluations, you're not going to get proper evaluations. So we have to keep that in mind. It would be foolish to put stuff in there that may come back at you later on. It would be easier not to do it. I think that what was in place before is probably better. You have to have the institution be able to manage that properly.

MR. ENNIS: Mr. Chairman, I think one of the things that's happening here that the committee should be aware of is that section 18 is crafted now to relate to the employment decisions that are made by public bodies; that is, the hiring and recruiting decisions. Here the impact of this kind of a change would be to take section 18, which is a discretionary exception -- it doesn't have to be applied. Indeed many government departments give out reference information on hiring at this point. When an employee or a failed job applicant asks for that information, they get it. But the section right now is in a very tight context of a recruitment decision and someone being able to see the references used for that.

The submission that has come in from the postsecondary network, as one of the sources for this submission, takes that and extends it into the employment relationship so that on an ongoing basis there's this kind of shielding. Regardless of whether it's a good idea or not, it's important to know that there's a qualitative shift on the use of section 18 from the initial hiring decision to the ongoing employment relationship.

MR. WORK: That's a good point. That's a very good point.

THE CHAIRMAN: Would it be better to put it in a different section if this was to be adopted?

MR. ENNIS: Dealing specifically with performance evaluation, that might be a clearer approach. To do what those bodies are proposing would probably require an overhaul of the entire section, not just an application of a new case for it but an overhaul of the intention of that section.

MR. WORK: Mr. Chairman, that's a good point that John just made. I'll pose a question to the government's technical people. Why couldn't you just give some discretion to withhold names of referees and evaluators under somewhere in section 16, if you can't do that already under section 16?

MR. GILLIS: Section 16 is someone else asking about a third party. Here we have the applicant being the individual whom the information is about.

MR. WORK: Yeah. So I ask to see the evaluations of my performance, and under section 16 they give me the evaluations, but they sever the names of the evaluators.

THE CHAIRMAN: Okay. We could get hung up on where this thing would be included if it's adopted. Let's stay away from where

it might have to go. I think the point has been made that there may be some question as to the most appropriate place, but let's not deal with that right now, just for the sake of time, but possibly come back to it later.

Gary.

MR. DICKSON: Yeah. I was just going to say that we're doing Clark Dalton's job for him. Clark is going to have lots of fun drafting the sections and subsections. Surely all we have to do as a committee now is determine what the public policy issue is. It seems to me that what seems reasonable is that the identity of the informant or information donor should be subject to a discretionary exception, but the substantive evaluation should be accessible, at least to the individual involved. It seems to me that if we deal with it on that sort of a principle basis, somebody can then decide whether it belongs in a brand-new section or in an existing section. But isn't that sort of the public policy issue we're dealing with?

THE CHAIRMAN: I believe you're correct. I believe also that there's no question here that we're talking about the contents of an individual's performance rating. Their merits or opinion or whatever it would be as to an individual is not subject to public access. That's part of the privacy protection of an employee. What we're talking about is an evaluation on that employee, part of an ongoing process, you know, not related to the initial employment of that person but something along those lines for ongoing evaluation where the information of individuals that he or she is working with -- we've said peers, subordinates, and clients -- would be protected. I think it's part of this conversation. There seems to be a sense that the individual should be entitled to the content of the information but not to the identifiable content that would allow him to find out who made the comments, again, as part of a proper evaluation process carried out by the institution. I think we have to keep in mind that this isn't simply somebody writing a letter and saying that Joe Blow is a schmuck and that all of a sudden becomes confidential. If it's not part of the review process, it is not protected.

MS BARRETT: Well, I have a question for, I think, Sue but maybe for Frank. When Sue suggested that other public bodies may need to come under this provision because the 360-degree review process is becoming more common or it's a new trend or something, if we didn't incorporate, say, municipalities or other public bodies into this protective policy, I wonder: what would the governing rules be? Does anybody have a sense?

MR. GILLIS: Well, the governing rules would be that you would have to find whether another exception applied. It's highly dubious whether one section would, even taking Frank's section 16. It might, but it's dubious that it would. Section 18 can't be pushed that far, so you're sort of left with very little protection.

THE CHAIRMAN: Is there definitely a movement in other public bodies to go with this kind of an evaluation process?

MS KESSLER: Well, we're seeing it in the human resources field, where a lot of the calendars that are coming out are advertising training and 360-degree appraisal processes. I know that a number of government departments are looking at it right now. So I think it's one of those moving targets where if we make this kind of an amendment for one sector, then at some point in time we may get the request to do it for the others as well.

THE CHAIRMAN: Well, as long as the basis is sound. The problem I'm trying to avoid right now is taking a lot more time going through and actually wording a response to this question. Could I suggest that we prepare a recommendation that would state that it would be available to all public bodies, that we would make it clear that the content of the opinion or reference is not protected, that only the identity of the person making the comment or anything that could specifically identify that person within the comment would be protected? The rest of the recommendation, as it reads in the middle of that one page here, would remain the essence, with those clarifications.

9:37

MS BARRETT: I'm happy with that.

MR. STEVENS: I wouldn't mind some historical reasoning for it. I mean, this issue came up as a result of the consultation. It came up as a result of a specific area; i.e., the postsecondary institutions raising it in the context of historical practice. Once again, I go back to the point that until today when Sue made the comment, I don't know that this issue had ever been raised by anybody as being something that was necessary to be expanded. When we discussed it here at this table, whenever that was last week, I don't remember somebody suggesting it should be expanded. So all I'm saying is that if we're going to expand it, I think the factual groundwork ought to be on the table so we can consider that, rather than hearing simply that people who are advertising courses for hire are talking about a 360-degree appraisal process.

THE CHAIRMAN: So your suggestion is that we leave it with postsecondary institutions as it is in the . . .

MR. STEVENS: No. I'm happy with your recommendation. All I'm saying is bring some facts back to the table to tell us that it's more than postsecondary. I mean, right now it seems to me that Sue perhaps has heard this, but it hasn't been part of the process. All I'm saying is do a little more work so we have the comfort that maybe this is out there. No one else raised it with us; that's my point.

THE CHAIRMAN: Okay. If we proceed with this as I had suggested, we could then ask Sue or someone in the department to bring us some information that would suggest that it's reasonable to expand this beyond postsecondary institutions. With that in mind we could revisit whether or not it would be expanded, but I'm looking at the fact that we've spent just about three-quarters of an hour on this question again, and I'd hate to come back and argue the points that we've just gone through.

As the recommendations come back -- and I think you've seen a draft of the recommendations -- if the wording isn't appropriate, if we've missed the intent of the recommendation, then we would revisit that as well. That's why I'm asking for a little bit of licence to have this thing written to cover the intent of this discussion, and if we've missed that point, I assure you we'll debate it again.

MS BARRETT: Can I just ask something?

THE CHAIRMAN: Gary had his hand up.

MR. DICKSON: That's fine. We'll leave it on the basis you've suggested, Mr. Chairman.

MS BARRETT: In providing the data supporting the expansion to public sectors, it occurs to me that there are two areas where I think they're headed. That's in municipalities, in social services, and also in child welfare. You might want to check those, because I'm pretty sure they're going in that direction.

THE CHAIRMAN: And that's what we'll be getting, the logic for

expanding it beyond postsecondary institutions.

MS BARRETT: Yup.

MR. CARDINAL: You know, if you add the paragraph in section 18 in addition to what you're recommending, that covers everything. Maybe that's something that could be looked at.

THE CHAIRMAN: We could do, but we've agreed that we wouldn't get into the legalities of where and how.

Okay. Now that we're ready, on to our new business after three-quarters of an hour. I apologize. I should have picked that up last time.

We're on question 54.

> Should section 32 be clarified by substituting the phrase "by or under an Act" with "an enactment" to make it clear that authority for collection may be in an Act or regulation?

There is supplementary documentation.

MR. DICKSON: Mr. Chairman, can I ask that in the future all the pages be numbered consecutively? It could save us a lot of time. With the turnaround I'm concerned that we're dealing with things when we don't have the benefit of all the extra work that the research staff has put together.

THE CHAIRMAN: As far as numbering it goes, I see your point, Gary. You have absolutely all the information that the research staff has supplied. There has been absolutely no documentation given to myself or any other committee members that isn't available to everyone.

MR. DICKSON: I'm talking about pagination. My package seems to be in a different order than some other members'. I'm just saying that we could save a whole lot of time if we just numbered every page of every attachment.

THE CHAIRMAN: Oh, I see what you mean. Perhaps one page of that came out, the one we just dealt with.

MR. DICKSON: Right.

THE CHAIRMAN: The problem, Gary -- and hopefully if we get through this, this will be the last meeting that this will be somewhat disorganized. What we ended up doing was that as we went through the questions, the questions dealt with were deleted from the package up until about three meetings ago, and each time there was a new package sent out. I had a problem in that I had notes on them to the point where there was hardly a margin left in my original paper, so I asked Sue and Diane to use the existing papers exactly as they were, because I just couldn't possibly go through it and keep transferring my notes over. That's why you're getting the old package. Unfortunately that means, in a couple of cases, adding a page to it, and that's why the reference is missing. But I take the point; if there is substantial new documentation, it will be properly identified.

MR. DICKSON: Thank you.

THE CHAIRMAN: Having argued so successfully that this wasn't necessary, I'm having trouble finding my own. My argument wasn't quite as successful as I thought it might have been.

Okay. Question 54. Has everybody found it? The information there indicates that there are at least two dozen instances where the authority to collect information is in regulations as well as in the act. I believe in an earlier discussion at the meeting the point was made that historically the departments have assumed that the interpretation was to include regulation. Certainly, from the information we have here, it has been the practice. I can't see that it would be practical at this point to go back and change it. I think we've had all kinds of discussions about the purpose and the use of regulations. I imagine we're going to go through that again, but hopefully we can shorten it.

MR. DICKSON: After that introduction, Mr. Chairman, I was going to say that I've been persuaded by I think a very strong argument by the IPC that effectively says this: if we want to signal to Albertans that the collection of personal information about them is an extraordinary sort of thing, a special kind of power not to be abused, not to be done indiscriminately, not to be done without compelling reason, then the way we signal that to Albertans is to put the requirement in the statute. We've seen an impressive array of current regulations that allow the collection of personal information, and clearly it would make more work if you said that the authority for it had to be by way of statute. But it seems to me that's what we're moving to, and I think, frankly, that's what Albertans expect, that their information is respected and protected. Quite frankly, I'm going to suggest the evidence is that under regulation it isn't.

There's a woman who's writing a story for the *National Post* now who found that mothers giving up children for adoption have to give a host of very, very personal information about a range of things in their lifestyle. This woman discovered just by happenstance that that information is shared with four other government departments all without the knowledge of the individual. This is the sort of thing that can happen when you simply say that as long as the sharing is mandated and authorized by a reg somewhere, you can do it. Nobody just takes the time to scrutinize it.

In the analysis we've received, there's a comparison with other jurisdictions. The short answer to that is that in Canada and British Columbia and Ontario and Nova Scotia and Saskatchewan, in each one of those provinces, I think there is some scrutiny of regulations in a broader, more public way than we do in this province. We have an anomalous way of passing regulations. You know better than anybody, Mr. Chairman. Unless and until we change the way we deal with regulations, deal with them in a more open way with some all-party scrutiny, then it's not good enough just to try and do what happens in other provinces, do it all by way of regulations. We have had the argument before. I think the issue remains as important as when we discussed it before.

Those are the comments I wanted to make, Mr. Chairman.

9:47

MR. STEVENS: Gary is absolutely right. We did have this argument before, so I'm not going to say a whole lot. What I find interesting about it is that we have a situation here where the interpretation of the government and the Justice department is that the existing wording includes enactment, and the facts which come out in this brief that had been prepared for us after our first discussion on the point illustrates the extent to which regulation in fact is a tool to establish the collection of information. Clearly, subsequent to the act going into force, the commissioner had an opportunity to opine on this particular matter and came to a different conclusion. So we have a different interpretation, one by the commissioner and one by Justice, but the practice reflects what Justice has said from the beginning. My suspicion is that the commissioner's office has probably learned something as a result of this backgrounder as to the extent of the use of regulations, but perhaps I'm wrong in that regard.

In any event, I think what we're talking about here is a situation that, as far as government is concerned, has been in place since the

beginning of this act. Clearly it has been acted upon, so I will be supporting the proposed amendment.

MR. WORK: Well, as has been said, you've debated this before, and the commissioner's office has had its 2 cents' worth. But for the record, the commissioner would prefer to see it remain the case, as the commissioner's opinion has been, that public bodies may only collect personal information of Albertans if they're authorized to do so by an act. The commissioner is not of the view that this should be permitted by regulation.

One of the reasons is that in Alberta the regulation-making process is not subject to a great deal of scrutiny or publicity, and fair information practices would suggest that the Legislature authorize the collection of that kind of information. I don't see any basis in this background material upon which I would recommend to the commissioner that he change his view on the interpretation of that section.

MR. ENNIS: Mr. Chairman, I think it's important, as a member of the technical group -- and I'm not speaking for the commissioner's office at all -- that the proofs that are before us on this sheet on question 54 be really closely examined here. The examples of regulations that permit collection of information are regulations that are for the most part quite in step with the statute from which they come. The commissioner's interpretation is "by or under an Act," which is what the words say in the act. If a regulation is very much in step with its statute, there isn't a problem with the information to be collected being prescribed in the regulation.

I know some of the members of the committee here are very familiar with the Child Welfare Act on the issue of adoption. That's an act I've had occasion to work with, where it's inconceivable that you can do adoption work without collecting a whole lot of personal information that is laid out in the adoption regulation. So that's a case where the regulation is in concert with the statute. It complements the statute. The authority is really under the statute; the regulation prescribes what information is to be collected. I think that's the ideal situation.

The commissioner hasn't said that regulations are not the place to prescribe things, but the decisions of the commissioner have been to this point that the authority has to come from the statute. You couldn't have a case in which a regulation authorizes the collection of something that's in no way remotely connected to what's required for the performance of the statute. So I think that in all the proofs offered on the bottom of page 2 and the first half of page 3, in almost every case, the statute does align fairly well with the collection authority. So the commissioner would say that these regulations are fine for prescribing the method, but the authority still rests in the statute. I think that's a point that could become confused if people thought that somehow these regulations themselves contained the authority.

THE CHAIRMAN: Just on that point. Am I not correct in assuming that every regulation has to be specifically approved by a statute, that there has to be regulation-making authority in general and specific as to what that authority could point to?

MR. WORK: Yes.

THE CHAIRMAN: So virtually every regulation on the book now would follow that rule. I think the purpose of this clarification is because we know that there's a difference of opinion as to how this might want to be interpreted, and essentially it's between the IPC office preferring one method of interpretation, much tighter, and the department or the government preferring the interpretation which actually has been practised, according to the documentation here. Rather than just leave this, go on, and say that we agree to disagree, the purpose of this question here is to clarify which interpretation is the one that should be in the act so that whatever we're doing, we're going to read from the same script.

I have Mike and then Ron and then Diana and then Gary.

MR. CARDINAL: Just a point. As a former minister I know that you have to have regulations to operate efficiently and effectively. You can't have all legislation; it's impossible. The legislation is laid out, and your regulations operate the legislation and the policies. You have to have it set up that way, because anytime you want to make a change in the department, you can't take it through the process of the legislation. You'd have the system so tied up that you couldn't operate the government. It wouldn't be fair to the department to try to run a government if everything has to be legislated. It would be impossible.

MR. STEVENS: You put the question well, so you can take me off the list.

MS SALONEN: I think you've touched on what I wanted to say. The regulation has to be authorized in the statute. The clincher, I think, in 32(a) is "expressly authorized," and if you're looking just at the authority of the program is in the statute, then you're right away falling into 32(c), that your collection is going to be needed for your operating program that you have authorized in the statute. Where we're looking at all these regulations, they really spell out often, data element by data element, what you are authorized to collect and limits in fact what you can collect. Many of the regulations even prescribe the form that you use to collect it so that you can only use each of these little boxes, and certainly that seems to provide a lot more protection to the public than the public body deciding that apart from any kind of legislative review.

MR. DICKSON: I'm glad we've talked about the child welfare thing. My concern would be this: we hear talk about protection, but if I'm a birth mother giving up a child for adoption and information about the number of sexual partners I've had, a vast medical history of me, I may understand why that should be shared with Family and Social Services. I may not be altogether clear why that information then is going to be shopped around between the Department of Health and the Department of Education and other departments. So it seems to me that the strength of protection in terms of individual privacy tends to vary a little bit, I guess, in terms of your perspective.

The point is that in Alberta, at least when you debate a statute, it gives a legislator an opportunity to say: why do you need the information, and how is it going to be used, and what sorts of safeguards are going to be there? When it's done by way of regulation, most people don't even know what's going on.

The second point is this. Contrary to Mike Cardinal's suggestion that regulations are sort of tightly mandated, we saw a statute in the last session and I've discovered that we now have about three or four statutes at least that say that regulations can be made for any other purpose being thus served by the minister for implementation of the act. I mean, it's so broad that virtually nothing would not be covered. I'm talking about the Railway Act last time. It was incredibly broad. It didn't even tie into the purposes or objectives of the statute.

So it's an old issue, Mr. Chairman, and you may be getting tired of it, but I just want to make those observations, that there is wholly inadequate privacy protection now, and this isn't going to make it any better. I think it's going to make it worse

9:57

THE CHAIRMAN: Okay. I think we've gone around the table. Our points have all been remade. Could we have a motion?

MR. DICKSON: I'll move that

> section 32 be clarified so that personal information can be authorized under 32(a) only by an act of Alberta or Canada.

THE CHAIRMAN: Gary is making a motion that recommends the tighter definition only by an act. All in favour? Opposed? The motion is defeated. By that I would assume that the answer to question 54 becomes yes.

Question 60: "Should section 34 be amended to allow for a shorter time frame," in other words less than a year, "within which completed exams and term papers may be destroyed?"

In requesting background information on this -- and it's been some time since I read it, but I recall that it came from B.C. This suggests that a change like this is not necessary. I believe that in B.C., in order to get around it, if they need to dispose of these exams, they simply give them back to the students. Then there's no particular legislation to be changed. Is that correct, Sue?

MS KESSLER: That's correct.

THE CHAIRMAN: So our recommendation is: no change. Concurrence on that?

HON. MEMBERS: Agreed.

THE CHAIRMAN: Question 58:

> Should sections 33(1)(j) and 38(1)(v) be amended to prevent employment references from being collected in a staffing process between public bodies without the individual's consent?

I'm going to suggest that because of the expansion of the act, the use of the term "public bodies" is quite varied, and I am not persuaded that it would be appropriate for this kind of information to be moved between public bodies, particularly of the MASH sector. It's my understanding that within the provincial government, when you're employed, you're employed by the personnel administration office and that if you move between departments, you're essentially employed by the same employer but maybe on a specific basis by a different department, in which case it would seem appropriate that the personnel file could move with the individual. I'll open that for either clarification or debate.

MR. ENNIS: Mr. Chairman, you're right on that, and that's a very often misunderstood point. Under the Public Service Act when a person is hired into the public service, they're hired by a single employer, the government of Alberta. Under the staff relations legislation, however, each department is viewed as a separate employer, but that's only for grievance purposes and for adjudication. There is already provision in section 38 for the sharing of information for the managing of personnel, so a public body that's within the umbrella of the government of Alberta can disclose to another public body information such as the transfer of a personal file about an employee. The transfer of benefits information or whatever from one public body under the government of Alberta umbrella to another is easily done under the act, and the act contemplated that very well.

What's being sought here in some submissions is clarification around whether public bodies can do the same thing when they're not under that umbrella. For example, I believe AADAC might fall outside that umbrella. "Can AADAC and a government department exchange this information without the consent of the individual?" might be an issue. Where I understand the problem is most critical or seen to be most critical -- I'm not sure that it is -- is in the hospital sector, where regional health authorities might want to exchange information about potential job applicants, let's say a nurse working in one regional health authority. Someone might be looking for information about that individual from another regional health authority.

THE CHAIRMAN: It seems to me that because you have a completely separate board, it is a separate hiring authority, and while it might be convenient, we could be pushing the lines as to how far you go in sharing information without at least the informed consent of the individual.

MR. ENNIS: The difficulty, Mr. Chairman, is that someone could effectively be blackballed in an entire sector of activity -- their career could be ruined -- and they wouldn't even know it because there would be basically a network of information sharing about them that they have no knowledge of.

THE CHAIRMAN: Let's say an individual working for one RHA is asking for employment at another one. It's going to be obvious that that's where they worked. You go through the same employment application procedures. You ask for references, and if they're not prepared to give them, there's probably a hidden message in there anyway. I personally would feel more comfortable that we don't open the reins on this one too much.

MR. DICKSON: Stick with your instinct, Mr. Chairman. I agree, and I make another observation. I guess I have this concern that if you were to say to RHAs that it's okay to move this information around, you know, anywhere in the province about a health worker, how do you then say to those RHAs: but information you have about patients you can't share in the same way? I think we're talking about a culture. I'm worried about the impact on the culture that could develop around a much broader sharing of information about individuals, and that's a huge issue. I'd support your gut instinct, your reaction here, simply for that second reason I've mentioned as well as the first one.

MR. CARDINAL: You know, talking about the health authorities, they're legislated authorities, and that is why they're of course separate from the government. When you look at the others -- for example, in social services you have persons with disabilities -- those authorities report to the minister; the same with the children's services authorities. So there is a difference.

THE CHAIRMAN: Well, if they're employed by the government, we have discussed that that is covered.

MR. CARDINAL: Even if they are funded, though, by the government solely, like the health authorities, they are legislated, and they have a different authority. They do not report directly to the minister on a day-to-day basis. They're independent.

THE CHAIRMAN: Probably most of them are. I guess my reason for forming a distinction is that when we have a separate board that determines the operation -- and as a public body I think we all work under some form of legislation. That's just a matter of degree. But when you have a different board, your policies are different, and, you know, how and why information is used could vary. I think it would need to be a little tighter in terms of just allowing information to flow freely.

There is an alternative. All you do is ask the permission of the

employee, the same way as when you're hiring. So it's not as if there wasn't an alternate way of dealing with this. I think a lot of our decisions, you know, when you're dealing with historical practice and such -- we did deal with those issues where the alternatives were very narrow and maybe having to loosely interpret the act.

What's the feeling here?

MR. WORK: Mr. Chairman, just briefly. I think the commissioner's office agrees with what you've said about the fate of this proposal, and that would just be to stay with the status quo.

10:07

THE CHAIRMAN: The essence of my recommendation is: no change. There is already provision for this information to flow within the government.

Sue, were you going to say something?

MS KESSLER: I was just looking back at the source documents in terms of where this recommendation came from, and it appears that it was only brought up by one submission, submission 45. So we didn't have a huge number of people trying to make an amendment of this nature.

THE CHAIRMAN: So is there a consensus that there's no change?

HON. MEMBERS: Agreed.

THE CHAIRMAN: Question 104:

> Should section 38(1)(a) be amended to provide for the disclosure of personal information in accordance with section 16 even when a FOIP request has not been made?

I have in the documents -- I think it was two pages -- some recommendations, and this is the last of those. It is also without a page number, by the way, Gary, but that's my fault. This was the one where there are actually two recommendations. One is the situation I've been talking about for quite some time, off and on since we started this. It relates to adding a subsection "that a public body may disclose information about observable circumstances, situations, or occurrences" -- and there was a list of them given -- "provided that personal details related to these matters may otherwise be subject to protection of privacy rules." That one isn't very specific as to the question that's raised in our document, but it's the area where it fits.

The second part of that says:

> That Section 38(1)(a) be amended to provide for the disclosure of personal information, even when a written FOIP request has not been made, provided that the test requirements of Section 16 have been applied to determine that the disclosure is not an unreasonable invasion of personal privacy, and that policy should be established pertaining to documentation when personal information has been disclosed in this manner.

That second paragraph relates to our earlier discussion on the question, comments made by the IPC office and then, after some consideration, revised comments which suggested, in essence, what I think we've included in the second paragraph to make that part of it more workable, in their opinion. Probably our greater discussion is going to be on the first half of this.

MR. WORK: Mr. Chairman, first of all, I guess if the committee doesn't appreciate this, I'll just say that this is a fairly significant change in this kind of legislation. Alberta will be pretty unique in that regard. That's no reason not to go ahead with it, if it's well considered. I'm just pointing out that this is a significant departure.

I know that the commissioner himself, after speaking to a number of public bodies that are or will be subject to this legislation, has agreed that there is a need in some cases to allow public bodies more freedom to disclose personal information. An example is one that came up in a meeting that I know Mr. Clark had with the Weekly Newspapers Association in the schools. The Weekly Newspapers Association said: well, if we cover a school track meet and we ask the coach who that kid was who just won the 100-metre dash, can the coach tell us? I mean, that's not the kind of thing you want to have to send to your lawyer for an analysis. It seems fairly straightforward, presuming that this amendment would allow that schoolteacher or track coach to say: okay; is it an unreasonable invasion of this kid's privacy to tell the newspaper his name? The mental process probably takes a couple of seconds, and he says: "No. That was Susan Smith that won that race."

So the commissioner would go along with the second proposal on that sheet. I don't think the commissioner would be as happy with the first proposal, and the reason is simply this. The second proposal is palatable because it forces the public bodies to go through that section 16 process and to just give a moment's thought as to whether or not this is going to do any harm to someone's privacy. The list of things in the first part are no-brainers. I mean, if one of those classes pertain, then regardless of the circumstances you tell the information. That, to us, takes some discretion away from the public bodies. The first one is "enrolment in a class or school." Well, maybe the principal or the teacher should have the discretion to say, with respect to Susie Smith, that it would be an invasion of her privacy to say that she's enrolled in this class, because there are some family problems, something like that. So in summary, to make a long story short, the commissioner would prefer to see the second alternative, where they have to apply a section 16 test. The commissioner would not be in favour of a list of byes.

MR. DALTON: Just a clarification here. All we're doing is touching up section 38. Section 38 is only an enabling section, and it has no discretion in it at all. It just enables you to do it; it doesn't require you to do it.

MR. WORK: That's right.

MR. DALTON: So when you talk about "Maybe I don't want to give this out," that's entirely right. You don't have to. So let's not confuse that issue in here.

THE CHAIRMAN: The IPC office would really have loved what I originally suggested in 16(4), so this is a considerable modification. I think Sue and a couple of the staff members were having fits when I suggested that as well. That comes from my ignorance of what the effect of each of those was.

Going back to what I've said several times in terms of the feedback, unofficial probably more than anything, that I was getting on the street and was also getting from MLA colleagues and such, the essence of this first part probably is covered in the act as it reads now. It's just a matter of who is interpreting it. People who are used to working with the act probably could find the logic for suggesting that that information is reasonably readily available right now, but the rank and file of people on the street and, obviously, in classrooms, where the question came up more often than not, don't really understand the intricacies of how and why. I also believe that some people were maybe defining it fairly tightly simply to object to the fact that they were unwillingly coming under the act. So I wasn't being totally naive in that. I think if there is enough question about the interpretation, about what it means -- remember that this is discretionary, that even though it's in section 38, which already is discretionary, the section still only says "may" -- that would clarify

the intent of the workings of that part of the act.

It also says that it is restricted to the generalities of it, not the personal details behind it. It's simply the fact that you did attend or were part of a program, nothing more. We're getting all kinds of suggestions that schools are taking down graduation pictures and class pictures and that you can't get into a yearbook. You know, one parent refuses to sign a document because they're not sure how far the intent is supposed to go. I think we have to clarify that sort of thing. I know this may have a few growing pains, but my feeling is that people who are not lawyers and co-ordinators should have an act that they can interpret, at least in the area that they're mostly likely to be affected by.

10:17

MR. DICKSON: The difficulty I have with the proposal on the table is this. We're changing the statute to respond to what is often ill-informed concern. The reality is that there's more flexibility in the FOIP Act than many people realize. Now, I understand local bodies that haven't had any experience with it, and we've watched, you know, the hysteria and the confusion and the concern. I would sooner opt to give these people the benefit of some experience with the act, a look at the educational materials and programs that are currently being operated by Municipal Affairs and advanced ed and Sue Kessler's office, to assuage some of the concerns, to address some of those issues. My experience in talking to school principals and school administrators is that once they understand how much flexibility there in fact is in the act, a lot of those concerns evaporate.

So I guess what I'm saying is that rather than go and start amending the act before these people have any experience with it, it is better to focus on a better education program, and we can worry about tweaking the act in the next review process. If it turns out that there's a crisis of unforeseen dimensions, the Legislature can deal with it again short of the three-year review. I just think that on principle it's fundamentally wrong to respond to misinformation and use that as a basis to change a statute when in fact what we really ought to be doing is a better job communicating what the statute is about, the purpose for it, and the flexibility that exists in it.

MR. ENNIS: Mr. Chairman, on this issue, Frank alluded to a meeting that was held a couple of weeks back with the Alberta Weekly Newspapers Association. That meeting was also attended by the Alberta School Boards Association, the ATA, members of our office, representatives of Advanced Education, and we were talking specifically about the school sector. Within the public body sectors there is a unique problem, and the problem is that one of its responsibilities as it plays that sort of parental role for the students who are under its supervision is that it has to expose those students to the community in some respect. In some way it has to bring them out to the community. Certainly the weekly newspapers are one of the vehicles through which schools do that in terms of celebrating achievement and stories about things that go on in schools. It's quite an important issue.

Mr. Dickson mentioned that the act has some flexibility in it, and certainly it does. There are 28 cases in which you can disclose information under section 38, but effectively the act is a total gag order on a public body when it comes to talking about individuals that it works with. It can disclose information in specific cases to specific people, but in terms of generally talking to the public, a public body doesn't have the ability to talk to the public about the people that it serves. Now, no one would really want hospitals or other institutions doing that, but when it comes to schools, there seems to be an expectation that schools will talk to the public about the people they serve, about the people they work with as students.

I had talked earlier on about the importance of having an ability to indirectly collect information for the purposes of ceremonies and awards and celebrations of achievement, and it seems that if that ability is there, there has to be a bit of a small relief valve to let that information out through section 38, some way that a public body can talk about individuals without risking a breach of privacy complaint. I think the people we talked with two weeks ago, the Weekly Newspapers Association and the School Boards Association, are looking to the work of your committee to provide some small relief in that area so that they can easily do these things like awards ceremonies and sharing information with local newspapers, things that are not invasions of privacy.

MR. DICKSON: Well, why not, then, construct a very specific exception to address that issue of education? As I understand the proposal on the table, it's not limited to a particular sector. It looks like it would apply to all local public bodies. I haven't had the benefit, obviously, of these meetings where these people raised these concerns. Why not, then, just at least ensure that it's a constrained exception that doesn't open it up to all local bodies? Let's just focus on schools and make it as narrow as is possible to address legitimate concerns without allowing for more widespread leakage of personal information on an unauthorized basis.

THE CHAIRMAN: Just answering that specifically, I wrestled with it when I was putting it together. I do work -- not personally; I'm talking about as an MLA -- with an organization in Peace River that deals with developmentally handicapped adults, and there are teenagers too. They're just as proud of what they do within their organization as a school would be. I recently went to an awards ceremony for the organization that runs it. You know, where do you start drawing the line? This is not a school anymore. As a matter of fact, what they work on is finding some of these handicapped people work in the community, and every time they achieve that, they want to publicize it. I mean, this is a good-news story, that we haven't institutionalized them anymore, and these young people are very proud of that achievement. I'm not sure how we could fence this in so tightly that we wouldn't miss the point. I would sooner have it being more general, and then if there is a specific thing that must be excluded, we could deal with it that way, but I would hate to fence it in that tightly.

MR. WORK: I think the reason the commissioner is favourably disposed towards this one is the notion that if the disclosure is held to section 16 kinds of situations, the protection that already is built into the act, that someone somewhere has to make a decision, exercise some judgment on whether or not this is an unreasonable invasion of personal privacy, and that gets carried over to these kinds of more, dare I say, routine situations. That does two things. It forces someone to think about it, and it also gives the commissioner the ability to review the decision they make. Now, as Mr. Dalton said, it's discretionary anyway. Nonetheless, we would still like to have the decision-maker held up to the section 16 criteria in making this decision.

THE CHAIRMAN: So that's why it's under section 38 though?

MR. WORK: Yeah. But I'm presuming from the way you've worded your second part of the proposal -- I mean, it refers specifically to the test requirements of section 16 with respect to the amendment of section 38(1)(a).

THE CHAIRMAN: That's my intent, that you're not going to be able to give out information that would otherwise fail the test. This

is a specific list of things that we're going to tell you up front really aren't included in that kind of intended protection. I didn't put it in those words. I think John used a phrase that really is the essence of why a lot of people are concerned. The act is written almost like a gag order. There needs to be a relief valve. This is not what we're intending. We're not intending this to be a behind-bars kind of interpretation. We want this to be reasonable in the way that ordinary, day-to-day people would react when they're dealing with these situations. This is not intended to be an exhaustive list, but it definitely gives some examples. We've got a million school kids out there. Maybe not that many; I don't know. There are about three-quarters of a million or so more families. These people are not capable generally or collectively of going through the act and seeing what does and what doesn't work. I think we owe it to them to be a little bit clearer in how we intend this act. I think that putting something like this in would show that we're intending this to be a grassroots document, even though for the most part it isn't interpreted and administered by grassroots people.

Did I see a hand over here? If not, could we bring this thing to a head by a motion? Or is everybody sleeping?

10:27

MR. STEVENS: Well, we can, given the discussion, and we have your document that is on the table.

THE CHAIRMAN: This is the recommendation.

MR. STEVENS: Which is more expansive than the wording in question 104, but I think the nature of the discussion reflects your wording. So I can move that

> section 38(1) be amended as proposed in the document which the chair put before the committee as it relates to question 104.

THE CHAIRMAN: Is further discussion necessary?

MR. DICKSON: Well, I'll move a subamendment that it be limited to -- what do we call educational institutions in the act? Is it educational bodies?

MS KESSLER: Educational bodies.

MR. DICKSON: Educational bodies.

THE CHAIRMAN: I'll accept the amendment for the sake of putting it to a vote, but that does change the intent of the suggestion. But just for the sake of making sure it's the feeling of this committee, on Gary's amendment, all in favour? Opposed? The motion is defeated.

Okay. On the main question, all in favour? Opposed? The motion is carried.

Question 107:

> Should section 41 of the Act be amended to remove reference to section 16 of the legislation and to replace this with an invasion of personal privacy test that more clearly recognizes the needs of academic historical researchers and genealogists as well as the nature of the records in the Archives? The application of the test would be reviewable by the Information and Privacy Commissioner.

We've heard positions on both sides. This actually is part of a government submission. It reflects some inquiries by archivists and curators. The IPC response was recommending that we really didn't need another harms test, that it would add some confusion.

We did earlier discuss and I believe agree to a 30-year access rule for archives information. I think we also agreed that it should be made as easy as possible for researchers and genealogists to get information that is not an unreasonable invasion of personal privacy, but in this case I tend to agree with the IPC office that we really don't need another harms test. My question is: is it possible within the present guidelines of harms tests to accomplish that goal of making reasonable information available for research and archives management without a new test? I didn't warn anybody I was going to ask this question.

MR. DICKSON: Just while you're waiting for volunteers, I was going to make an observation. In terms of the submissions we didn't hear directly from archivists; right? I went through the submissions again. I don't remember a single submission from an organization representing archivists or archivists specifically arguing for this. What we had is a suggestion that's come forward from a government department. Community Development, I think, had received some input. I think it's very hard testing a professional or public concern without the benefit of receiving that sort of submission firsthand and directly. I think the three-year thing you alluded to earlier was an effort to try and address the legitimate interests of the archival community, but to me, to go with this sort of second almost parallel test just creates more problems than it solves. I'm flat-out opposed to it.

MR. ENNIS: Mr. Chairman, the previous discussion -- and I don't want to take everybody back there -- does have some impact on this question. The discussion about amending section 38, where you've already taken some decisions around routine disclosure by public bodies, will have some impact on the ability of archives to disclose information that they previously have felt reluctant to disclose, things like, for example, educational history. It's possible that if section 38 allows for that kind of a disclosure, enables that kind of a disclosure, then there isn't really much of an issue for the archivists to worry about under section 41.

THE CHAIRMAN: The other thing I want to toss in here as sort of an explanation to the department people who likely had a hand in making the government submission or the documents to it is that part of what we've been doing here is trying to get some clarity to make it easier for people to understand what the act is doing. That was a good part of the argument that I just made on the previous section. If we have more than one harms test, people are going to look at them, and then there's going to be confusion as to which applies to what. Lawyers probably wouldn't make that mistake, but I'm going to suggest that the average person on the street isn't going to be as informed as to what does what when you read the wording of a harms test . That's why I'm wondering if we could live with the existing provisions.

MR. WORK: The commissioner's office, Mr. Chairman, would agree with what you've just said.

MR. DALTON: Sir, it's a matter of principle. You have to meet one of four tests in that section. One of them is that it would not be an unreasonable invasion. The point there is that if it is an unreasonable invasion, then you shouldn't be in there. "Unreasonable invasion" is the term that is used. Frankly, I think with reasonable invasion and things of that nature, you're still allowed in. So that's the real test in that provision, and it seems to me that it's not unreasonable.

THE CHAIRMAN: What I'm suggesting, then, is that there would be no recommendation for a change, but I would like a footnote in there that gets the message that we want to make it as easy as possible for researchers and genealogists to obtain this information without unreasonable invasion. I'm not sure if that would translate into any action, but I think the message is there that we heard the

concern.

Your comments are correct, Gary, that we didn't receive a lot of concerns, but I recall getting teased a lot at the first review when virtually at every presentation there was somebody from one of the societies expressing some concern. Maybe that's a little bit why it sticks in my memory. We don't want to destroy their ability to operate, but within reasonable guidelines. Okay; we're agreed?

HON. MEMBERS: Agreed.

THE CHAIRMAN: My God, we're on the last page, offences and penalties. I had quite a bit of discussion with various people on these questions. I'm not going to read them all. There are five questions essentially dealing with the same issue. The first three talk about interpretation, and the question was raised by the IPC office: should the purpose and enforceability be dealt with? The second question was clarifying what the term "person" means, and the third question dealt with the possibility of one government department fining another government or a department. In going through this, the suggestion made to me, which I'm inclined to agree with in terms of the present interpretation, is that the purpose is fairly clear in terms of what the penalty is. The word "person": does it apply to a government body or a department or simply a person? I had even suggested at one time that it be expanded to make it quite clear. I am advised that the word "person" does now apply to a public body; it applies to an individual. I had asked: was it necessary to be broad enough that it covered any person or only persons who were employed by or contracted by or in the service of a public body? With the broadening of the interpretation, we had one recommendation that talked about people attempting to illicitly gain information; in other words, computer hackers and such. It suggests to me that this term may want to be broad enough to include anybody, inside or outside of government or public service, that breaks the rules of the act.

The third question, if a government department penalizes or fines another government department. It's simply money changing hands within the Provincial Treasurer's office, but in essence the embarrassment of being fined still serves the purpose, so I'm inclined to believe that there's a reason to have it there.

For the most part, I think we are dealing with public bodies and people employed by or contracted by government anyway, but without turning this into about a three-page section, my gut feeling is that it serves its purpose and should maybe stay where it's at. That's for the first three questions. I apologize for being so lengthy on that, but there was a lot of discussion that had gone on about this.

10:37

MR. DICKSON: I was tempted to say that we could offer to suspend the right to vote of anybody who offends any of these sections.

Seriously, my concern, frankly, was going to be expanding this. We've talked a little bit before -- and I couldn't find my notes -- about transborder shipment of personal information. You know, one of the things that those of us on the health information committee addressed was the seriousness of that. Now, that's not raised directly by the question, but I'm going to suggest to the committee that we consider making it an offence or a penalty to take personal information and move it, contrary to the provisions in the act, to sell or market that information without doing what the Ontario health information bill would require, which is some oversight, some review, and some protection to make sure that there were adequate privacy safeguards. So I'm talking about really a whole new offence.

THE CHAIRMAN: In the area of health information?

MR. DICKSON: No. I use that only for illustrative purposes. I'm talking about specifically identifying abuse of personal information by moving it outside the province. This gets back to the data matching and data sharing we talked about before, and there's a recommendation somewhere in here about that. I think there should be a penalty that specifically attaches to that obligation. The act is really silent now on that whole business of taking personal information and using it outside the province, yet as you see, insurance companies -- it's most manifest in the health area but also in other areas where we have a concentration of economic power and more and more information going to direct-sales outfits, whether they're headquartered in New Brunswick or in New Jersey. It seems to me that we should be alive to that and address it in some fashion, and this would be a really effective way, I think, of highlighting some of those concerns requiring that there are some reasonable safeguards in place.

THE CHAIRMAN: I have to admit I don't totally understand the point you're making. It struck me that these offences and penalties covered the infractions of virtually any part of this act. What you're asking for is to create a new offence.

MR. DICKSON: Yeah. I'm sort of doing this from the back end. Before you have a penalty, there has to be an offence. The offence we haven't really talked about, except there was some discussion about concerns around data matching, data sharing, and my recollection is that there was going to be some further discussion. I think that was a deferred item. Maybe somebody remembers better than I when we talked about that. I'm suggesting there should be an offence, a specific one, and then there'd be a penalty that would attach to it.

THE CHAIRMAN: We did deal with an issue on data matching, and that was my concern with it, that in this section you were creating a new offence. This is a penalty section. I now understand what you're getting at when you said through the back door and moving on to creating an offence and then having a provision in here for the penalty. I'm not sure I agree with you, but we'll open the discussion on it.

MR. DALTON: I'm trying to understand it, and I think I do. Maybe I can assist in this sense. If what you're talking about is a data collector here that somehow stores it off-site somewhere else, some other jurisdiction, then I think you're still covered by the act in any event. You're still, as a body before Alberta, facing the jurisdiction of this particular section. If what you're saying, though, is that you transfer this information to someone else, you're disclosing it then. If that's the case, then you can only disclose it in accordance with section 38 or any of the other research sections. If you do that wrongly, you're still, as a body corporate in Alberta, subject to the offence provision.

I'm having difficulty understanding transport of data flow here other than a disclosure situation or your own public body and you're manipulating it in Ontario for example. We would have a great deal of difficulty, I think, dealing with that latter case, because what law applies? Ontario's or Alberta's? Unfortunately, we can't go beyond our own borders, but we may have some ability to go after the body that's in here. Remember, we're just talking about public bodies here, so they've got to be here anyway. So I'm not sure there's a need for that, because I think it already exists in the sections we have.

MR. DICKSON: Well, what stops a public body from contracting with an outfit in Phoenix to take personal records from one of the

public bodies to do some matching or to store the information, for example?

MR. DALTON: It's the use and disclosure rules that stop them from doing that. Assuming that you're within your use or disclosure rules in the contracting out, there's not a problem there, but they're still subject to the act in terms of what further they do in use and disclosure.

MR. DICKSON: What I'm suggesting is that the use and disclosure rules may not be strict enough for me, may not provide adequate protection.

MR. DALTON: Well, they do say this: you can only use it for the purpose for which you collected it and for no other purpose, except in the following circumstances. Similarly, disclosure sets out in 28 sections the 28 times that you can disclose this information. So even within the province everybody is governed by those rules, and if you breach that, you've breached the act. Similarly, if you extend it and you're still within your use box or still within your disclosure box and you allow something further to happen as a result of that, then it strikes me that as a public body you're still subject to this offence section.

10:47

MR. ENNIS: Mr. Chairman, just in terms of how this works in practice. We've seen a few cases come through the office, and perhaps I can share those with the committee in terms of how they worked out.

Now, one case I remember well was a consultation we were invited into by the Department of Family and Social Services. They had the difficulty, having very large processing requirements, of selecting a processing centre in Canada. There are about six or seven major data-processing centres, two of which have presence in Calgary. I believe the bulk of them are in Montreal, and there is one in Ottawa. The commissioner looked at a very rough proposal as to how they would handle the tendering process on that kind of a contract, who they would invite into the tendering. A consideration the commissioner put in front of the department at that point was not just where is the processing done, but where are the backup sites. For some of those processors the backup sites were in Texas, and it was believed that one had a backup site in Central America. So the department was exploring that, and the commissioner asked them to make their decision based on keeping the backup site within a Canadian jurisdiction somewhere, one that had somewhat equivalent privacy protection so that there would be the oversight of a commissioner somewhere in that process.

That's a very rough rule to work with, but that was the guidance given to the Department of Family and Social Services, with the notion of trying to keep the information within a Canadian jurisdiction so that Canadian laws could operate and keeping it out of the midst, if I can put it that way, of foreign law enforcement and investigative bodies. That was for income support information for Family and Social Services.

THE CHAIRMAN: Now, the essence of all of this would still come under the presumption that if the public body chose to deal with a contractor that either divulged or broke the act in some way, the public body here in Alberta is the one we deal with. We penalize them for, you know, in effect using bad judgment. Anything the subcontractor does, the public body is responsible for if it comes to an offence or a penalty. Am I correct in that?

MR. DALTON: That's correct.

THE CHAIRMAN: And in your case was this a recommendation or was it an order?

MR. WORK: Mr. Chairman, if I can interrupt John -- well, I just did; didn't I? Sorry.

THE CHAIRMAN: Now you've got my permission.

MR. WORK: Well, at least I got some sanction. Thanks.

The concern was, for example, that if this data was sent to, say, a state in the States, Oklahoma just at random, to be processed and the contracting company went into receivership or went bankrupt down there, potentially the creditors in the States might seize the computers. They might seize the tapes, they might seize the raw data, they might seize the CD-ROMs, whatever contained Albertans' information. So, as John said, it came up with Family and Social Services. The commissioner also raised it with the chief information officer for the government of Alberta, and basically the message was: look; if government departments will keep their data processing as much as possible in Canada, where bankruptcy and insolvency is a federal jurisdiction, there is some uniformity and some predictability and some ability for a public body to intervene and get the data back. I think the chief information officer recently replied to that and said that they were looking at making that a government policy with respect to the processing of personal information, that it stay either within Canada or within a jurisdiction where bankruptcy and insolvency laws offer some ability to retrieve this stuff. I'm sorry I'm not more positive about what the chief information officer did say about that, but that was the problem we had with the stuff going abroad.

I'll just remind you that section 36 does impose something of a requirement on the heads of public bodies to protect personal information. There's some question as to how far that obligation extends.

MS BARRETT: Well, I think we should codify the commissioner's ruling, whether it was a ruling or a suggestion, with respect to the story related to Family and Social Services. That would be a very intelligent move to make. I'm not sure if this is the section or area that we should be doing it in. I think maybe it should be reserved for a separate discussion. If public organizations are collecting data and having that stuff either analyzed or anyway resident in another country without a backup being here, clearly that exposes a lot of people to risk of inadvertent violation of the act in a jurisdiction where we have absolutely no clout.

THE CHAIRMAN: You know, as a policy this is good. Assuming, from memory, that you were quoting reasonably accurately -- Frank, you used the words "as much as possible." So obviously there might be some exceptions where this just doesn't simply work.

In terms of where it should go, I think this is an offences and penalties clause. What we would be doing is either creating a new requirement or a new offence. I think it's something we might want to think about. I'm not persuaded right now that we can actually put it in or should put it in this act unless we know more about the specifics and how it's potentially manageable. That's all.

MS BARRETT: Well, on that note could we ask the IPC office and maybe Labour to submit any suggestions they might have?

THE CHAIRMAN: Yeah, to see if this in fact is a potential problem.

MS BARRETT: Yeah.

THE CHAIRMAN: Okay.

MR. STEVENS: Well, I was just going to say that it seems to me that we have perhaps some knowledge at the table as to what the government's policy is relative to this type of issue. We have an example that has been in front of the commissioner, and I think that if we do some inquiry, then we'll have some sense of the way things work today within government. But it also seems to me that clearly this applies to postsecondary and the municipalities. I mean, there are groups that are not at this table, if I can put it that way, who would have potentially a similar problem. So when you're talking policy, it extends beyond the government of Alberta.

THE CHAIRMAN: Okay. Because we're six minutes away from adjournment time and I actually see the light at the end of the tunnel becoming much bigger, can we agree for now that with 84, 85, and 86 there are no recommended changes, subject to some discussion on feedback from the previous discussion? Is that possible?

HON. MEMBERS: Agreed.

THE CHAIRMAN: Question 87. There was the suggestion that the fine of $10,000 might be inadequate. I think, also in line with the previous discussion as to whom it effects, the $10,000 seems to me to be quite adequate for an average individual. If you're not concerned about $10,000, then increasing it significantly isn't going to matter. If you're fining the government and the money simply transfers from one department to another, it doesn't matter if it's $10,000 or $100,000 because the embarrassment is there already. My suggestion is that we don't change the fines, that $10,000 seems to be a fair average with other provinces. As a matter of fact, it looks as if it's in the higher end of average.

MR. GILLIS: I just wanted to raise -- and it's generally on offences and penalties -- the new federal act that's coming through that deals with (e): destroy records. Just so you're aware of it, they have added in the federal legislation: destroy or tamper with records. Just so you're aware that's a possible addition. That comes from the Somalia difficulties, where public servants were actually taking records that had been used for decision-making and changing them and saying: this is now the record. So I just bring that up as something you might want to consider.

THE CHAIRMAN: Oh, relative to our previous discussion. Okay. And this is something we might want to bring back. If there is a potential problem, we should have a look at it.

Okay. Getting back to the $10,000, do you agree that it can stay where it's at?

HON. MEMBERS: Agreed.

10:57

THE CHAIRMAN: Question 88:

> Section 77 currently protects an employee from adverse employment action for disclosing information in good faith to the Commissioner, but does not protect the employee from adverse employment action if that employee properly discloses information to an applicant. Should consideration be given to imposing a penalty on public bodies which discriminate against an employee who appropriately provides access to information to an applicant, as recommended by the Commissioner?

In other words, not that the commissioner is recommending what he's giving out but that this is part of the commissioner's recommendation.

I think it's an appropriate suggestion. I was looking at it and am going to suggest that consideration be given to amending section 77(5)(b) by inserting the words "or duty" after the word "right." Where it says "adverse employment action" cannot be taken "because the employee, acting in good faith," it would read "has exercised or may exercise a right or duty under this section." It would expand it more along the lines of what the commissioner was asking. If the employee is required to give out that information because the act says so, they shouldn't be sanctioned. Would that to some extent cover the concerns of the IPC office?

MR. DALTON: No, I don't think so, but I know what you want. It would say: a duty under this section. There is no duty under this section; it's actually just a right. It's a right to whistle-blow in a sense. There's no particular duty in this section, but you can change it. It's not enough just to put in that particular word, I wouldn't think, Mr. Chairman, but we understand the import of what you're trying to do.

MR. DICKSON: The other thing I was going to say -- you also have discretionary exceptions. Is there a duty there if information is shared? I was just going to make the observation that a lot of the requests I've made to the Treasury Department -- they have an interesting thing there. I don't know whether it's all public bodies. They put a stamp on it. If it's an opposition MLA requesting information, it's sort of highlighted right on the transmittal form, and I guess I have a real concern that employees who in good faith share information that they understand is responsive to the request -- I'd hate to see those people having compromised their job for doing that. I think this is an important suggestion and one I'd be keen on seeing put in, but I think that what you've suggested does not go far enough, Mr. Chairman.

THE CHAIRMAN: Well, my intent wasn't to open an entirely new whistle-blower act but simply to say that an employee acting in good faith interpreting this act should not be sanctioned.

MR. DALTON: That could be done.

THE CHAIRMAN: Maybe my suggestion as to what is done might not be appropriate, but could we have some agreement that we would expand this?

HON. MEMBERS: Agreed.

THE CHAIRMAN: Guess where we're at?

MR. STEVENS: Well, we're at the end of this page, but I think we still have one question that we haven't dealt with before. To my knowledge we have not addressed the question at the top of page 2. I think it would be 14(b).

THE CHAIRMAN: We had actually discussed it and come to an agreement and then backed off from it. We had originally agreed that EPCOR and ENMAX would be exempted or excluded from the act and then rethought that and said that we would review it further.

MR. STEVENS: I think we got some additional information. That's what we did. In any event, I don't think at this point in time we have decided the issue. For the record, I remain of the view that the playing field should be level for EPCOR and ENMAX and a specific exemption be provided to those two electrical utilities.

THE CHAIRMAN: There was also some discussion that because there was an extensive list of possible municipal corporations, if you want to call them that, that would be included. The suggestion was

that it would be specific. Otherwise, this could be a never-ending list if municipalities chose to use an exemption criteria rather than selecting entities that should be specifically excluded.

MR. DICKSON: I'm not persuaded that they should be fully exempted. If you look at the second bullet from the bottom, to me that makes the case. Medicine Hat, a municipally owned utility, is planning on using the multiple exceptions, the mandatory and discretionary exceptions that already exist in the act. Every time we take something and say that this is going to operate completely outside the act, just exempt the whole thing, I think what we do, frankly, is undermine the FOIP regime in the province. I think we have generous, expansive, comprehensive exceptions where legitimate business interests -- I think it's not acceptable, Mr. Chairman, that they simply be allowed to step outside the thing altogether. So I'm opposed to Ron's suggestion.

THE CHAIRMAN: But that was specifically your first comment. I believe the suggestion was that it not be expanded to municipal corporations, or whatever the proper term might be, but to limit it specifically to these two.

MR. STEVENS: I'd like to move that

> the electrical utilities, specifically EPCOR and ENMAX, be excluded from the FOIP act.

THE CHAIRMAN: Discussion? All in favour? Opposed? That's carried.

Okay. Now we're at the end. We're actually five minutes past adjournment time, so what I'm going to suggest -- you had a point, Gary.

MR. DICKSON: Yeah.

THE CHAIRMAN: We'll deal with that at the beginning of the next meeting. Diane could make a note of it and put in on the agenda.

At the next meeting we will be well into the recommendation stage. I'm also going to ask, with some gleam of hope in my eye that maybe sometime this week we'll adjourn session -- would everybody agree, if we should be so fortunate, that we could expand our meeting time from two hours to something a bit longer, that might get us advanced in this process?

MR. CARDINAL: Actually, Gary can decide that. It's up to him.

MR. DICKSON: Well, we'd better be looking at the two-hour meeting time. When's our next meeting, Mr. Chairman?

THE CHAIRMAN: It's next Monday. So that's just some warning. I guess if you guys on the opposition side want to keep us up till next Monday, we'll have a two-hour meeting.

MR. DICKSON: All you've got to do is park Bill 21, Mr. Chairman, and we'll go home tonight.

AN HON. MEMBER: I move for adjournment.

THE CHAIRMAN: The meeting is adjourned.

[The committee adjourned at 11:06 a.m.]