Legislative Assembly of Alberta

The 27th Legislature
Third Session

Standing Committee on Health

Freedom of Information and Protection of Privacy Act Review

Wednesday, October 13, 2010
9:30 a.m.

Transcript No. 27-3-12

Legislative Assembly of Alberta
The 27th Legislature
Third Session

Standing Committee on Health

McFarland, Barry, Little Bow (PC), Chair
Pastoor, Bridget Brennan, Lethbridge-East (AL), Deputy Chair

Bhardwaj, Naresh, Edmonton-Ellerslie (PC)*
Blakeman, Laurie, Edmonton-Centre (AL)**
Forsyth, Heather, Calgary-Fish Creek (WA)
Groeneveld, George, Highwood (PC)
Horne, Fred, Edmonton-Rutherford (PC)
Lindsay, Fred, Stony Plain (PC)
Notley, Rachel, Edmonton-Strathcona (ND)
Olson, Verlyn, QC, Wetaskiwin-Camrose (PC)
Quest, Dave, Strathcona (PC)
Sherman, Dr. Raj, Edmonton-Meadowlark (PC)
Taft, Dr. Kevin, Edmonton-Riverview (AL)
Vandermeer, Tony, Edmonton-Beverly-Clareview (PC)

* substitution for Fred Horne
** substitution for Kevin Taft

Department of Service Alberta Participants

Cheryl Arseneau	Director, Policy and Governance
Di Nugent	Director, Legislative and FOIP Services

Office of the Information and Privacy Commissioner Participant

Marylin Mun	Assistant Commissioner

Support Staff

W.J. David McNeil	Clerk
Louise J. Kamuchik	Clerk Assistant/Director of House Services
Micheline S. Gravel	Clerk of *Journals*/Table Research
Robert H. Reynolds, QC	Law Clerk/Director of Interparliamentary Relations
Shannon Dean	Senior Parliamentary Counsel/Clerk of Committees
Corinne Dacyshyn	Committee Clerk
Jody Rempel	Committee Clerk
Karen Sawchuk	Committee Clerk
Rhonda Sorensen	Manager of Corporate Communications and Broadcast Services
Melanie Friesacher	Communications Consultant
Tracey Sales	Communications Consultant
Philip Massolin	Committee Research Co-ordinator
Stephanie LeBlanc	Legal Research Officer
Diana Staley	Research Officer
Rachel Stein	Research Officer
Liz Sim	Managing Editor of *Alberta Hansard*

Transcript produced by *Alberta Hansard*

9:30 a.m. Wednesday, October 13, 2010

[Mr. McFarland in the chair]

The Chair: Good morning, everyone. I'd like to call the meeting to order. As we've done in the past, we're going to introduce ourselves for the record. Would those members substituting for any of the current committee members please indicate for the record today who you are and who you're substituting for?

Welcome to all our helpful staff and department people as well. Good morning to *Hansard*, and thanks for being here.

Let's start with our committee clerk.

Mrs. Sawchuk: Karen Sawchuk, committee clerk.

Mr. Quest: Good morning. Dave Quest, MLA, Strathcona.

Mr. Olson: Good morning. Verlyn Olson, Wetaskiwin-Camrose.

Dr. Massolin: Good morning. Philip Massolin, committee research co-ordinator, Legislative Assembly Office.

Ms LeBlanc: Stephanie Leblanc, legal research officer with the Legislative Assembly Office.

Ms Nugent: Good morning. Di Nugent, Service Alberta.

Ms Arseneau: Cheryl Arseneau, Service Alberta.

Ms Mun: Good morning. Marylin Mun, assistant commissioner with the office of the Information and Privacy Commissioner.

Ms Blakeman: Good morning, everyone. My name is Laurie Blakeman, and I'd like to welcome each and every one of you to my fabulous constituency of Edmonton-Centre.

Ms Notley: Good morning. Rachel Notley, Edmonton-Strathcona. Unfortunately for us, we're not there right now.

Mr. Vandermeer: Morning. Tony Vandermeer, Edmonton-Beverly-Clareview.

Mr. Bhardwaj: Good morning. Naresh Bhardwaj, MLA, Edmonton-Ellerslie, substituting today for Fred Horne.

Mr. Groeneveld: Good morning. George Groeneveld, Highwood.

Mr. Lindsay: Good morning. Fred Lindsay, Stony Plain.

The Chair: Good morning. I'm Barry McFarland from the fabulous constituency of Little Bow.

I want to make special note that our Member for Highwood and myself have hopefully got some family providing food for the masses on a nice, sunny day while the combines, hopefully, are running.

Mr. Groeneveld: Right.

Ms Blakeman: I'm sorry. I neglected to say that I'm substituting in for Dr. Taft for the duration of the examination of the FOIP Act review. Thank you.

The Chair: Thank you.

I would like to note that our deputy chair, Bridget Pastoor from Lethbridge-East, is unable to be with us today. She's had a personal thing happen to her assistant, and she's got some personal matters to take care of. Our thoughts are with Bridget and her assistant.

We will be joined later by Mrs. Forsyth from Calgary. She's going to be on teleconference, but at this point I don't believe she's hooked up yet. I'm sure *Hansard* is going to give us a thumbs up when she's with us.

With that, approval of the agenda that we have today. Are there any items that anyone would like to add under other business? Yes?

Ms Blakeman: I have sought a couple of times to have a short discussion about the effect of putting act reviews through the standing policy committee process. If we could have a short discussion about that at that point in the agenda, I'd appreciate it.

The Chair: Okay. Could we add that on, committee clerk?

Mrs. Sawchuk: Yes.

The Chair: Then could I have a motion that the agenda for October 13 of the Standing Committee on Health, subject to . . .

Ms Notley: So moved.

The Chair: Ms Notley has moved it. All in favour? Carried.

I'm just going to make a few comments here. We're continuing this review, that started on Wednesday, September 29, on the issues that were identified by the committee during the submissions and oral presentations processes and the resulting proposed recommendations. Members should have a copy of the summary of those issues, the compilation document with yellow highlighting on the cover page. If you don't have one of these updated documents, would you please notify the committee clerk now, and she'll circulate it.

If you've had a chance to review the document, you'll notice that the decisions made by the committee have been identified as carried, defeated, or withdrawn. The issues not yet considered or deferred have been highlighted in yellow. Please note that a correction was made to the motion by Ms Notley under issue 14 at the top of page 4. The decision should read "defeated." The corrected document was posted at 3 p.m. yesterday.

I'd like to suggest that we continue with our review now, starting with issue 5 on page 2 of the compilation document, and I would with your concurrence like to call on Ms Notley to bring forward each of her recommendations. It would be very expedient if somebody could move the motion on these yellow highlighted documents, and then we can get into the discussion.

With that, unless there are any questions, I'd like to turn the floor over to Ms Notley.

Ms Notley: Thank you. Well, in this area of section 5 there are three recommendations that deal generally with an issue that we've grappled with in a bunch of different sections throughout this. Having taken the time now to go over the submissions that identified these issues as well as some of the history with respect to it and how it's been addressed in different jurisdictions as well as some of the information that Ms Mun had provided to us when we talked about it sort of tangentially at previous meetings, I would like to propose that I think there may be a way to deal with all three of them in one fell swoop by adjusting the approach one would take to it.

Let me just give you a bit of background to that. The concern is, of course, that when there are service providers, particularly for-

profit service providers, that are providing government service in a variety of different ways under a variety of different arrangements, those records inadvertently end up getting shut behind a closed door because they are either not considered a public body or, alternatively, because the public body is not deemed to have care and control of those records. Now, Ms Mun had previously said that, you know, this really isn't a problem because we typically say that any sort of service provider who would fit the broader definition of employee under the act of the government would; their documents are deemed to be in the care and control of the public body, which is fine.

As I was sort of looking through how I would deal with these three recommendations, our researcher in our office had a chance to have a conversation with Ms Mun and to find the source of that guarantee that those documents are deemed to be under the care and control of the public body. Ultimately, Ms Mun was able to provide us with the 2002 order of the Information and Privacy Commissioner. Meanwhile, because one of the presenters who had raised this issue was from B.C. and they referenced the fact that this issue has been addressed in B.C., we then went and looked at what the Legislative Review Committee in B.C. had said and done about this issue. In fact, as it turns out, in 2004 and then again just about two months ago in B.C. the Legislative Review Committee again made a recommendation asking that the Legislature there clarify the fact that records of a service provider are under the care and control of the public body, which would then ensure that they're covered by the act.

I then looked at: well, should we look at that kind of recommendation? I read through the decision of the office of the Privacy Commissioner, and although the current law of this in the province as per this one decision is that those records are deemed to be in the care and control of the public body, there are a whole slew of criteria that are applied. For instance, one of the criteria outlined in the decision is: in the absence of a contractual decision to not make it. It appeared to me from this decision that if a service provider signed a contract with the government that said, "Our documents will not be deemed to be under the care and control of the public body and instead will be under our own care and control," then they would be able to contract out of the obligation of the Freedom of Information and Protection of Privacy Act, which I would suggest would not be a good thing and doesn't appear to have been the intention of the drafters.

9:40

All that is to say, if that makes sense, that what I would suggest, then, that what might be the best way to deal with it, is that we adopt a recommendation which is not dissimilar from the one that was adopted by the British Columbia legislative committee to simply amend the act to make it clear that records created by or in the custody of a service provider under contract to a public body are under the control of the public body on whose behalf the contractor provides services, which is basically a clarification of a decision already rendered by the Privacy Commissioner here in Alberta.

The other reason for doing it is because even though that's the law here as per the Privacy Commissioner, in B.C. what's happened is that the courts have stepped in and have actually rendered an opposite decision. So we now have a higher level of law, obviously, out of B.C., but it still has merit, as some of the lawyers in the room would know, that actually contradicts the status that the Privacy Commissioner has put in place here. What's happening now is that public bodies are essentially in a position where if they want to, they can create these faux contracts and faux corporations and then put all their documents behind that faux curtain. That's why the Legislature in B.C. had made this recommendation. They had that decision just come down quite recently, and they said that that was against what they were trying to do. Hence, my recommendation. Does that make sense?

Ms Blakeman: Are you putting a motion on the floor?

Ms Notley: Yes. I would therefore move that in order to deal with recommendations 7, 8, and 15 together, this committee recommend that the act be amended to clarify that records created by or in the custody of a service provider under contract to a public body are under the control of the public body on whose behalf the contractor provides services.

The Chair: Ms Notley, would you have a copy of that for the record, please?

Ms Blakeman: I'm wondering how her proposal differs from one moved earlier that talked about: any record created on behalf of a public body was deemed to be under the care and control of a public body? You're coming at it from the point of view of the service provider.

The Chair: While we're getting this thing circulated, would it be okay with the committee if we got the representative from the office of the Information and Privacy Commissioner to make a comment on Ms Notley's comments? Please, Ms Mun.

Ms Mun: A couple of comments. First of all, I know the concern is that a service provider might negotiate with a public body and contract out of the FOIP Act. I want to make it clear that the commissioner has issued a number of decisions saying that you cannot contract out of the legislation. The law is the law. Just to throw that out.

The other thing is that if you are going to be including a provision in the legislation that further clarifies and makes it concrete that a public body is ultimately obligated for the actions of their employees, I would suggest that the committee consider the terminology of employees in its broadest sense as opposed to limiting just to service providers because it would then seem to suggest that service providers is a subset of employees. That's just something for the committee to consider as well.

The commissioner has issued the order that Ms Notley referred to. It's Order 2002-006. In that situation there was a third party who fell under the definition of an employee of a public body, and in that case the adjudicator ordered the public to retrieve the record from that third party because that third party was an employee of the public body.

The Chair: Could I just get a clarification from you, Ms Mun, before Ms Blakeman? I'll read the motion that Ms Notley has put forward, bearing in mind that you have tried to differentiate between service provider and employee. It may or may not require a change. I'm not sure. Here's the recommendation in terms of the motion: amend section 3 to clarify that records created by or in the custody of a service provider under contract to a public body are under the control of the public body on whose behalf the contractor provides services. My question, before Ms Blakeman, to Ms Mun is: are you suggesting that "service provider" should be changed to "employee"?

Ms Mun: Yes.

The Chair: Okay. With that comment, Ms Blakeman.

Ms Blakeman: We keep coming back to this same problem. This is a different take on the same one that I presented in a motion. It was defeated, but it appears under issue 1, the motion that was to include a section along the lines of what was in the PIPA report, that a public body is responsible for any records that are created by anyone doing business on their behalf, that it's their responsibility. I'm beginning to think that we need some sort of a recommendation that goes forward, that says that you need to clarify this in some way, shape, or form.

There obviously are rulings from the commissioner. There's what's in the annotated. There's what's in the regs, because I noticed that section 2 of the regs, criteria to be used for designating public bodies, does cover some of the issues that were raised under some of those recommendations. Clearly, people are still confused about it out there, to the point where this keeps coming back in front of us. I mean, this is now the argument: because people are confused, do we need to change the act, or do we just need to insist that they follow the act and the rulings that are there?

My concern about this is that we be careful who we capture because there are always unintended consequences here. For example, recommendation 8 talks about any organization or agency that receives significant amounts of public money. Two problems there. One is: what's significant? And two is that it would capture anyone, any agency that received a grant from the government, which is truly a huge, unintended consequence that we would not want to be involved in, I would argue.

We've come at this a couple of different ways. I share the concern of the representative from the Privacy Commissioner's office that in adding additional language, it gives it an importance that we perhaps didn't intend or starts to create a hierarchy of definitions of users or a hierarchy of definitions of employees. I'm just interested in what the rest of the committee feels about whether we need to try and do something to deal with this or whether we just insist that people follow the rules and the determinations of the commissioner that are out there, that service providers, contractors are covered under the various sections we've discussed and that those records are to be protected both for access and privacy by the public body with whom anyone is contracting.

The Chair: I've got two questions. Mr. Olson and Ms Notley, please.

Mr. Olson: Well, I agree with Ms Blakeman's comments about not trying to overdefine things. I like the idea of the legislation being kind of general in its wording rather than trying to specifically nail down each and every type of subset that we might encounter.

My question when I stuck my hand up was going to be for Ms Mun, just to ask her if this amendment, subject to your suggested change of wording, would then be consistent with what you already understand the law to be in the position of the Privacy Commissioner? We really wouldn't be changing anything in substance; we would just be clarifying something.

9:50

Ms Mun: I think our office's view is that an extra provision is really not necessary because if the organization or entity is captured under the definition of an employee, our office and the legislation will hold the public body accountable. That was previous discussions that we had.

My suggestion is that if the committee, however, decides that they do want to include a provision to further clarify that, you're going to have to be careful of the wording because right now the wording is "service provider." It would indicate that there seems to be – I was always told that if you have different wording in the legislation, you must have intended something different, so if you use "service provider," it must mean, you know, something different from "employee." If you put "employee" in there – again, the caution is that I don't know what the actual wording of the provision will be – that could then cause parties to talk about what you really intended in having this provision as opposed to the general approach, which is what our office has taken, which is that if you're an employee, the public body is held accountable for the actions of their employee. It's as basic as that.

Mr. Olson: Thank you. You've reinforced my feeling that I would just leave it.

Ms Notley: Okay. Well, I have a bit of a concern with respect to the information that's being provided because this is not a question of – like, if the law, if the statute said that this stuff is in the care and control of the public body, you know, stuff created by an employee, and as I said, the whole issue of employee versus service provider is fine. I don't care if we use the word "employee" versus "service provider." But if it said that in the statute, then you're quite right; you cannot contract out of it.

The decision, however, of the commissioner is an interpretation of what is currently a vague statute. One of the criteria that the commissioner looks at is whether or not the parties have contracted out. Clearly, it is possible to contract out because it is not clear in the act that it is not. What happens is that the commissioner looks at a number of criteria and determines whether the documents are, in fact, in the care and control of the provider. One of those criteria is, for instance, whether they have developed a contract that says otherwise. So it is not black and white at this point; it is subject to interpretation.

That's very clear in the decision that was referred to me by Ms Mun, and I will review it when deciding whether or not – because at one point the institution argued they had no right to possess the record, and that's something to be considered in terms of whether or not they have care and control of the record. The decision says:

> In my view, if a public body requests that a record be created for its use and obtains a copy of that record, the public body will, in the absence of any contractual . . . authority that says otherwise, have the right to possess the record.

Clearly, the commissioner is looking at the role of contracts as a means of getting around the obligation of the public body, not necessarily getting around but as a means of qualifying, shall I say – I don't mean to suggest it's intentional – the public body's obligations to make those documents available. It's very different to have a statutory statement of obligations versus one commissioner's order of an interpretation of what the statute says. The commissioner can actually write another order tomorrow that would limit that interpretation, limit the scope of it. We don't know. The courts could overrule the commissioner's order. We don't know. We do know that in B.C. that's effectively what's happened.

So the point of putting it in statute is that it's not the same as what we have now. It clarifies it and ensures that what Ms Mun says is the current practice of the commissioner's office is in fact preserved and also that the ability to contract out is clearly guarded against. And when I say contract out, I mean contract out of the obligations; I don't mean contract out of the service. I think there is a difference.

The Chair: Thank you for that.

A comment from Dr. Sherman and then Ms Blakeman, please.

Dr. Sherman: Thank you, Mr. Chair. Ms Mun, I'll make a comment, then ask you one or two questions. One, our job here is to pass good legislation and smart legislation. Then there's kitchen-sink legislation, in which you throw everything, including the kitchen sink. The last thing we want to do is have these unintended consequences that Ms Blakeman mentioned. If you throw everything in, it's actually going to impede access to information for those who truly need it, and it's going to increase the bureaucratic load and paralyze many of the municipal governments, as we heard earlier on. That's not the intent here, I hope.

From my understanding we do have remedies: the office of the Privacy Commissioner, and we have the courts. So my question to you is: will this be good and smart legislation? Is this required?

Ms Mun: Our view is that we felt the current provision does encompass the concerns that have been expressed about employees and their obligations under the legislation because, as I said, public bodies are ultimately held accountable. As I said, if it's the committee's decision that they want to include this provision, they just have to look at the wording to make sure that it is not going to result in unintended consequences. It's the committee's decision as to whether they feel that this provision is necessary or not.

Dr. Sherman: The concerns that Ms Notley had: is there access to information as the legislation is currently worded?

Ms Mun: Yes. Like I said, we have this order. In the one that Ms Notley is referring to, in that case with the third party or service provider or contractor, as you referred to, what had happened was that an applicant had made an access request to the public body. In this case it was Alberta human resources and employment, and they said: you know, that's not our record; it's the third party's record. So they didn't process the access request. That case went to inquiry, and the commissioner determined that that third party was an employee of the public body; therefore, he ordered the public body to retrieve the record and process it. So this is the determination that the commissioner would have to rule on.

We had another order where the commissioner also found that a third party was an employee of a public body, but in that scenario the employment relationship did not extend to the record that was being withheld, so he did not order the public body to process that.

Every time our office deals with third parties or organizations or service providers or contractors, one of the circumstances we always look at is: does that entity fall under the definition of an employee of a public body? If it does, then we look at the record and say: okay; we hold the public body accountable for the processing of that request, for ensuring that that employee is collecting, using, and disclosing personal information in accordance with the act. We say that when the third party is collecting, using, and disclosing personal information, it is deemed as if the public body was collecting, using, and disclosing that personal information.

Dr. Sherman: Thank you.

The Chair: Thank you.

Ms Blakeman: Well, two things. I agree with Ms Notley about the reason for the concern around this. This government's current administration is engaged in much more contracting with outside groups, not less but more. The concern is that we the legislators are responsible for making sure that the public, Albertans, have access to government information or information on stuff that goes on on the government's behalf and also the corresponding protection of privacy of Albertans. The concern is that there always seems to be somebody out there willing to deliberately or accidentally interpret the rules, that it doesn't apply to them. As we end up with more and more and more contractors, this happens more and more often, and not very many people follow this process all the way through to the end, including going to the commissioner's office. So we don't want to be creating a situation where we are disempowering more Albertans.

Having said that, I'm noting two things. One is the recommendation, that we've already passed, office of the Information and Privacy Commissioner recommendation 1, that the definitions section, 1(e), be amended to read:

> "employee," in relation to a public body includes a person who performs a service for or in relation to or in connection with the public body as an appointee, volunteer or student or under a contract or agency relationship with a public body.

First question to you, Ms Mun: was that intended to address this issue?

Ms Mun: I believe it does. It will capture an organization. As I said, this definition of employee means that when you have third parties who are in collaboration or working in consultation with a public body, they will be captured as an employee of a public body. So their records in relation to that collaboration, you know, would be subject to the FOIP Act as well. The public body would be held accountable for that.

10:00

Ms Blakeman: That's right. This is where you talked about a partnership. Potentially even P3s could get picked up in this or some sort of collaborative effort. Okay.

The second thing, back to Ms Notley, then. The definitions section, which is section 1, is where the employee definition lies, but this is to amend section 3, which is the scope of the act.

Ms Notley: No, it wasn't to amend section 3. I said to amend the act. I referenced that language for the second part of it, but it wasn't to amend section 3; it was simply to amend the act, to clarify.

Ms Blakeman: That makes a big difference. Okay.

Ms Notley: I didn't identify the section.

Ms Blakeman: Okay. Thank you very much. Those are my questions.

Ms Notley: I just want to clarify with Ms Mun, though, in terms of what you're saying to the people who are here today, that in the absence of the order from the commissioner the obligation of the public body would not at this point be clear, correct?

Ms Mun: That's not the only order.

Ms Notley: But in the absence of the commissioner making orders, it's not clear on the face of it.

The Chair: Seeing no further comments, the question . . .

Ms Notley: Well, she was going to answer my question, I think, if you don't mind.

The Chair: Okay. Sorry.

Ms Mun: I don't know how to answer that, to be quite honest, because public bodies don't operate except through their employees,

through individuals. So when you say that in the absence of a commissioner's order it's not clear, then I'm thinking: but the public body is subject to the act; employees, then, of the public body are subject to the act. So in my view it is captured.

Ms Notley: Yet the order itself doesn't deal with it that clearly. The order itself reviews a number of criteria to determine whether in that particular case . . .

Ms Mun: I think, though, the problem is that they have to determine: is that entity an employee of the public body? That entity may be doing other services; it might be doing other functions. So I think the commissioner would then have to say: given what was before me, given the records that were issued, was that third party an employee of the public body?

I know you had referenced "in the absence of any contractual or statutory authority that says otherwise." I think that reflects the fact that a contract lays out very clearly between the public body and the other entity what the services are that this entity is to provide to the public body. The entity may be doing other functions on its own, so the contract itself will say, you know: "This aspect of what we're doing, we're doing for the public body. We're doing it in collaboration with the public body." However, if that contract said, "We're not doing this particular function for the public body," if that record related to that function, of course, the contract would give clear direction and say, "Then that is not subject to the act." I think that's what that phrase was referring to. It's not saying that you can contract out of the legislation.

Ms Notley: Well, I mean, I'm just reading the decision, and the decision doesn't engage in a question of whether the public body or the provider is an employee of the public body. You know, the primary question asked in the discussion is: "As such, in order for the Applicant . . . to gain access. . . it must first be determined whether the Public Body has custody or control of that record." Then we go through a number of different criteria, and we decide whether or not they do or they don't. In the course of making that decision, you then look at whether or not there were contracts around whether or not they do or don't have care and control of the thing.

It doesn't seem to be quite as clear as what you're saying, and it seems to me to be something that is too easily changed by a new order, by judicial review, by operation of the common law, in essence. It's something that we could prevent by statute if we believed that it was an important thing to do.

I'm obviously in the minority here, so we might as well just vote on it and move on. I think it's a very important issue to address given what's happened in B.C., given that other legislative groups have identified the same problem and identified it as something that we should work on given the history of FOIP in Alberta. The B.C. act and the Alberta act were the two leading FOIP acts in the country when they were first developed. If they're seeing problems with it, it probably means that there are problems to be addressed. There is clearly an issue that's been raised in a number of different submissions about concerns around this issue.

The Chair: Unless Ms Mun has a closing comment, I would call the question.

Ms Mun: I do want to say that there is also another order issued by the commissioner which dealt with, like I said, another third party performing a service for an employee. In that case the commissioner did find that as an employee of the WCB that weighed in favour of finding that WCB has control of the records at issue. The order indicates, too, that records held by an employee for his or her duties as an employee would also be under the control of the public body. So, you know, the commissioner does address those in orders.

The Chair: The question has been called by Mr. Vandermeer. Would those in favour of the motion presented by Ms Notley, that has been read into the record . . .

Ms Notley: Can you just clarify that it's not to amend section 3 but to amend the act?

The Chair: We had: amending section 3.

Ms Notley: Right. I didn't mean for that to go in there. I think when I originally read it in, it was supposed to simply say to amend the act.

The Chair: So the motion would be to

> amend the act to clarify that records created by or in the custody of a service provider under contract to a public body are under the control of the public body on whose behalf the contractor provides services.

Ms Notley: I had also said that I was quite happy to have that changed to employee as opposed to service provider.

The Chair: Correct. The record would indicate, then, that

> the custody of a "service provider" be changed to "employee" under contract.

Okay? Everyone clear? All in favour of the motion? Opposed? The motion is defeated.

Okay. Next on the list, I believe, is item 22. Now, there are a number of issues here dealing with a harms test applying to exceptions in sections 16 through 29 of the FOIP Act. Ms Blakeman was speaking in the past about motion M, part 1.

Ms Blakeman: Yep. I've had a motion severed here. This is section 24 that we're looking at around exceptions for advice from officials; that is, that a public body may refuse to disclose information to an applicant if the disclosure could reasonably be expected to harm rather than reveal information that meets the listed criteria. The other part has been severed from it.

This is putting a test in place. Rather than simply talking about revealing information, it's putting a test in place to look at harm. A harms test is much more demanding about withholding information than a test that information would reveal something. You can see they're different if you're testing for what harm would be the effect versus what would be revealed. I think that in some cases that needs to be considered here.

Harm has been a very good test for us in clarifying a number of things that have for instance come before the Supreme Court because it just refocuses us to say, "Okay; if this is really going to hurt somebody, then clearly we don't want that to happen" rather than when you start talking about, well, if this information revealed other information. It's a totally different test and a totally different way of looking at things. I think the harms test, because it demands a higher level of clarity – it is a more difficult test to pass – is a more useful one in applying the act.

I have never recommended exact language. All I've ever done in any of my motions in this particular examination, review of the act is to state the issue, and I would leave it to the drafters to accomplish the direction that we give them. So this is to look at amending the criteria to make it one of "harm" rather than "reveal." I would move that motion onto the floor.

10:10

The Chair: Could you, for edification, please, Ms Blakeman, repeat the actual motion that you're proposing?

Ms Blakeman: I think I've given them all to you now. The motion itself is that

> section 24 of the FOIP Act be amended to state that a public body may refuse to disclose information to an applicant if the disclosure could reasonably be expected to "harm" rather than "reveal" information that meets the listed criteria.

The Chair: So harm applies . . .

Ms Blakeman: Sorry. To the individual, not to the information. The information applies to the reveal part.

The Chair: Okay. Comments? Questions? Dr. Sherman.

Dr. Sherman: Thank you, Mr. Chair. Ms Mun, from the current act as it has applied over the recent few years, have individuals been harmed as a result?

Secondly, do you have mechanisms currently in place so that people aren't harmed?

Ms Mun: I think the application of section 24, if I recall, centres around the word "reveal": reveal advice, reveal proposals and so forth. I think the arguments that public bodies have brought forward to our office about section 24 are that revealing that information would result in some sort of harm or some sort of negative effect on the public body. It doesn't have a harms test, but I do know that public bodies have argued harm in connection to the revealing, that there is a problem with revealing.

Section 24 is a discretionary exception to disclosure, which means that even if that exception applies, a public body may nevertheless decide to still release the information. It means that just because the information falls under 24 doesn't mean that the public body has to withhold it. They can still release it. But in exercising that discretion, public bodies would probably argue that, you know, by revealing that information, that could be harmful in some way to them.

I think that's how it's been applied to date.

The Chair: Ms Notley, please.

Ms Notley: Yes. Well, I have sort of another motion right under this which basically gets at the same issue. Really, there are two areas under the exceptions which don't have a harms test built into them completely, and one is section 24. I guess my concern or my question is this. All the other harms tests that appear in the exception clauses throughout the act identify the nature of the harm: harm to law enforcement, harm to economic interests, harm to privacy, that kind of thing. So while I think we do need to inject a harms test into this, I think we might need to have a bit of a discussion about what the harms test would be.

Right now the way it sort of reads is that the harm is to the information. Of course, you know, it doesn't necessarily make sense that way. I mean, I'm not sure whether you could always says it harms the information for it to be disclosed or that it never harms the information itself to be disclosed. I'm not sure.

Now, I certainly noted, for instance, that in section 25 you have "harmful to economic and other interests of a public body." That's what you're actually looking at for your harms test. Frankly, I think, you know, that's probably sort of a better test. But I'm open to the test.

I think there is a problem here because right now section 24 has no harms test, and it's ridiculous. It's ridiculously broad. There is practically nothing that doesn't arguably fall within it. The fact that the public body has the discretion to release the information is of no assistance when the public body decides it doesn't want to. Right now section 24 allows it to use this blanket exception and this blanket wall between them and the citizens in terms of providing access. We need to find a way to actually link it to some kind of rational harms test.

So I support the concept. I guess I would just want to know how we're going to structure that harms test.

The Chair: Ms Mun, before we go to Ms Blakeman, would you clarify your previous comment that this is a discretionary disclosure section with respect to the comments that Ms Notley just made in respect to a blanket wall?

Ms Mun: Okay. Under part 1 of the FOIP Act, which deals with access, a public body is required to disclose information in response to an access request unless it is authorized to withhold that information. The act lists a number of exceptions to disclosure. Some of the exceptions to disclosure such as section 16 and section 17 are what we call mandatory exceptions, which means that if the information falls under those provisions, a public body has no discretion; that public body must withhold that information. But the discretionary ones – and there are a number of discretionary ones – basically say that if that information falls under those exceptions, the public body still has the ability to release the information if it so chooses.

When our office looks at the public body applying a discretionary exception to disclosure, the commissioner looks at it from two perspectives. The first perspective is: does that exception apply to the information? If it does, then the next thing he looks at is: did the public properly exercise its discretion in refusing to disclose that information? Some of the things that the commissioner would consider are: did the public body consider the principles of the legislation; did the public body look at the relevant circumstances?

If the commissioner determines that the public body properly exercised its discretion, then the commissioner will rule that the public body properly withheld that information. However, if the commissioner finds that, number one, the exception does not apply to the information, then the commissioner says that the public body has no authority to withhold that information. He can order the public body to release that information.

Let's say he finds that the exception does apply to the information. Then he has to look at whether or not the public body properly exercised their discretion in refusing to disclose that information. If he finds that the public body did exercise their discretion properly – they considered all of the relevant circumstances; they considered the principle of the legislation – then he says that the public body's decision to withhold is proper. But if he finds that the public body did not exercise their discretion properly, he would go to the public body and say: reconsider your decision. He cannot substitute the public body's decision, but he will send it back to the public body to review the matter.

The Chair: Okay. Thanks for that.

Ms Blakeman, followed by Ms Notley, please.

Ms Blakeman: Thanks. I just want to take a step back and put this in context for everybody. This is the section that's called Advice from Officials, and it starts out by saying:

> The head of a public body may refuse . . .

That's the discretionary part.

> . . . to disclose information to an applicant if the disclosure could reasonably be expected to reveal . . .

This is the test that's in there now. Then it goes on and gives a number of reasons why they could refuse if something was going to be revealed as a result of it.

Some people would see this as a huge loophole and have talked about it that way in their submissions. Others, mostly Executive Council and members of government, see it as duly exercising caution to keep their ability to govern secret so that they can move on and do the business of government. The problem is that for the opposition and the media this is the most commonly used clause, and almost anything in the world can be made to fit into this in our impression.

I know this is a Hail Mary pass, and I know that members of the government that are sitting on this all-party committee could never imagine sitting where I sit. But just as an exercise in fantasy try to imagine what it would be like for you in four years to be sitting where I'm sitting and trying to get information from me, sitting in government on Executive Council, when I can say: I'm sorry; anything that might reveal "advice, proposals, recommendations" or "consultations or deliberations" about "officers . . . of a public body" or "a member of the Executive Council" or "the staff of a member of the Executive Council" or any "positions, plans, procedures, criteria or instructions developed for the purpose of contractual or other negotiations" or "plans relating to the management of personnel" or "the contents of draft legislation, regulations and orders" in council or the "contents of agendas or minutes" of the "governing body of an agency" or anybody else there, "a committee of a governing body referred to in subclause (i)" or "information, including" – you're starting to get the picture. This is a long list of reasons why no information is given out.

10:20

What I'm trying to put in place here is a reasonable limit that says that the department would then have to say, "We choose not to give you this information that is advice to government in whatever form because we argue that this would harm us in some irreparable way," that there actually is a harms test there, and it could be shown to us and anybody else that harm would result. What we have now is completely – it's smoke. It's just: "No. Anything that has to do with what government is developing is off limits to anybody."

I think that there needs to be a limit to that. We have existed now for a considerable period of time with no limitation on section 24, and I can tell you that for those opposition FOIPs that get this far, this is where they get stopped most commonly. We, frankly, abandon it at this point because the issue is imminent, and we usually don't have the time to follow it any further, or we don't have the money to follow it any further or employee time to follow it any further.

The point is that there needs to be a reasonable limitation upon this, and right now there isn't. Although the representative from the Privacy Commissioner says, "Well, you know, the arguments are often that it would harm us in this way," I think that test needs to be there. Rather than just saying, "Well, if we give you this information, it might reveal other information," I think the harms test needs to be in there.

I know that for the people that are sitting around this table minus two of us, you know, the concept that you would ever be trying to get at this information that was from a government that wasn't you is completely foreign. It does happen. Five or 10 years from now you could be sitting where I am, trying to get information from a government that says no because it might reveal information. So think further ahead and larger than where you're sitting now.

I think a harms test is a reasonable test. It still allows government to say, "This is the harm that would ensue," and if that test is not met or it is met, fine, that's the end of the argument. But right now there's no test. It's just: "Get lost. You've moved into our area." I'm not going to read this into the record again, but, you know, you heard me start to run through that list. It's everything, and pretty much nothing is excluded. It's just far too wide.

That's why I'm asking for this. I think a harms test needs to be used in this section.

The Chair: Thanks for that. I just want to actually make a comment to you, Ms Blakeman. When I heard the arguments for and against, as a government member, believe me, I wasn't thinking anything at all like you brought forward. I was in fact thinking more of the cases where you read and hear in the media about, say, the Young Offenders Act and the police responding to the media about an atrocity that's been committed to a young person or an adult by a young offender. It seems that even though everyone, maybe reluctantly, appreciates that the young offender legislation is there for a purpose, sometimes it gets misused. Really, the person that is the victim is the one who was the victim, but you can't get the information because they're afraid it will disclose more about that person than the perpetrator if that makes any sense.

Ms Blakeman: Good example.

The Chair: Well, it is convoluted. Not all of us think about hiding government documents by any stretch of the imagination. There's lots of public documentation out there that I think people do feel and probably do have reasonable access to. From a personal point of view, you know, this legislation has not provided an awful lot of constituency work for this member. It's been a drawback in other areas but not this particular one.

Ms Notley: I would also say, I mean, your example is a good one except that the majority of denials in terms of access to information really occur where, equating it to your example, the public body is the young offender.

The Chair: I meant the police.

Ms Notley: I know, but the point is that we're not able to get access to that information, and there is a list which goes on endlessly providing exceptions.

Let's just be clear. You know, the representative from the office of the commissioner suggests that there is still some form of review because there's a review about whether the public body exercised its discretion appropriately. Well, let's just be very clear here. That review is exceptionally limited, and even where it is determined that that discretion has not been exercised reasonably – and it's very rare that that happens – all that is required is that it goes back to the public body to come up with a more rational explanation for why they chose not to release the information. Of course, because we have two pages of exceptions in this clause, it's really not very hard for them to do that. I think that's really important.

The other point that I would make is not only in terms of following from Ms Blakeman's suggestion that members of the government here imagine what it would be like if you were ever actually not in government. Also, just taking it a little bit out of our particular combative setting, imagine that you are a citizen trying to find out information about where your taxpayer dollars are going.

If I were you, I would not be wanting to go to taxpayers, justifying why there is such a gargantuan exception to their ability to find out

what the details are in terms of how their taxpayer dollars are being spent and used. This is a citizens' document. That's what the genesis of freedom of information is. You talk about loopholes. This is a very, very large loophole, which practice and experience have shown us is used a lot.

The Chair: Thank you.

Mr. Olson: While I appreciate the comments that have been made and I understand the concern, I guess I would just ask for the same consideration on the other side. Put yourself in the position of somebody who's trying to make decisions and develop policy. Government, obviously, is responsible for the decisions that they make and have to be held accountable.

When I read this section, advice from officials, a lot of the stuff that Ms Blakeman referred to strikes me as work-in-progress type of stuff. It's advice, consultations, deliberations, proposals, recommendations, analysis. That's what a lot of those exceptions are. I note that in subsection (2) it says that it does not apply to things that kind of are the end of all of those activities: "statement of the reasons for a decision," "the result of product or environmental testing," "the result of background research." We are responsible for the results; we're accountable for the results.

I guess I do have some difficulty with that preliminary part, which is the advice and the consultation. That would be my position.

The Chair: Thank you.

Dr. Sherman.

Dr. Sherman: Thank you, Mr. Chair. I guess another question to Ms Mun. How many of these requests based on this problem do you currently get? In voting for this, what are the practical implications of a harms test? What is it? What does it cost? Will it help? Will it not help?

Personally, being a member of government, I've got no problem with knowing what the advice is. We didn't make up the advice; the bureaucrats gave us the advice. What I've got a problem with is harming other people out there.

Ms Mun: Okay. Just in response to your question, a couple of things that the committee may wish to note. The committee had asked the legislative research team to do a comparison of other jurisdictions with respect to whether or not other jurisdictions also have an exception to disclosure such as advice. On page 18 it says that every other jurisdiction except New Brunswick has a similar provision of advice from officials as an exception to disclosure. I was just doing a quick scan of the table that the research team had prepared, and I notice that the wording of the provision relating to advice is very similar across jurisdictions. I didn't see any harms test in any of the other provisions. So there is that.

10:30

You asked how many times section 24 has come before our office. I really don't have the statistics, but I do notice that in the 2008-2009 annual report from Service Alberta they do report that for exception 24, there were 295 occurrences of that application.

Di, did you want to add more comment about that? It's the third most used exception. The first one is personal information of third parties, the second one is privileged information, and then the third one is advice from officials.

Ms Nugent: No. I think, Marylin, that you clarified that well. Thank you.

Ms Mun: Okay. I hope that answers your question.

The Chair: Okay.

Ms Blakeman: Question.

The Chair: The question has been called. All in favour of the motion as presented by Ms Blakeman? Opposed? The motion is lost.

Issue 2 under 22.

Ms Notley: Well, as I said before, the only place where there is not a harms test already is in 24 and parts of 16. We've just dealt with 24. The next one, a couple down, deals specifically with section 16. I suggest we deal with it that way and just pass on this one.

The Chair: Just pass on it?

Ms Notley: Yes. Or I can withdraw it because it's dealt with under item 23.

The Chair: Thank you for that. We've withdrawn that.

The next one would be for further consideration, recommendation 104. It was raised by Mr. Olson.

Mr. Olson: Well, I did raise the question. I'm satisfied with the answer that I got. I wasn't ever indicating that I was prepared to make a motion on this. I note, for example, that there is a section, section 20, disclosure harmful to law enforcement, and there are a number of provisions in there which I think address that concern. So unless any of my colleagues want to make a motion on it, I'm satisfied.

The Chair: Thank you.

Ms Blakeman.

Ms Blakeman: Thanks. I appreciate that this wouldn't become a formal motion because I think there are a couple of sections. I think of 20(1)(c) also when you start to talk about protection and law enforcement. Don't forget that they've also got section 18, which is around threatening anyone else's safety or mental or physical health. So there's a protection from physical harm there as well as the investigative techniques.

I think what's important here is that the police investigations not be impeded while they're going on, but there should be an ability of people after the fact to find out what happened. Certainly, we've had a number of examples with the RCMP after the fact where we've wanted to go back and say, "Okay; exactly what happened?" so that we could adjust our procedures or give a reasonable explanation to the public why certain measures were put in place or used at the time.

I don't think we need to do anything further with this. I think it is working well for us as it is. There is a check and balance in place, and I don't want to upset the balance of that.

The Chair: Thank you both for your comments.

With that, we'll move on to 23, recommendation 97.

Ms Notley: Basically, section 16 is an exception, one of the many in division 2. This one relates to where the disclosure is harmful to business interests of a third party. That's the title of the section. I think that's reasonable, somewhat reasonable. It at least requires – I assume it requires – a third party to show that it is harmful to their

business interests. Notwithstanding that that is the title of the section, to me the way the section reads now – and perhaps I'm interpreting this incorrectly, and I'm happy to be told that that's the case – there are ways in which you can navigate your way through this section to effectively ensure that there is no harms test actually applied here. The way that that could happen – and I'm looking at section 16 itself:

> 16(1) The head of a public body must refuse to disclose to an applicant information
>
> (a) that would reveal . . .
>
> (ii) commercial, financial, labour relations, scientific or technical information of a third party,
>
> (b) that is supplied, explicitly or implicitly, in confidence.

Basically, let's say that we're talking about commercial information that's implicitly supplied in confidence but not explicitly, so that makes it kind of easy. Then we go to

> (c) the disclosure of which could reasonably be expected to . . .
>
> (ii) result in similar information no longer being supplied to the public body when it is in the public interest that similar information continue to be supplied.

What that says to me is that, basically, if there is any kind of information that a third party has that it shares with the public body, even perhaps as a service provider or an employee or whatever, and they provide that commercial, financial, labour relations, scientific, or technical information – and I don't know what technical information means, but I suspect it's a rather wide scope – and they implicitly provide it in confidence and disclosing that information could result in that third party never providing the information again, then we're done. We don't actually have a harms test in this section even though that's what the title of the section says.

Given the conversation that we just had around the need to ensure that third parties who do business and have relationships with government are not exempted, I want to ensure that the blanket sort of access that was described by people from the commissioner's office is not capable of being limited in scope quite dramatically by this combination of 16(1)(a)(ii), (b), and (c)(ii). Particularly, it's (c)(ii) which strikes me as having really removed the harms test. If you got rid of 16(1)(c)(ii), I suspect you would be back to having a fairly meaningful harms test in the clause, but it seems to me that with sub (ii) in there you do a fairly good job of getting rid of the harms test. That is my concern. My request for this committee is that it consider limiting 16(1)(c)(ii) in particular, that that is not a criteria.

The Chair: Okay. I'm always confused by the legalese that's presented in legislation. When I see a negative in a sentence, it always confounds everyone as to what the purpose of it was. If you follow me all the way through, as you said, Ms Notley, 16(1), then you're going to (c)(ii) specifically?

Ms Notley: Yeah.

The Chair: In layman's terms would Service Alberta or the information and privacy office – I appreciate what you said, Ms Notley, and your explanation – please tell me what you think that section actually means.

Ms Mun: Okay. I'm not a lawyer.

Ms Nugent: Neither am I.

The Chair: I'm not knocking lawyers. They always use words that tend to confuse the average person to some degree. Maybe that's why they get paid for the services they provide. Sorry, with respect, to the two colleagues on this committee that are lawyers.

10:40

Ms Mun: Okay. Section 16 has a three-part harms test. The first part is that you have to look at the nature of the information. Is it a trade secret? Is it commercial? Part one of the test is that you look at the nature of the information that's being withheld. The second part of the test is whether or not that information was provided to the public body in confidence, so there's that element of confidentiality for part two. Then part three talks about harm. It talks about, as Ms Notley says, one of the outcomes of the disclosure. One of the outcomes would result in similar information no longer being supplied to the public body.

I wish I remembered, but there was an order, a really old order, that the commissioner had issued where one of the public bodies had argued: well, if we disclose that information, the third party is not going to give us that information anymore. In that case what happened is that the commissioner found that that outcome was not reasonable or not justified because that public body in its own enabling legislation has requirements as to what information the third party must provide to the public body. In that scenario, you know, that outcome was not justified.

Does that help?

Ms Notley: Well, I mean, it helps that it's been an issue and to know that, in fact, public bodies have used that very excuse, as I've described it. The problem is that in that particular order the reason the public body was not able to do it had nothing to do with this act and everything to do with that particular public body's other statutory obligations. If we're dealing with public bodies that don't happen to have those other statutory obligations, we are once again in a position where the public body can say, "If we disclose that information, this third party is never going to give it to us again, and that would be bad," which, again, as I say, results in a tremendous undercutting of the information that we've been provided before by Ms Mun with respect to the obligation of a public body to act as though it's in the care and control of documents which are created by third parties with which it has a relationship.

This is a huge, huge exception to that because it basically allows the third party to say: "You know what? We don't want this information out. You disclose it; we're not giving it to you anymore." And Albertans, taxpayers, don't get that information. As we have said over and over in these meetings, we have a situation where the government is contracting out more and more and more every day, and Albertans want to know that they can keep track of what's happening with their tax dollars when that happens.

The Chair: I believe we've just been joined by Mrs. Forsyth in Calgary.

Mrs. Forsyth: Hi, Chair. Thanks. I'm on the line now.

The Chair: Very good. We're just on issue 22.

Ms Notley, we've got Mr. Olson going to ask a question. But I'm not being argumentative. On the question that I have, maybe I can narrow it down to this. When I read the sentences and the parts that you incorporated in your argument, was there any intent – I'll back up. Section 16(1)(c)(ii): "result in similar information no longer being supplied to the public body." What relevance, significance, or connection does it have to the preceding sub (i)? I don't know if they're to be dealt with separately or if one followed the other. Do you know what I'm trying to say?

Ms Notley: Yes, I do. You ask a good question. Basically, as Ms Mun said, you know, the public body, let's say ministry A, is asked to disclose information which a third party, let's say a private social services provider, has in their care and control. Ministry A says: "We don't want to reveal it. We don't want to disclose it." They will say, "We're not disclosing it because that information . . ." and they have to prove three things. They have to prove one of the things under sub (a). They have to show that the information would either reveal trade secrets or that it would reveal commercial information or that it would reveal financial information. You know, it's got to meet one of those six criteria, only one of them. So it's got to be that kind of information. Then they have to be able to show that the information was provided either implicitly or explicitly in confidence, right? The public body, the ministry, would have to say: well, you know, it was kind of a given, when we were talking to contractor A, that this type of information would probably stay with them. It has to be this kind of implicit or explicit notion that it was provided in confidence. Or, simply, the third party says: I'm giving you this information, but we're assuming it's going to be kept in confidence.

Then the third thing that the public body has to do now under sub (ii) of (c) – and that's the one I'm concerned about – is just simply say: "You know what? If we reveal this information, this contractor is never going to give it to us again."

Another example – I mean, I hate to politicize this, but it makes it sort of meaningful – is monitoring, environmental testing that's been paid for. Of course, we talk about how monitoring and environmental testing are made available under the act, but the exception to that is where you pay a fee for it. A third party has environmental testing that they've paid a fee for, and the government says: well, we would disclose this, but if we do, such that the citizens understand what we knew, then these guys will never give it to us again, so we're not disclosing it.

Mr. Olson: I just had a question that I'm hoping maybe Ms Mun can shed some light on. This section 16 is exceptions to disclosure. Subsection (3) is exceptions to the exceptions, right? Subsections (1) and (2) don't apply if a third party consents, which would be obvious, or if "an enactment of Alberta or Canada authorizes or requires the information to be disclosed" or if it "relates to a non-arm's length transaction between a public body and another party." What would be a non arm's-length transaction between a public body and another party? Have you run into that?

The Chair: While Ms Mun is looking this up, I just want to clarify for Mrs. Forsyth. I led you down the wrong path here. We're on 23, not 22.

Mrs. Forsyth: Okay. Yes. I found that. Thanks, Chair.

The Chair: Sorry about that.

Ms Mun: I don't like that term "non arm's length" because it's always such a convoluted term. Can I just look at this? I'll get back to you on that.

Mr. Olson: Sure. Thank you.

The Chair: While you're doing that, we'll move on to Ms Blakeman and then come back to the conversation.

Ms Blakeman: Well, there is a harms test as part of this. That is the third factor in all of this. The harms test, as I read it in the Annotated FOIP Act, is that there has to be a clear cause and effect relationship between the disclosure and the harm which is alleged. Two, the harm caused by the disclosure must constitute damage or detriment and not simply be a hindrance or an interference. Three, the likelihood of the harm must be genuine and conceivable.

It goes on to reference. There are a number of commissioner's orders on that harms test, and it references the Prime Minister of Canada: the Information Commissioner versus Canada, the Prime Minister. It says that at least there must be a clear and direct linkage between a disclosure of specific information and the harm alleged. It isn't just about saying, "This is going to hurt me," without really being able to demonstrate that it will.

My understanding of the section that we're talking about is that it's about reporting. It's about getting groups to report, and if they refuse to report, the lack of information would be the harm created. I'm undecided on this section. I just don't have time to read through all of the commissioner's decisions on this. Have there been cases where we've now had a lack of reporting or a severing of a contractual relationship or a refusal to contract again because there has been some disclosure discussed?

Ms Mun: I'm not aware of any. I'm not saying that there is or there isn't; I'm just not aware of it.

Ms Blakeman: Because it didn't reach you. Okay.

Ms Mun: Okay. Can I get back to Mr. Olson's question now, please?

The Chair: Yes, you may, please.

10:50

Ms Mun: Okay. As I said, the term "non arm's length" is kind of difficult. The non arm's-length transaction is also referred to in section 4 of the act, but it's in relation to the ATB. I find that might be helpful. For instance, in section 4(1)(r) it talks about "a record in the custody or control of a treasury branch other than a record that relates to a non-arm's length transaction between the Government of Alberta and another party." In section 4(4) it talks about:

> A non-arm's length transaction is any transaction that has been approved
>
> (a) by the Executive Council or any of its committees,
>
> (b) by the Treasury Board or any of its committees, or
>
> (c) by a member of the Executive Council.

If I follow that same principle for non arm's length in 16, I think that what it's referring to is that if the information relates to a non arm's-length transaction between a public body and another party, it would imply, then, that it's a transaction that has been approved or involves a public body. It would fall under a non arm's-length transaction. It's a bit convoluted, I know.

Ms Notley: Suggesting any transaction that involves a public body?

Ms Mun: It appears to be. The information relates to a non arm's-length transaction between a public body and another party.

Ms Notley: I thought non arm's length meant more like, you know, there was a potentially conflicting relationship or something between the two parties, so you have to specifically turn your mind to whether or not the value of the transaction supersedes the potential conflict of interest between the two parties not being arm's length from one another. That's what I thought, that in a case like that, you would definitely need to disclose it regardless because it's a discretionary decision to allow a non arm's-length transaction. Isn't

the idea that almost all government interaction is arm's length and that what's not arm's length is where there's a personal benefit that can be . . .

Ms Blakeman: You're talking about confidentiality or conflict of interest.

Ms Notley: Or conflict of interest. Where there is anything that has the potential for conflict of interest, it would be exempted from the act and should be disclosed, right? Hence, it is exempted under section 16 from the exception, right? I don't know. I'm just not sure.

Ms Mun: Yeah, and I may be off on this.

Ms Notley: I think we might need to find out. Otherwise, you're saying that it's all government transactions, which doesn't make sense.

Ms Mun: I'll check with my office, and then I'll get back to this committee maybe after lunch.

The Chair: That would be a good idea.

Ms Mun: Okay.

The Chair: Yes, Dr. Massolin.

Dr. Massolin: I was just going to offer to the committee, Mr. Chair, that I've got the Annotated FOIP Act here and the sections describing the arm's-length situation. I can get that distributed to the committee.

The Chair: Sure.

With that, maybe it would be a good time to take a five-minute stretch break. We'll call the meeting back in five minutes, please.

[The committee adjourned from 10:53 a.m. to 11:03 a.m.]

The Chair: We're all ready to go. I could hear that Mrs. Forsyth is back with us.

Mrs. Forsyth: Yes.

The Chair: Thank you. Unfortunately, Heather, you don't have the copy in front of you that Dr. Massolin handed out as information for us, so if you have any questions, we'll do our best to explain it to you or have Dr. Massolin explain it.

Mrs. Forsyth: Maybe if he could just give me a *Reader's Digest* version.

The Chair: Okay. Or, you know, if we're going to come back to it after lunch, Karen has offered to scan it and get it down to you.

Mrs. Forsyth: Great. That would be perfect. If she could let Jeffery know, I'd appreciate it. Thanks, Karen.

The Chair: Okay. Will do. Very good.

Ms Blakeman: I don't think we need to wait. We've been able to clarify it.

The Chair: Okay.

Ms Blakeman: It essentially relates to – it's a triple negative, which is exempting a situation where what we would call or refer to commonly as a conflict of interest exists. Just to walk your way down the legislation, you're not required to disclose it if a third party consents or it's already in an act or this non arm's-length transaction is one that is directly related. If you look under the interpretation that was circulated, it talks about: a transaction at arm's length is one where "there are no bonds of dependence, control or influence." So one that is not arm's length is one where control or direction or influence is being exercised, what we would call conflict of interest; in other words, where somebody is exerting control on someone else.

Do you want to try it now? Are you ready to go? Rachel will take a whack at this.

The Chair: Just before you do, Ms Blakeman, for the sake of Mrs. Forsyth could you be specific about which section?

Ms Blakeman: Heather, we're in section 16 of the act, which, if you have it in front of you, is page 22, in the sort of exclusion section that's at the bottom. But we're also looking at the Annotated FOIP Act, page 5-16-14, which is where they start to break it down. This is the people that use the act and interpret it. This is the kind of extra instructions that they use to help work their way through it. That's where this definition of arm's length and non arm's length is coming from.

Mrs. Forsyth: If I can just get a clarification, Chair. My understanding from the conversation that I'm hearing is that Ms Notley wants the right to be able to access or FOIP contracts with government. There's been some discussion on whether or not you can do that. The clarification that you've got from FOIP, does that mean now that you can access contracts from the government or that you can't?

The Chair: I'm going to let Ms Notley make a comment. Ms Blakeman is shaking her head no, and Ms Notley wants to make a comment, Heather.

Ms Notley: I'm just going to try and review this a second time because, you know, the more people you have telling you something, the more fun it is. In the most global of terms you're right: what I'm getting at is the number of opportunities that exist within the act for information that is held by third parties to not be accessible by the public. Section 16 is one of those exceptions. But I accept most of section 16. Most of the exceptions to access that are set out in section 16 are reasonable exceptions.

For instance, where the third party or the business says that the government releasing information that was provided to government by the third party would result in that third party having a trade secret disclosed and having some kind of financial damage occur as a result, then the public body or the government doesn't have to disclose that information. That's a reasonable exception.

What started this conversation was the fact that the way that section is written, though, there is one exception, which may have been intended for a different purpose, which is too broad. My sort of short version interpretation of it is that where the third party says, "You know, if you disclose this information, I'm not giving it to you again," then the public body or the government can say, "We're not disclosing this because the third party will never give us this information again." I was saying that that's too broad. We can talk about that further.

Then what happened was that Mr. Olson asked about the exception to that exception – that makes it even more fun – which exists in subsection (3) of this overall section 16, which says: yeah, you can use these exceptions, but there are certain cases where you can't use these exceptions. One of those places where you can't use the exception is where there are non arm's-length transactions. Basically, what we've determined is that the interpretation of non arm's length is where there is some type of inappropriate influence or too close of a relationship between someone in government and someone on the other part of the transaction. Where that is the case, it may still be a legitimate transaction, for sure, but nonetheless it needs to be disclosed to the public even if it potentially impacts negatively the business of the third party.

So that's what this section does, and that's fine. I have no problem with that. But we were trying to find out what non arm's-length transaction means, and we've now concluded that that is basically what it means. Does that help at all?

11:10

Mrs. Forsyth: Well, if I'm confused on this particular issue, then obviously the public is confused. The people that are dealing with FOIP want to access information, so is there some way you can clarify this so that people clearly understand what can be accessed, what can't, what is exempt, what isn't exempt, the true meaning of non arm's length, et cetera? Laurie referred to section 16 of the FOIP Act, page 22, and then there's an exclusion. I thought our role as a committee was to try and simplify the FOIP Act, clarify it so that an Albertan can understand what can and what cannot be accessed. I guess, you know, we're even trying to get some clarification from people around the table on FOIP. I just think it has to be simple, and clarity is key.

Ms Notley: Just in terms of what I was proposing with respect to limiting the exception included in section 16 by eliminating subsection (c)(ii) under section 16(1), I think Ms Blakeman is correct, actually, in her description of why that section was first put in place, the idea being that it was probably put there to ensure that, you know, when you have whistle-blowers or tip lines or things like that, when people like that report to government, you should be able to ensure that those reports are still made and that you don't lose them by disclosing who reported them. I think that makes sense for why it's there, but I'm just concerned that the way it's been written, it could be used in different contexts, like the ones that I've described, and that's why my proposal is that we eliminate that subsection.

The Chair: Okay. Are there any other comments that anyone would like to offer on this motion that we have?

Mrs. Forsyth: Well, if I can, Chair. Maybe Ms Blakeman would like to comment because I think that it is critical that we fully understand. So if Ms Notley decides that she wants to FOIP or someone else wants to FOIP something about a contract – and she keeps referring back to children's services on some of the contracts that the government has gotten – can she FOIP it? Then I hear about the whistle-blower. Well, if someone's going to – let's use this terminology – blow the whistle on government, are they protected or are they not protected? Certainly, you know, if someone is coming forward, in regard to whistle-blowing, you want them to be protected. So I just want to make sure that I understand what can and what can't be done.

Ms Blakeman: We've drilled down pretty deep here, Heather. Essentially, I'm okay with this. Arm's length: think of it as literally linking arms. So if you are in a relationship with someone that you would literally link arms with – your best friend, your sister, your mom – and they gave you information, unduly influenced you, that's a non arm's-length relationship. What it said is, you know, that this information is protected, but it's not protected under three reasons: one is that they've all agreed – you and your sister agreed, or whoever the transaction is with has agreed – that they would give out the information; two, another act already authorizes that the information could come out; three, the information was gained through this non arm's-length relationship.

So just replace conflict of interest. It was nepotism. It was that somebody gained this trade secret through nefarious means. That information would have to be part of the public record. They can't keep it hidden just because they gained the information in an improper way, through a relationship that has undue influence in it. Does that make more sense?

Mrs. Forsyth: Yes, and I apologize that I came in late. Ms Notley is recommending that the section 16 exception must be narrowed to enhance the public's right to know about the government's contracts with businesses. Am I correct on that?

Ms Notley: What I'm looking for is to narrow the scope of one of the exceptions to that. So, yes, I want people to get more access where it doesn't hurt business. Right now in the act it is possible that instead of business saying, "This will hurt us financially" or "This will hurt our competitive position" or anything like that, they can also say, "If you disclose this, we're not giving you this information again." That's it. That's all they have to say. That's the one I want to get rid of.

I don't mind the other ones that say that it doesn't have to be disclosed if it would hurt the competitive nature, it would hurt them financially, or any of that kind of stuff. That's fine. It's this other one that says: oh, by the way, we get to not disclose this because the third party said that they would not give it to us again if we did. That's the one I want to get rid of, just that. I understand that that originated out of a desire for whistle-blower protection of some type, so I would rather see that tightened up to make that clear and to exempt the situation that I've just described.

The Chair: We've got a comment from Ms Mun, and then we would entertain a motion from Ms Notley to clarify what exactly it is. I've also got a hand up from Mr. Olson, please.

Ms Mun.

Ms Mun: Okay. It needs to be clarified that section 16 deals with business information. It's not about whistle-blower. It isn't. It's important to note that that was not the intent of section 16, to protect whistle-blowers. There is a separate provision on that.

The other thing is that we're not talking about personal information here. We're talking about business information. There is a three-part test that needs to be met, and we've talked about the three-part test. All three parts of the test must be met in order for this exception to apply. Now, 16(3) talks about an exception to that where they say that even if you met the three-part test, section 16(3) sets out circumstances where you cannot invoke, you cannot apply section 16, and one of those deals with a non arm's-length transaction. It's interesting to note that the non arm's-length transaction that's referred to in 16(3) talks about a public body and another party, not a third party. So it's important to realize that it involves someone else, some other party that's totally not involved with a third party at all. I hope that helps clarify this.

The Chair: It does.

Ms Notley, with your indulgence, could Mr. Olson make a comment, please?

Mr. Olson: Well, I'm just trying to process Ms Mun's most recent comment because I was going to raise this issue of: who is this other party? You're now making a distinction between the other party and a third party. Like I say, I kind of feel like I need to process that.

But just back to the provision of section 16(1)(c)(ii), which Ms Notley is focusing on, I get your point, but there are words in there about, you know, "reasonably be expected to" and also "when it is in the public interest that [the] information continue to be supplied." I think you've acknowledged that you could see that there could be a circumstance where maybe – you referred to it as whistle-blower; maybe that's not right – it could be in the public interest that the information continue to be supplied and that there could be a reasonable risk that it wouldn't continue to be supplied. How would you address that concern? That's one of the things I'm struggling with.

The other thing is that I'm still struggling with this public body and another party because if you fit within 16(3), it takes you right out of this whole other discussion, and 16(1) is talking about how the head of a public body must refuse. If there's no longer that mandatory requirement to refuse, then where are we? Are we back into a discretionary? Maybe you have to fit somewhere else, then. I don't know. I feel like I'm going around in circles a little bit right now, and I'm a little reluctant to stick up my hand one way or the other until I get this sorted out.

11:20

The Chair: With that in mind, Mr. Olson, maybe Ms Notley could propose the motion that we might want to vote on.

Ms Notley: Sure. Exactly. I appreciate the clarification provided by Ms Mun because I think that if 16(1)(c)(ii) does not focus on whistle-blower protection, then I'm much more comfortable with just suggesting that that piece should be eliminated.

Here's an example. My proposal would be that section 16 be amended to delete section 16(1)(c)(ii). That's fine. If you look through the legislation, you will see periodically that sections of it are deleted upon review, so it does happen. The reason for that is that, as Mr. Olson has rightfully pointed out, this is not even a discretionary exception. This is a mandatory exception. If someone can bring themselves under this mandatory exception, we're done. There's no opportunity for anyone to review the merits or the wisdom of the decision or the application of discretion, all that kind of stuff. Because it's so open ended, it simply allows the third party to say: if you disclose this, we will not give this information to you anymore. Then it means that it falls within this, and the public body has to say no.

Now, to make this sort of more realistic, here's an example that I can think of. I'm not trying to politicize it, but I'm trying to make it more meaningful. Say the government has approved a certain certificate for industrial activity, and as part of that certificate there's been an agreement that industry will do its own testing. They will pay a fee to have somebody else come and do their own testing and provide that information to government, but the certificate doesn't talk about what government does with that information.

Then somebody does a FOIP to the ministry to get that information. Perhaps the certificate doesn't say that they must disclose the information. Government enters into one of these voluntary, "we're going to work together," blah, blah, blah kind of things, so they're giving information. This is where the public interest comes in because the question becomes: the information comes to government – let's say that it's problematic information about the test results – and the public not only has an interest in knowing about those test results, but they also have an interest in knowing what the government knew about them, right?

That's how you hold government accountable. Did the government know that industry A was polluting environment B, right? How did they act towards it? Well, if that company can say, "We're not going to ever give you this extra information anymore," then what that means is that the public never gets it. Yes, that's true that it's in the public's interest to have the industry give that information, but wouldn't the better way to deal with it be to have legislation telling that industry that it's got to provide that information? You have a different way to ensure that industry does it.

That's just one example. There are other examples, but I'm just trying to give you sort of a general idea of a way this might potentially be used inappropriately. Maybe environment wasn't the best one because I know that there's a pretty strong environmental regime that talks about reporting already and probably already deals with it in a different setting. But there are other things: consumer testing, consumer product liability, you know, stuff where government works with business and knows information that the public should have access to.

At this point it's only a question of business voluntarily providing that information to government. We know government has that information now, but the consumer will never get access to it because the businesses are not going to ever give that information to you again, and government doesn't have the time to legislate every single piece of information that they want from business. So we end up in this situation where the public doesn't get the information. All the rest of the stuff about impacting the business status, competitiveness, all that kind of stuff is fine. It's just this section that I think is too broadly crafted. That's my rationale. I've given you my motion. I will not say anything more on it.

The Chair: Thanks, Ms Notley.

Comments from Ms Mun.

Ms Mun: I just thought I'd refer to the Annotated FOIP Act manual because it talks about that particular provision that we're discussing here. It says of section 16(1)(c)(ii):

> As this section refers to information generally, and not to the specific information provided by the third party, the public body must show that disclosure will result in that type of information no longer being made available to the public body by the public at large.

They say:

> The first requirement will not be met if the public body is only able to show that the information will no longer be made available by the third party.

I think the wording of that provision is talking about similar other kinds of information not being given to the public. So it's not good enough just for that third party to say: no, I'm not going to provide that information anymore.

> The second requirement is that it must be in the public interest that similar information continues to be supplied to the public body. Consequently, a public body or third party must also establish that it is in the public interest that the information continues to be supplied.

It says:

> Where a person is required by law to supply the information to a public body disclosure of that information could not reasonably be expected to result in similar information no longer being supplied to the public body.

That's where I was referring to a very old order by the commissioner where there was legislation in the public body's own governing legislation that requires that kind of information to be supplied to the public body.

If we can make copies of this page maybe for the committee.

The Chair: Would the committee like a couple of minutes to review the documentation, then? Does anyone else wish to make a comment on this before we call the question?

Seeing none, I will call the question on the motion presented by Ms Notley that

section 16 be amended by deleting section 16(1)(c)(ii).

All in favour? Opposed? Motion is defeated.

Heather?

Mrs. Forsyth: Oh, yes. I support Ms Notley. Sorry. I guess I'm going to have to speak up.

The Chair: Okay. Thank you.

Recommendation 101, item 24.

Ms Notley: Well, you're going to be pleasantly surprised to hear that having reviewed everything in preparation of this, I'm withdrawing my recommendation under item 24 and also under item 25.

The Chair: Okay. Thank you very much for that.

Issue 105: "Should the FOIP Act specifically provide for an exception where the life or physical safety of a law enforcement officer or any other person is endangered?" Mr. Olson, you brought that up for discussion.

Mr. Olson: Right. I think I'll be saying the same thing on this one as I had on the previous one. I think there is provision, maybe not as specific as what was recommended in that recommendation. But trying to be consistent in my approach to this, I think if there is a more general provision that covers it, then I don't see the need to put in a specific provision. I think there is. I'm just scrambling to find it right now.

11:30

Ms Blakeman: Which? In 18, harm to person?

The Chair: Would you be referring to section 18, Mr. Olson?

Mr. Olson: Right. "Threaten anyone else's safety or mental or physical health." Certainly, law enforcement officials fit within anyone, so it's general, but it covers it.

The Chair: Are you withdrawing?

Mr. Olson: Yes. Well, it never was a motion that I made, so I'm not withdrawing it; I'm just not prepared to make a motion on it.

The Chair: Okay. Very good. Thank you for that.

Recommendation 121, issue 27: "Should the time that records under section 22 are exempt from disclosure be decreased?" Ms Notley.

Ms Notley: Yes. This is a pretty basic one. This right now allows for all cabinet records to be exempt automatically from disclosure for 15 years. By removing this and changing it to 10 years, we move closer to that which we were hearing about earlier today, which is: we are all fine with the completed decision being disclosed once it's made. This is 10 years after the fact. One assumes that we're not still making decisions at that point or that 10 years later it's reasonable for that information to come out. This is part and parcel of a package, of course, of recommendations trying to enhance transparency and access to government records on the part of citizens. By reducing it from 15 to 10, I believe, that amendment would achieve that outcome.

Ms Nugent: I just thought maybe for the committee's reference a comparison that we had across the provinces: Alberta is 15 years, the federal act is 20, B.C. is 15, Manitoba is 30, New Brunswick is 15, Newfoundland is 20, Nova Scotia is 10, Ontario is 20, P.E.I. is 20, Quebec is 25, and Saskatchewan is 25. I just thought I would speak to kind of the average if that will be of any assistance.

The Chair: Thank you for that.

Ms Blakeman: Well, I know from some investigation that I've done that we arrived at the 15 years in this particular legislation because we averaged it out between the 10 that I think was in B.C. and the 20 that was federal. As always Alberta wants to have a made-in-Alberta solution, so we chose halfway down the middle at 15. There's nothing precious about the 15. It was just a number that was chosen at the time.

I think what's interesting here is: what are we really worried about? Why does it need to be 15 years that records are withheld before the public, Albertans, get an opportunity to look at the information and understand why a decision was made? I can understand a five-year rule because, as I said before during these debates, five years takes you into the next mandate, whether that's the same government or a different administration.

But 15 years is three, almost four, full terms away. What is so precious, so critical that it needs to be kept from the public eye through almost four terms of government, 15 years in other words? I just cannot imagine what that would be, particularly when we are trying to learn the lessons of history that are given to us while we don't get the opportunity to even look at that history for 15 years. Difficult, you know, to correct any mistakes or move ahead with anything here with a 15-year mark. For those reasons I just think it's too wide an application. I can understand five, as I said, and, as I said, some of them are 10. We seriously considered 10 and just decided to pick another number, but it is an awfully long time to hold those records aside.

The last piece of that is how quickly the world is changing now. Even when we look at the apparatus that is in this room and that we are using, you know, the *Hansard* recording straight off these microphones in this room, I think five years ago that didn't exist. Our whole lives and legislation and what's happening in the world are moving much, much faster, and almost a world goes by in five years now. So when you're saying 15, it's an extraordinarily long period of time in this current world's definition. I just think it's too long a period of time to not allow the public to understand what went into decision-making by any public body, whether that's a school board or a hospital or the provincial government.

Thank you.

The Chair: You're welcome.

Any other comments?

Mrs. Forsyth: Barry, I'll make a comment on this. You know, as someone who sat in cabinet for two different posts, I'm not opposed to supporting the 10 years. The FOIP commissioner talked about the

different years across Canada, and that's an interesting comment. When you look back at some of the decisions in regard to the time limit that was changed from 90 days to one year, we look at B.C. because of its similar legislation to Alberta's. It's difficult to compare. B.C. is closest, so I would support the 10 years.

The Chair: Okay. Thank you.

Any other comments?

I will call the question. All in favour of recommendation 121 as moved by Ms Notley, that

> section 22 should provide that the cabinet records exemption cannot be applied after 10 years, not 15,

Sorry. Ms Blakeman, did I boo-boo?

Ms Blakeman: No. I'm waiting for you to call the question.

The Chair: Sorry. All in favour? Opposed? The motion is carried.

I'm tempted to inject a bit of humour. This applies to those of us who have experienced married life. When you look at this and you turn it around, there should be an exemption for people who have a tendency to remember things that happened 15 years ago and won't let it go.

Mrs. Forsyth: My husband would agree with you on that one, Mr. Chair.

The Chair: Seems to me all of us could relate to that in one way or another.

Ms Blakeman, motion M, part 2, please.

Ms Blakeman: Thank you. This is essentially the same argument exactly, but the previous one was for cabinet and Treasury Board confidences. I was directing the same motion towards section 24, which is advice from officials. It's exactly the same argument as I've just made, and I won't repeat it again. Basically, the exemption here is also 15 years, and I think it's just too wide for all the reasons I've already given. This is advice from officials. The public should be able to look at that after a period of 10 years, not after a period of 15 years. It's exactly the same motion as we just passed, moved by Ms Notley, as it applied to section 22. Mine is exactly the same applying to section 24, advice from officials.

The Chair: Comment from anyone?

Ms Notley: I would just like to say as well that for all the reasons I outlined with the previous motion, I think this motion, too, ought to be approved. In fact, this information is arguably less sensitive, based on the discussion that we've had in the past around the type of information covered by section 24, so I would think that this would be a reasonable motion to support.

11:40

The Chair: Thank you.

Further discussion?

Then I'm going to call the question that Ms Blakeman has moved, that

> section 24 of the FOIP Act be amended to state that this provision does not apply to a record or information that has been in existence for 10 rather than 15 years or more.

All in favour? Agreed? The motion is carried.

Moving on to recommendation 126 under issue 29, there are two different issues here.

Ms Notley: Well, I might suggest that we've really fully canvassed this issue already under our discussions that we had under item 22 unless somebody disagrees with me. I think we've basically already fully outlined the concerns we have with respect to section 24.

This would be another approach at that issue by limiting the types of information that are listed under section 24, but it basically gets at the same problem that we've already identified. Frankly, I think that the more reasonable thing would have been to leave the type of information in there and then subject it all to a harms test rather than picking and choosing types of information since the way you describe information can change. That's probably a less precise way to deal with what I see as a very problematic section within an act that it appears to be in complete contradiction with. However, having said all that, I'm not sure if we need to redebate all this.

Ms Blakeman: Not the first one.

Ms Notley: Yeah. At least not the first one. I think the first one has been canvassed pretty thoroughly already, so I'm happy to withdraw it. I don't think we need to debate things more than once.

The Chair: Thank you very much. I don't see any need for discussion. It will be noted that recommendation 126 has been withdrawn.

I'll leave it up to the committee. Do you want to deal with this one or break a couple of minutes early for lunch?

Ms Blakeman: Which one?

The Chair: Ms Notley, section 24(2.1), or were you withdrawing both provisions under issue 29?

Ms Notley: To be honest, I mean, at the time what I did was identify that one as one that should be considered just because it related to section 24. I don't have specific arguments with respect to applying a harms test to this particular section versus other sections of section 24. But if there are others who would like to engage in that, I'm happy to make the motion, and we can briefly discuss it.

Ms Blakeman: No, because, well, specific to the chief internal auditor we already have a section under section 6 that specifically addresses that "the right of access to a record does not extend to a record relating to an audit by the Chief Internal Auditor of Alberta." There's already an exclusion there for that.

The Chair: Ms Mun is nodding in agreement.

Ms Notley: Why do we have two?

Ms Blakeman: Well, because lots of people that made suggestions to us didn't read the act.

Ms Notley: I'm happy to withdraw that section. We have already dealt with it.

The Chair: Thank you, Ms Notley. Having had that clarification, Heather, we're going to break for lunch right now.

Mrs. Forsyth: Okay, Chair. How long?

The Chair: We'll be back at 12:30. That's 46 minutes from now.

Mrs. Forsyth: Good. I'll have my homemade turkey noodle soup.

The Chair: Happy Thanksgiving.

Mrs. Forsyth: Thanks.

[The committee adjourned from 11:44 a.m. to 12:34 p.m.]

The Chair: Welcome back, everyone. We are going to start with issue 31. Just to let you know, though, when Ms Blakeman returns here, we're going to revert to issue 28. There is a clarification that Marylin Mun and Dr. Massolin would like from Ms Notley or Ms Blakeman, and it's just a clarification on numbering.

Item 30, recommendation 9 from Service Alberta: "Should the FOIP Act be amended to provide the discretion to withhold a three-column document in its entirety?" Are there movers for the motion? Mr. Groeneveld has moved that

> the FOIP Act be amended to add a provision giving public bodies discretion to withhold a "three-column document" in its entirety.

Mrs. Forsyth: I'll go ahead, Barry, if I may.

The Chair: Yes.

Mrs. Forsyth: I guess it's more of a clarification on why they feel that the three-column document should or has to be exempted. I mean, from my time with the government the three-column documents that we normally had pass by us on our desk were about legislation and the changes in legislation that we were proposing that were going to be presented in the Legislature. I don't recall any, as far as I can remember, that confidential that they couldn't be – you know, it gave the old act, the changes to the new act, and the rationale behind the changes to that particular piece of legislation. Through the debate in the Legislature when the new act was tabled, a lot of that was brought forward in the House either by the minister presenting it or if they had an MLA that was carrying the bill. I guess I'm a little perplexed on why they would want this three-column document exempted.

The Chair: Thank you, Mrs. Forsyth.

I'll ask Ms Nugent to give us a comment and then for any other questions.

Ms Nugent: Well, I guess our specific recommendation is the first column in the three-column document. As you know, the purpose of the three-column document is to provide advice to senior officials regarding new or amending legislation. Now, the public body feels that the first column does reveal draft legislation and advice and deliberations as the column indicates which provisions are being considered for amendment and which ones are not. That was the reason it was specifically being asked that the entire three-column document be exempted. There have been some cases where there was some discussion that the very first column didn't have to be severed; the other two we could understand. So that's kind of where we were going with that.

The Chair: Ms Blakeman and Mr. Groeneveld.

Ms Blakeman: Thank you. I'm trying to choose my words carefully here. My experience with the three-column documents flows from a situation that was happening about six or eight years ago – this was before the Routine was changed – where legislation was introduced and got first reading before question period and then was often put on the floor after question period. Of course, my response was to stall, so I became an expert at getting up and talking on a bill that I hadn't read – I couldn't read it; I didn't have time – for 20 minutes, filling time while somebody frantically ran back to the caucus to get a researcher to write something down and run back. This irritated people to no end, that that amount of time had been blown off, and others in my caucus did the same thing.

Eventually the Government House Leader and I reached an agreement that opposition members would be given a briefing on legislation, and as a result, when we commenced debate, it was expected to be informed debate. It was about the same time that the three-column documents came to be commonly used. It's very common for us to go into a briefing on a bill and for a minister or department staff to be there with a three-column document.

I'll tell you that some ministers hand the three-column document out to us, and we walk away with it. Some of them let us read it at the table and take it back, and others never even turn it around, so unless I sharpen up my reading upside down skills, I can't tell what's on it. The issue of whether this document is advice to officials or is critical to be withheld from opposition or members of the public and anyone else that's inquiring is a bit of a tempest in a teapot, frankly. It's been in, as I say, fairly wide, casual use.

12:40

As to whether the first column discloses a tremendous amount of information, it doesn't particularly. I mean, by the time you get to a three column document – and you guys would be able to talk about this better, about where it comes into your process – my understanding is that it's pretty far along in the process. There are no, you know, big trade secrets that are being given away here. There is no huge policy that is being given away. It's been talked about and gone through quite a few committees already, so I don't see the need for this. My understanding is that somebody insisted on getting it and then tried to FOIP it. As a result, there is now push-back saying: "No. We're not going to give it to you."

You know, this is a useful document. We've had it, as I say, on a casual basis that most ministries will share it with us, even let us take it away. A few won't, and really that's more about the personality of the minister than of any people working in the department. If you thought about it, you'd know who it was who wouldn't give it to me. It's been a useful tool. I know it's a useful tool for government. It's a useful tool for us and for others. I see no reason and I haven't heard a compelling argument as to why it would need to be withheld or have the first column severed off. In its use it just has not been of that level of advice that it would need to be withheld.

The Chair: Thank you.

Mr. Groeneveld.

Mr. Groeneveld: Well, thank you, Chair. Certainly, in listening to Ms Blakeman, I hadn't really thought of it maybe at the stage where she sees that document, I guess, which is pretty much a final document. I'm thinking more prior to that, you know, that that three-column document can change over and over and over again as it moves along. You're probably absolutely right. Until it gets to that stage, it doesn't mean a whole heck of a lot to anyone for the FOIP process, but I have known in my ministry of people trying to FOIP that three-column document before it ever got to that stage. I guess that's maybe where I was thinking a little bit. Because of the changes to it at that stage – I think Ms Blakeman is right – there's not much point in FOIPing the document.

The Chair: Now help me with one. It's just an example, and I know probably Mr. Lindsay has them as well. If you had an act or a piece of legislation dealing with acquisition of property for transportation corridors, for instance, I guess my personal fear was that until it was in a final format, it wouldn't take a mental giant to figure out what lands you were possibly contemplating and the risk to the taxpayer of a speculator moving to acquire property before the government did for a public corridor. Then the ensuing cost lies with the taxpayer. It wasn't a matter of hiding anything from opposition members. It was simply trying to protect the best interests of the taxpayer as you go forward developing the legislation that would enable you to assemble, as an example, a transportation/utility corridor. You know, maybe that's just hypothetical, but it was in the back of my mind, I know, a number of times when we were looking at different pieces of legislation.

Anyone else?

Ms Notley: Well, this strikes me as one of those areas where, frankly, the kinds of concerns that are being raised are actually addressed through other provisions of the act already. This is really, you know, putting something in writing which, where the concerns that are being raised are a risk, they're already protected from. Otherwise, all we're doing, of course, is expanding the scope of that which is excluded from the public's purview, which is something we should try to avoid in all but the most necessary cases. So I'm just wondering, you know: is it not the case – perhaps we could get some advice from that side of the table over there – that most of these concerns around those things that would actually disclose potential legislation at that point would already not be disclosed? Right?

Ms Mun: I think the position of our office is that this proposed recommendation is a bit problematic because it raises a lot of questions. What is a three-column document? How do you define it? Does it include all drafts of three-column documents? Section 24 talks about withholding information that would reveal plans and advice and so forth. I guess our view in the office is that you need to look at the content of the document. If the content of the document falls under section 24 – it doesn't matter whether it's in column 1, 2, or 3 – section 24 would apply. But the proposed amendment is naming a document, and you go: well, we need some direction. You know, the act will pretty much have to define what you mean by a three-column document, then.

Mr. Olson: Well, I guess I was just going to probably repeat some of the comments I made earlier when we were talking about section 24 and advice from officials because my comments are similar to the ones I made then. I think of a three-column document as kind of a living document as it works its way through the process and as policy is being developed and options are being looked at. I think we're accountable for the end result we get to. So I would have been inclined to support this motion of Mr. Groeneveld's for that reason. However, I take Ms Mun's point about: what exactly is a three-column document, and how is it not covered by section 24? So I'm contemplating that right now.

The Chair: Thank you.

Dr. Sherman and Ms Blakeman.

Dr. Sherman: Thank you, Mr. Chair. For me I'm sort of ambivalent on this one. I'd like to give you the reasons for my ambivalence. One, personally, as a new parliamentarian I've got no problem with people seeing what advice we get because, ultimately, we make decisions based on that advice. Many times we get very good advice, and many times we get – oh, gee, how do you say this nicely? – advice that's not so good. We eventually pay the political price for it. From that perspective I've got no problem with the world seeing the three-column document, just to make sure the advice we're getting is honest, decent, good, well-researched advice.

From the other side, in speaking for Mr. Groeneveld's point, we are elected members of government. I really have no interest in hanging our bureaucracy out there and having them launder it publicly if they have given us advice that isn't so well thought out and well researched. It's hard enough to retain the quality of people that we currently have in the bureaucracy, with the recent economic climate, and hard enough to retain talent. Ultimately, we're the elected people that make the decision, and we are responsible for the advice, to judge whether the advice we're given is right or wrong when we make our decisions. This is what democracy is all about. It's about debating this on the floor of the House. That's what we do in the Legislature.

Really, it's a question of, you know, I guess, sort of me coming to the swimming pool: people can judge what kind of shorts I wear for themselves when I come to the pool, but is it really any of their business how I got the shorts on?

My question to Ms Mun is: does any government in this country do this?

The Chair: This is quite a picture.

Dr. Sherman: Does any government in this country make their three-column document public prior to a decision being made?

12:50

Ms Mun: I looked at the comparison that the research team did on section 24 of our legislation, and I don't remember seeing that terminology of "three-column document" in the other legislation. Is that correct? Okay. They tell me it's correct.

This was the question I raised to this committee, that a three-column document is a reference that I think government bodies in Alberta use. I don't know if other government bodies also use the three-column document terminology. If you do include this provision in the legislation, you may almost have to define what you mean by the three-column document. As I said, I think our office's view is that, particularly if you look at section 24(1)(a), it would encompass the contents of a three-column document without naming the document. It has the content in mind. I think that's the intention: to enable government ministries to have the ability to talk freely and to give advice freely, too.

Dr. Sherman: Thank you.

The Chair: We've got Ms Blakeman and Mr. Lindsay, please.

Ms Blakeman: Yeah. I suspect that the three-column document that we're referring to here – and those of us around the table have mostly seen them – essentially is a document that comes out with three columns, usually on 14 by eight and a half foolscap paper, that has sort of: what is, what the problem is, and what the government is looking at doing, in three columns.

Ms Mun's point is exactly right because if you look at the document we've been working with today – guess what? – it has three columns. So which three-column document would we be talking about? If we go forward with this, we would have to define it very clearly because what you and I have all been talking about here, we understand because we've seen it. But other people haven't.

According to what's written here, it says: a three-column document. Well, that could be three columns of numbers. Or it could be a name, address, and telephone number; that's three columns. Anything that has three columns on it in a document would qualify under this wording. It's why the specificity of language in legislation is so important. If this were to go forward, there would need to be real clarification as to what we were talking about exactly. So there's that problem with this.

The second piece is that as the legislation moves along and changes, which is the difference in the versions between what Mr. Groeneveld was talking about and the version that I see, which is many versions further on, you are protected under 24 because it does talk about "advice, proposals, recommendations, analyses or policy options developed by or for a public body or a member of the Executive Council." Later on, under 24(1)(e), it says, "the contents of draft legislation, regulations and orders of members of the Executive Council or the Lieutenant Governor in Council." I think that could also be argued at some point to cover what's in the one column of the three-column document that we're referring to.

The protection about having to give that over to a member of the public while the legislation is still being developed is in the legislation already. We just cause ourselves problems by putting through something like this when, one, it's been used very casually and, as far as I know, this is the only time it's really been an issue; and two, any information that needs to be kept and used as strategy and policy information and draft legislation is already protected under 24. So we'd be duplicating it.

The Chair: Mr. Lindsay.

Mr. Lindsay: Well, thank you, Chair. Ms Blakeman makes some very interesting comments. Again, it appears generally that it is covered under 24, but there certainly are instances where there have been requests for information in the three-column documents. Really, what they are used for is to provide information and strategy as we develop legislation to be brought forward to the public through the Legislature. So I believe that there is a need for it, but again there is also a need to make sure that we define exactly what a three-column document is.

The Chair: Okay.

Mr. Groeneveld: I think probably the issue has been brought up. As Ms Blakeman says, she and I know what we're talking about for one specific three-column document. If we put something in here that no one really can define what it is, it's probably a waste of time. I would be prepared to withdraw the recommendation, I think, probably, until we get some clarification on what a three-column document is. Having said that, I still have concerns with the three-column document that you and I are talking about being FOIPed in the process.

The Chair: So you're withdrawing?

Mr. Groeneveld: Well, we can't change the wording to explain what it is in this, I don't think, can we? Not that I can see.

Mrs. Forsyth: Barry, I'd like to be put on the list.

The Chair: Go ahead, please.

Mrs. Forsyth: Well, I guess my concern is the fact that this recommendation came from Service Alberta, and Service Alberta is the department responsible for the FOIP legislation. So one must ask themselves: if it's their recommendation, they must have a rationale behind this recommendation. It would be interesting to hear what their perception is of the three-column document and why they would even put this recommendation on the floor.

The reason I say that is that it's been brought up by some of my colleagues, and I agree with them – I think it was probably George and even Fred – about the definition of a three-column document. I think I'm seeing the same in my picture of the three-column document as many other people at the table, you know, when we're moving through the legislative process. To me that doesn't seem to be a big deal.

But then Ms Blakeman talks about a three-column document that could be names, addresses, and phone numbers, or it could be Heather Forsyth and something else and the third column another column, and that could be considered a three-column document. So it opens a much bigger picture than I am thinking Service Alberta has in mind.

I think it was George that thought about withdrawing this particular recommendation until we get some clarification, and I certainly would support that.

The Chair: Although Mr. Groeneveld has offered to withdraw it, Ms Nugent has offered to give a commentary on it, Heather.

Ms Nugent: What I would like to clarify is that I think when the public bodies, the different departments came to us, this was in the content absolutely, that it was advice to officials under section 24. I think the issues under the severing of the three-column document at that point in time were some issues where they didn't disclose it. It went to the commissioner's office, as Marylin said, in some cases. I'm not quite sure of the decision that was made in any one particular case, but it was, I believe, that they didn't feel – and there were some difficulties in trying to take that one document, separate it, just put what the first column was versus what the proposed was and the comments that were with it.

Certainly, if the party wishes to withdraw it. I think it was specifically put in here just for clarification as to the whole document when it was used under section 24. That's my understanding.

Mrs. Forsyth: Well, if I may, Barry, if they put this particular recommendation in for clarification, it certainly has not done that. It's begged many questions, and we've heard those questions around the table.

Mr. Groeneveld: Just a comment on that. Most of the stuff we've tried today has been muddying the waters, not clarifying. So I think we're holding pretty true to that. I'm prepared to withdraw this one, then.

The Chair: Very good. Mr. Groeneveld has withdrawn issue 30.

Now, issue 31, recommendation 62. Mr. Olson, you again had raised this as an item for discussion, I believe.

Mr. Olson: Yes.

The Chair: Oh, I'm sorry. Dr. Massolin.

Dr. Massolin: I'm sorry, Mr. Chair. You had mentioned going back to issue 28 just briefly, just to clarify something.

The Chair: Oh, right. Right. I'm sorry.

Dr. Massolin: Sorry. My intention is not to muddy the waters either, so my apologies right from the get-go. Just on that motion that was passed with respect to section 24. In looking at section 24, of course, there are two subsections – namely, 2(a) and 2.2(a) – in which this 10-year, which would be changed from 15-year, limit would be applied. I just wanted to make sure that it was the intention of the motion here to capture both subsection (2)(a) and (2.2)(a) because, if so, that might trigger a consequential consideration, which we'd want to broach at this point. I just wanted to get confirmation of that.

1:00

Ms Blakeman: What would you think would be the consequential one? The section does not apply to information – sorry; this is (2)(a) – that has been in existence for 15 years or more. The second place it appears – you're right – is under (2.2):

> Subsection (2.1) does not apply to a record or information described in that subsection,

which is the stuff about the chief internal auditor. Then

> (a) if 15 years or more has elapsed since the audit to which the record or information relates was completed.

That would change that to 10 years since the audit was completed, and I think the same arguments apply. So I did intend that.

Dr. Massolin: Okay. Then I'll just ask Ms Mun to elaborate on what the consequences might be because she's the one that brought it up to me during lunch.

Thank you.

Ms Mun: Just for consistency. Section 24(2.2) talks about the chief internal auditor; so does section 6. So the question is: if this gets changed in section 24, would it also be changed under section 6(8)?

Ms Blakeman: I don't remember that.

Ms Mun: If you look at section 6(8)(a), "if 15 years or more has elapsed since the audit," it's pretty much a parallel provision to section 24(2.2).

Ms Blakeman: Oh, there we go. Oh, yeah. It's almost exactly the same.

Ms Mun: Yeah. So just to clarify that that's the intention.

Ms Blakeman: Yeah.

Ms Mun: Okay.

Ms Blakeman: Yes. Again, without writing by committee – what we've done is bad enough I think, but to write by committee would be totally unacceptable.

Yes, that was the intention. I did reference section 6 when we were debating that section, so I did know about it. I'd just forgotten about the 15 years. Yes, it specifically mentions the chief internal auditor at that point, but I think that all the same arguments apply.

The Chair: Has sufficient clarification been given, then?

Dr. Massolin: Yes, I think so, Mr. Chair.

The Chair: I presume everything is fine, then.

Dr. Massolin: Yes. Thank you, Mr. Chair.

The Chair: You don't need any additional wording in the minutes?

Dr. Massolin: No, I think, because we've got direction from the committee. I'm thinking ahead to the final report and what we would include, and it seems like there is a consensus to change it in both section 24 and section 6.

The Chair: Thank you.

Dr. Massolin: Thank you.

The Chair: Very good.

Now if we could, Mr. Olson.

Mr. Olson: Well, I think, again, this is one that I raised for discussion. I'm sorry. My recollection is that there was already an answer for this in the act. I see Ms Blakeman shaking her head, so maybe she can give me the reference, but right now I'm not finding the reference.

Ms Blakeman: It's under section 4, records to which this act applies. It talks about: "This Act applies to all records in the custody or under the control of a public body . . . but does not apply to . . ." and then you get a list of the exceptions. There are a couple of things that are relevant to this because you're basically talking about this sort of idea of prepublication materials, which is not clear, but if we take that as research or drafts and also the copyright issue – if you look at section 4(1)(i), it covers "research information of an employee of a post-secondary educational body," and my second reference is (h), going backward, which is around teaching materials

> (i) of an employee of a post-secondary educational body,
> (ii) of a post-secondary educational body, or
> (iii) of both an employee of a post-secondary educational body and the post-secondary educational body.

So it's covering all of that.

Copyright is its own thing. Again, the example that was used at the time was a playwright. Well, now you're playing in my sandbox, and I can tell you that every playwright copyrights every draft. Copyright is a different legislation, to start with, and they are all trained to copyright themselves. There's an additional section that talks about that any research material that will have a commercial value is in a different section.

So I think this has been covered off in a number of different ways to make sure that something that someone is going to make money from or that is research that is going to go on to something else is protected at the appropriate time.

Mr. Olson: Thank you. I don't have a recommendation or a motion to make on this one.

The Chair: Very good. Thank you for that.

We will now move to issue 36, dealing with the Workers' Compensation Board.

Ms Notley: I have a draft motion here.

The Chair: While this is being handed out – again, it's not to be argumentative – could we just get any comment from our research people on the crossover between what we're reviewing under the FOIP legislation and our ability as a committee to make specific recommendations about other legislation, not specifically this one, Ms Notley, but just while everyone is reading it?

Ms Blakeman: I think that this deals with it. If I remember correctly, the problem the committee had with my motion was that it was having the committee direct the Workers' Compensation Board. Of course, as a committee, we can make any recommendation we want to anybody about anything, but generally the committee felt that it was not appropriate for this committee, reviewing the FOIP Act, to be directing the Workers' Compensation Board to be doing something in particular. That's why I withdrew the motion at the time. Ms Notley has offered to do a revised version of it, and hers is directing the minister of employment to do something, which is within our purview and would be expected.

The Chair: I just wanted to give us a chance to read the motion and kind of digest what the intent of it was.

Ms Notley: When you're ready, I can give you some background.

The Chair: Go for it, please.

Ms Notley: Okay. Sure. We had some conversation about this before and some bits and pieces of advice here and there in terms of what the concern was that was raised originally that generated this, because that was a question, and then how the various pieces of legislation interact with each other. I spent about two and a half hours yesterday with all of the legislation open in front of me, bouncing back and forth between the Workers' Compensation Act, PIPA, and FOIP, trying to figure out what worked where, when, and this is the conclusion that I came to.

In essence, the problem that the person raised with us, brought to our attention, was that there were different sets of rules and different sets of legislation and different sets of remedial options available with respect to how his personal information was handled, used, and disclosed in the course of his claim with the Workers' Compensation Board and that he kept turning around and going to different places and being told he couldn't go there. Now, having read through his stuff in more detail, I realize that in some cases had he had a lawyer that was incredibly well versed in this stuff, he might have had one or two options available to him to resolve his problem although at the end of the day it was not a consistent answer.

So here's the deal. FOIP applies, mostly, to WCB, and part 2 of FOIP deals with protection of privacy. So we've moved away from the whole issue of getting access and people getting access to general public policy information. Now we're getting to the issue of the protection of a person's privacy. As we've been told, FOIP controls how WCB manages this stuff. That's where we get our protection in terms of what WCB does with our stuff.

1:10

Division 2 of the FOIP Act sets out the circumstances under which public bodies – and in this case we're talking about the WCB – can disclose personal information that they have. Most of them are the obvious ones. Where the person gives consent for that information to be disclosed, where it's for the purposes under which the information was collected in the first place – i.e., you give it to the body because you want them to do item A, B, or C for you, and in order for them to do that, they have to disclose the information – where it's complying with a subpoena, where it's collecting on a debt to the public body, for instance, or to law enforcement agencies: all these are your standard reasons where a public body can disclose the personal information of a citizen that they hold.

Also, however, it can be disclosed pursuant to section 40(1)(f) in FOIP, where it basically says that it can be disclosed for any purpose in accordance with another enactment of the government of Alberta, and this is where the Workers' Compensation Act comes into play. Then we have the Workers' Compensation Act, which provides in section 35 that on the written request of the employer of an injured worker the board shall provide to the employer a report of the worker's medical condition.

Section 39 states that an employer can request that a worker be subjected to an examination where the employer pays for the doctor and that information is provided to the employer.

Part 8 of the Workers' Compensation Act then goes on to say that "no member, officer or employee of the Board and no person authorized to make an investigation under this Act shall, except in the performance of that person's duties or" – and this is the key thing – "under authority of the Board," divulge information obtained. Yeah. That's basically it.

In essence, what happens is that under FOIP the person's information can be disclosed by the public body if there's another piece of legislation that allows it to be disclosed. Workers' compensation is that other piece of legislation that allows it to be disclosed.

The Workers' Compensation Act has a different set of rules about to whom something can be disclosed, and it gives itself its own authority to change the rules. Section 147 says, "under authority of the Board." Basically, the board can change its own rules about when and how and for what purposes it will disclose information.

The problem is that the worker has no way under the Workers' Compensation Act to appeal that. The Appeals Commission under the Workers' Compensation Board is very limited in its jurisdiction. It does not deal with board policy. It does not deal with access to information issues. It only deals with specific issues relating to a compensation claim. I looked at that jurisdiction. Meanwhile the commissioner's office, it would seem to me, runs up against a blockade because if the board passes a policy saying, "We shall disclose this information as per the act or as per our own policies," then the commissioner's office has no more ability to deal with it.

Then, on top of it, you have disclosing to the employer under the authority of the act. You know, we'd been told: oh, well, that person could still go through PIPA and have PIPA deal with the employer's bad acts, that they used the information inappropriately, which was the complaint here. But they can't do that because PIPA says: well, yes, you use the information inappropriately if you use it for a way that is different than what you said you would use it for when you got the consent to get the information. But, of course, the employer never got consent to get the information; they got the information under the authority of the Workers' Compensation Act, and the Workers' Compensation Act doesn't require consent nor does it define the purposes for which the information will be used. Then, of course, that all applies if PIPA applies to the third party, and we have the situation where the third party may not even be subject to PIPA.

The reason I raise this is because the Workers' Compensation Board, as I'm sure every MLA here knows, is a body which is not without its problems. I can't believe there's any MLA who hasn't spent a lot of time dealing with people who have had to work with Workers' Compensation. We know that they have the authority to extract the most sensitive, the most personal, the most private information that a person can possibly have. We know that they hold that information. There's a different set of rules for how they can under certain circumstances disclose it, and now we're not sure that people have the same right to appeal anything to adjudication, depending on the nature of the employer and the policies that are written by the Workers' Compensation Board itself.

Already I took too long explaining that, and I will say that it took me about two and a half hours of flipping back and forth through the acts, trying to figure out what worked where and when and under what circumstances.

What I'm simply suggesting here is that we establish a panel to have a few folks that know more about this sit down and look at this with a view, as I said, to maximizing the protection of privacy for the injured worker while maintaining the rights of the employer to their natural justice rights. What I mean there is that employers and workers have appeal processes where they often are on opposite sides of an adjudicative process, and they have a right under the Workers' Compensation Act to get access to that information. I'm not suggesting that they don't have that right or that that right should be limited.

We still maintain the employers' rights to that information where they need it, and we still maintain the ability of the WCB to do its job in terms of compensating the worker with all the best information at their disposal, but otherwise we do everything we can to ensure that the worker has the ability to correct the information the same way they would under PIPA or FOIP, has the ability to have more control over when the information is disclosed and how they can get remedy and what place they go to for remedy if their rights are breached. Right now not only is it not clear; it's not the same. It's not consistent, depending on the circumstances.

What happens right now is that the Workers' Compensation Board through section 147 has the ability to write policies that, arguably, take them out of much of the scope of the remedial avenues that would otherwise be available to the worker under FOIP or PIPA.

That's what I discovered. That's what I wrote. It's just a panel. It doesn't commit anybody to doing anything.

Ms Blakeman: It doesn't spend any money.

Ms Notley: It doesn't spend any money. It tries to get at a very sensitive issue that impacts a lot of people very significantly that is not currently being well managed.

The Chair: Thank you. You've done a lot of work and put a lot of emotion into that, so thank you.

Ms Blakeman: I'm very prepared to support this motion in place of mine. I think we're coming from the same place. Ultimately, what I was concerned about is that the privacy rights of Albertans are protected, and that's what the FOIP Act is supposed to be doing.

We came here to look at the review of the FOIP Act. The purpose of the FOIP Act says two things: give access to public body, government information and protect the privacy of Albertans. We have a situation that has developed over time with the WCB legislation and its ability to change its own policies that, I think, has created additional problems to protecting Albertans' privacy, which is why I was talking about: okay, let's get everybody together and work this out.

It just took Ms Notley – whatever – eight minutes to walk through why this gets so complicated. It is a bit like watching somebody walk into a labyrinth and go into one wall, and they back up, and they go another direction, and there's another wall, and they back up and go another direction, and there's another wall.

Really, this is, I think, the best that this committee could do: have identified the inconsistencies that are out there and the lack of protection for Albertans in some cases, recognizing that the WCB Act in itself is created to do something different. I think this is the best the committee could recommend, to say that we need a number of representatives to go off and work on this one because clearly there are issues. It's bigger than we want to take on here or could, and somebody needs to go look at it. I think that's well covered in the motion that's been put forward, and we should send it off for somebody else to deal with.

1:20

The Chair: Thank you.

Ms Notley, just to clarify, then, your motion replaces the two bullets that were there, correct?

Ms Notley: Yes, exactly.

The Chair: Okay.

Heather, any comment?

Mrs. Forsyth: Unfortunately, Barry, I don't have the motion in front of me. I guess that's the problem with having telephone call-ins, but I've listened intently. I really am not opposed to what Rachel is proposing. I get the gist. It looks like she is wanting to establish an expertise panel and still maintain the employers' rights, still maintain WCB, and all of that stuff. I'm not opposed to that. I think it's a good idea. I mean, she alluded to the fact that there probably isn't an MLA in this province that hasn't at one time or another dealt with a WCB issue, so I'll support that.

The Chair: Very good.

I don't see any other hands up here. I'm going to call the question. Ms Notley moved that

> the minister of employment establish a panel consisting of representatives from the WCB, workers, employers, Service Alberta, and the Ministry of the Attorney General to review the outcome of the combined application of the Workers' Compensation Act, FOIP, PIPA, and the HIA to the collection, use, and disclosure of injured worker medical records and to make recommendations that will if possible maximize the privacy rights of these workers while preserving the natural justice interests of employers and the WCB's ability to fulfill its statutory purpose and also ensure the consistency of adjudicative forums and remedial options available to injured workers in the event of alleged improper use or disclosure of personal medical records by either the WCB or the employer.

All in favour? Opposed? The motion is carried. Thank you very much.

Could I just revert? The committee clerk just advised me for housekeeping clarification. Mr. Groeneveld withdrew his motion just before this one, and I neglected to call the vote. All in favour of the withdrawal? Opposed? Carried. Thank you.

Mid-afternoon crazies, it's called. Am I correct that we are now at item 46, on fees?

Ms Notley: I think you're at 39, actually.

The Chair: Issue 39. How did I miss that? I apologize. Bottom of the page.

Okay. Issue 39: "Should section 71 of the FOIP Act specify that the public body must prove that exceptions were applied in a reasonable manner?"

Ms Notley, please.

Ms Notley: Thank you. On this particular motion I'm going to ask Ms Mun to give some advice here if she can. Section 71 currently reads as a section which sets out the burden of proof on different occasions where a public body is attempting to rely on one or more of the exceptions. Depending on the type of exception being relied upon, the burden of proof varies.

I think that where this would have an impact would be on the exercise of the discretionary exceptions. My question to you, or perhaps to any of the lawyers in the room, is: when discretion is exercised and there is a review of how that discretion is exercised, is it now the judicial test that they test it against reasonability now?

Ms Mun: Okay. First of all, as I said, I'm not a lawyer, but my understanding is that in the application of mandatory exceptions the standard would be correctness. Either you are or you are not under that exception, right? But if it's discretionary, the first test is that you have to say: does that exception apply, first of all? After it applies, then you look at whether or not you exercised that discretion properly. In part of exercising that discretion properly, the public body would have to lay out all the circumstances that they considered in making their decision. So that would probably be captured under reasonableness, I suspect.

Ms Notley: Yeah. That's sort of what I realized when we had the conversation earlier about discretion. I'm certainly not a lawyer with any kind of expertise in this. None at all.

It's really about how you measure the way in which the discretion was exercised. Is it just a question of showing that you'd turned your mind to it, or is it a question of having turned your mind to it in a reasonable way? I'm not sure if the standard is the same or different. I think it's the same. Because I know there is that review of discretion, I'm inclined to withdraw this motion unless somebody can tell me that the standard is different.

I see Ms Blakeman is looking at the annotated piece to see if there's any guidance there.

Ms Blakeman: There is, actually. It's specific to fees. This is appearing on page 5-71-2 of the annotated rules, and it's referencing specifically section 71. In the general section that starts this off, it does talk about: "When the issue is the reasonableness of a fee estimate the public body will have the burden of proving that the fee is reasonable." To my eye, I think this is the only place that "reasonable" appears in the act or is part of the annotated. So this is the one place that it actually is in place, section 71, where it's actually talked about.

Ms Notley: In fact, even as you say that, going back to decisions that I've read around where you're assessing how a public body has applied its discretion, I don't think they apply the reasonableness standard. I think they just say it has to show that they did it, that they don't necessarily have to have been reasonable in how they did it. I don't know. I'm sorry. This was one of these ones where I was pulling from another document very quickly.

Mr. Olson: I'll offer a few words although I certainly won't presume to offer any legal opinion on this. It just seems to me that, you know, exercise of discretion to be reasonable has to not be made in bad faith and those types of things. I'm comfortable with the status quo, so I would like to support Ms Notley in her inclination to withdraw her motion.

Ms Notley: I have to say that I think I need to have better background to suggest that it's not there right now, so I'm prepared to withdraw that.

The Chair: Motion to withdraw recommendation 234 by Ms Notley: all in favour? Thank you. Carried.

Now we'll move on. The theme of the issue is fees. Item 46: "Should the fees in the FOIP regulation be adjusted?" Can I just ask a question here? Is this not part of a regulation, as the wording outlines, as opposed to the legislation that we're reviewing? If it is, is the regulatory part part of what we can make a recommendation on? I'm not trying to pass the buck; I just want to know.

Ms Mun: The fees are set out in the FOIP regulation. What the FOIP Act does is that it says that a public body may charge fees in accordance with the FOIP regulation.

Ms Nugent: I agree with Marylin.

The Chair: So the end result is that we can make . . .

Ms Blakeman: Oh, yes, because we're charged to review the FOIP Act, which includes the regulations. You can't apply the act without the regs. We've talked about regs all the way through here.

The Chair: I just didn't know if we were treading on other ground. That's all.

Three recommendations under item 46.

Ms Notley: I suspect we can get through these fairly quickly, but I think they should be done separately because there are three slightly different rationales for each one. Each of the recommendations that I'm putting forward looks to reduce the amount of fees that a public body can charge. Yes, I know that we did hear from a particularly sympathetic public body, and by sympathetic I mean that the concerns they raised were not not heard by the committee members in terms of the cost for a very small public body to process some of these applications.

1:30

Having said that, though, although there may be examples of particularly small public bodies, generally speaking I'm concerned, again, about increasing and maintaining accessibility for Albertans. In looking at the interjurisdictional comparison, I see that Alberta's application fee is the highest in the country. Some other jurisdictions don't have them, and some have them, but they're lower than Alberta's. As a result, I would suggest that we look at reducing the application fee.

Now, the recommendation that I sort of attached my name to, that wasn't written by me but was actually written by someone else that put in a proposal, was that we eliminate the application fee. I, frankly, am more just concerned that we're an outlier in terms of the rest of the country and that we look towards bringing it into an average in line with the national average. In any event, I think that we should look to ensuring that we're not charging more fees than the rest of the country.

The Chair: Thank you.

Ms Nugent: Well, I would like to share with the committee that, yes, the initial fee in Alberta is $25. Right now I just have the statistics for Ontario and British Columbia. The search and retrieval fee and the disclosure fee and photocopying and additional copies: all of that is much higher than Alberta.

Ms Notley: I looked at these. I mean, there are places where we're higher; there are places where they're higher. The application fee is something that everyone has to pay regardless of the merit of their request, regardless of how large their request is, so it's disconnected from the work, disconnected from the complexity of the request. We just appear to be, as I say, higher. There are lots of places where we're lower in terms of the overall fee calculation, but we have not been provided with an analysis of how many times those different calculations apply in how many different areas and what we end up receiving overall in fees on a per capita basis or per request basis versus other jurisdictions. We haven't received any of that information. It's difficult to compare, but this was one that stood out like a

sore thumb, the basic application fee, which, again, as I say, is not connected with the nature of the application.

Ms Nugent: I would like to add an additional comment, that no additional fees are collected until the cost of the processing request exceeds $150.

The Chair: Okay. Good information.

Ms Blakeman: I don't support this recommendation. I think we have a balance here now. I don't find that a $25 fee is an onerous amount of money. Barring those that are working at a minimum wage job or receiving a benefit of some kind, I think most Albertans can find the $25 to make the application. On the other side of it, the cost to the organization of processing even the beginning of the FOIP request can range from difficult for some of the smaller municipalities/public bodies that we've heard from to a fairly large accumulated cost in some of the departments that receive a lot of those requests. I don't find the $25 application fee to be unreasonable, nor have I heard any particular evidence that that fee is precluding a particular number of people. There's been no evidence that, you know, 60 per cent of the people that want to apply can't or anything like that. So I am not willing to lower the fee at this point.

What I am concerned about: I'd be more interested if we were talking about indexing it. Now, because it's in regulations, the government can change it without bringing it forward to the Legislative Assembly for debate, but what tends to happen is that it doesn't come forward, and it sits for a very long time before government reviews the rate and increases it. If we look at a number of the benefit programs that are in place, like AISH or seniors' benefits, for example, they're not indexed to anything and stay at the prescribed rate until somebody opens it up again and changes it. At least we had minimum wage, and it looks like we will again, where it is actually attached to something that gets reviewed and is automatically indexed and moves up or down every year.

My concern is more, you know: are we charging enough for some of these fees? And I'm a little concerned that there is no indexing, no incremental increase in any of these fees. That would be taken care of if the government was reviewing it on a regular basis, but the track record doesn't show that that's, in fact, the case. So I'm not willing to support this.

The Chair: Thank you.

Dr. Sherman.

Dr. Sherman: Thank you, Mr. Chair. I won't be supporting this motion either. In fact, Ms Blakeman has made many of the points that I was going to make. We've heard from those who have to provide the service. They're already having a challenging time with not only the budgets but their ability to deliver that. Getting rid of the fee altogether in itself will defeat the purpose of what we're here for, for people to get access to their information. I see requests going up. There needs to be some responsibility and some ability to actually recover the costs for the service that's provided.

The Chair: Are there other comments?

Then I am calling the question on Ms Notley's motion that the application fee be eliminated.

All in favour? Opposed? The motion is defeated.

The second recommendation, 278.

Ms Notley: Yes. Well, the second one relates to the process of charging applicants for the time taken to sever documents or records. This struck me as a particularly ironic process, having been in receipt of 50 pages of documents myself where all of it but one word on each page is blacked out with marker such that the whole thing is ridiculous. Then being told that we need to pay for the time that was spent running a marker over the 300-plus words on each page such that one word remains unblocked is a particularly frustrating process for people trying to get access to information from the government.

You know, we've talked about how we've heard this sort of pleading on behalf of public bodies that are just struggling under the administrative burden of telling their citizens what it is they're doing. I really think that if you believe in the principle of freedom of information and you understand that income is an impediment to a large number of people and you see these estimates of hundreds of dollars or thousands of dollars or tens of thousands of dollars that come at people who make requests, then there needs to be some way to address what is turning into the use of cost recovery to erect barriers between certain citizens and information that is held by their government.

In this particular case there was a whole slew of recommendations that came forward. These are just three, and I selected from I don't know how many. I mean, we all know that there were a number of recommendations that came forward from people concerned about the cost. I found this one particularly compelling. As I say, perhaps some of the government members here haven't seen these, but I could show you boxes and boxes of documents that are nothing but marker over paper, and the idea of paying people to do that is a very frustrating one to me. So I'd like to see some way to stop that particular cost-recovery process.

1:40

The Chair: Thank you.

Ms Blakeman: Well, I think there are a couple of points. First of all, remember that we're not talking about an individual seeking their personal information. There is no charge for that. We're only talking about a fee applying in a situation where they are accessing nonpersonal information. That's number one.

Number two. According to the regulations currently under section 11, which is fees for nonpersonal information, under 11(6) a fee may not be charged for the time spent in reviewing a record. Part of this motion was that a fee may not be charged for reviewing. Well, it's specific in the regs already that you can't charge for reviewing.

Again, I don't find that the fees are unusually high, and much of what happens here is allowing the department the flexibility to negotiate. Obviously, there is no cost recovery involved here. I don't understand how, from $150 or a $25 fee, you're possibly attempting to get cost recovery. You're not.

I think the issue that the previous member speaking was trying to get at is, you know, having to pay for blank pages or blanked-out pages with black marker drawn across them, where we're now expected to fork over literally thousands of dollars for blank pages. Yes, that's a very frustrating experience, but that's really not what is actually in this recommendation. I think we're trying to get at the problem of charging us for photocopying, you know, thousands of pages of blank documents.

I've had the same thing. I remember one of the previous leaders of the Official Opposition standing up in the House day after day after day holding up a blank sheet and people laughing and going: you're making this up. No, we weren't. That was the FOIP document we got, and there were boxes full of blank pages or blanked-out pages. But that's a different problem than the fee that is being charged either as a fee to initiate an access fee or the $150 limit that's here.

Ms Notley: We've moved on to a different one.

Ms Blakeman: No. Aren't you talking about 278?

Ms Notley: Yeah.

Ms Blakeman: Yeah. You can't charge for reviewing now.

Ms Notley: No. It's severing.

Ms Blakeman: Severing. No. I find it's worth while to leave it and allow the public body to negotiate the fee there. I think the flexibility is important.

Ms Notley: Well, perhaps if I could clarify. What I'm getting at is the process. Perhaps the language is not – again, I was grabbing someone else's recommendation. The concern is the process through which people are asked to pay for pages and pages of documents that are blanked out and the time it takes to blank them out. Literally, we get a document where there are two words on a page.

The Chair: I hear you, Ms Notley, and I know that Service Alberta wants to make a comment. Before we do, I got ahead of myself again, and I think what we should have on the table is your motion first. We're having the discussion.

Ms Notley: Sure. Fair enough. In deference to the fact that the act already refers to reviewing a record, I would say that the FOIP Act should be amended so that a fee may not be charged for the time taken to exclude information.

The Chair: To exclude information from a FOIP request.

Ms Notley: From a document.

The Chair: From a document. Very good.

Mr. Groeneveld: Could you repeat that? I think you said the same thing twice, didn't you?

The Chair: No. Ms Notley, I think, has indicated that the FOIP Act should be amended so that a fee may not be charged for the time taken to exclude information on a request, right?

Ms Notley: Yup.

The Chair: Okay.

Ms Nugent: I just have some statistics I thought maybe committee members might be interested in. Just to identify the fact that even though 70 to 75 per cent of the cost of processing a request is attributed to the severing of records, no fee is charged for the time taken to review the records.

Ms Notley: No. I think we covered that already.

Ms Nugent: Yeah.

Between April 1, 2007 – these are statistics that we're pulling out – and March 31, 2008, the direct cost of FOIP to the government, not including the commissioner's office, was approximately $6.9 million. The amount of fees collected by provincial government bodies was less than $73,000.

The Chair: Okay. I'm not trying to make a point. Can you just clarify again what the 6 point some-odd million was for?

Ms Nugent: It was the direct cost to the government to run FOIP.

The Chair: Oh, to run FOIP. Okay. And the revenues received were $73,000?

Ms Nugent: Yes.

The Chair: That would include all the fees: photocopying, et cetera, et cetera.

Ms Nugent: That's your fees that are coming in. That's correct.

The Chair: Okay. And you're saying that there is no charge for the time taken to review.

Ms Nugent: That's right.

The Chair: I know there would be a big difference between reviewing and excluding. Any idea what the time split would be?

Ms Nugent: It would depend on the request: how many records there were, what it was about, how difficult the request was. That's difficult to respond to at this point.

The Chair: Okay.

Mr. Lindsay, I think you had a question.

Mr. Lindsay: I did. Thank you, Chair. Well, the act really tries to and does, I think, strike a balance between right of access and protecting privacy. The issue is more disappointment in not getting the information that you requested. I think that's part of the process, that throughout the review certain information is deemed to be not admissible, and it's blanked off. I think the act is working in that regard.

The Chair: Okay. I see some pensive looks. No further comments? None?

I'll call the question on Ms Notley's motion, then, that

> the FOIP Act should be amended so that a fee may not be charged for the time taken to exclude information on a request.

All in favour? Opposed? The motion is defeated.

Ms Notley: Okay. Well, the last one, again, arises from my review of the cross-jurisdictional information, where it talked about the number of photocopies that could be made before charges were assessed. Now, I hadn't been aware of what the representative from Service Alberta had just said, that no charge of $150 is applied if it's less than $150, so maybe this actually already covers the issue. It may do that, in which case I'm happy to withdraw.

Ms Blakeman: Anything up to $150 is in the initial $25?

Ms Notley: Right. So that would probably end up putting us in the same position as if the first hundred pages were photocopied for free.

The Chair: So you would . . .

Ms Notley: Withdraw.

The Chair: You've heard Ms Notley's motion to withdraw recommendation 280. All in favour? Opposed? Carried. Thank you.

Issue 48, purposes of the FOIP Act, recommendation 22. Ms Notley.

Ms Notley: Yes. I'm passing out right now just a copy of the purpose section of the Nova Scotia act, which is referenced in this recommendation. I can't remember which person that came before us recommended it; it's not in my notes. Nonetheless, the idea is that the purposes section of the Freedom of Information and Protection of Privacy Act should be expanded to state that the act's purposes include increasing public participation in policy-making, scrutinizing government operations, and reducing wrongdoing and inefficiency and should add phrases modelled on the purposes clauses in Nova Scotia's legislation.

1:50

I'm just passing out to you a copy of the purpose clause in Nova Scotia's legislation. Just to review our own legislation, the only place where the act right now addresses this issue in Alberta is "to allow any person a right of access to the records in the custody or under the control of a public body subject to limited and specific exceptions as set out in this Act" – that's what it says – whereas in Nova Scotia we have a much broader statement of purpose. Of course, we've heard already today that in determining the way in which certain public bodies exercise their discretion or apply the facts or whatever, the commissioner has a view to the purposes set out in the act.

What they say in Nova Scotia is that one of the purposes is

> (a) to ensure that public bodies are fully accountable to the public by
>
> (i) giving the public a right of access to records,
>
> (ii) giving individuals a right of access to, and a right to correction of, personal information about themselves,
>
> (iii) specifying limited exceptions to the rights of access,

which we've already talked about,

> (iv) preventing the unauthorized collection, use or disclosure . . . by public bodies, and
>
> (v) providing for an independent review of decisions . . .
>
> (b) to provide for the disclosure of all government information with necessary exemptions, that are limited and specific, in order to . . .

And this is what I thought was particularly useful.

> (i) facilitate informed public participation in policy formulation,
>
> (ii) ensure fairness in government decision-making.

I thought that this was a healthy restatement, to some extent, of why it is we have freedom of access, freedom of information legislation, that it is really about trying to get information to the citizens, as some of us have said repeatedly throughout this conversation. I thought that the Nova Scotia purpose section did a better job than what we have right now in terms of setting out that objective, so I'd ask that committee members consider making a recommendation that the purpose section of the act be amended to include language along the lines of what Nova Scotia has in theirs.

Ms Blakeman: I can't accept the motion that you're putting forward now to add this on to what we've got because it actually changes the meaning of our purpose. If you wanted to wipe out what we've got and start over again and accept Nova Scotia's, that's a different cup of tea, but by attaching it to what we have, you do create a different meaning. What you would be doing then is setting up basically a test where you would have to say, "I have to prove that I'm doing X; I'm asking for this information because I'm going to use it to facilitate informed public participation" or "I'm going to use it to ensure fairness in government decision-making."

That last section sets up a test that you're getting this information in order to do that, which is different from what we currently have under our purposes of the act. The government at taxpayer expense collects information, and the purposes of this act are to allow any person a right of access to those records and to control the manner in which the public body collects it, uses it, and discloses it. Then there are the provisions about allowing everybody – there are specific exceptions in here. There's a right of access that allows individuals the right to request corrections and to provide for independent review through the commissioner's office.

Our purposes are set up a certain way, and adding that section onto this changes what we're doing. I apologize. I'm being very administrative law person right now, but you're asking me to accept something that changes what we've already got in place. It creates an additional burden here, and I'm not willing to do that.

The Chair: Mr. Groeneveld.

Mr. Groeneveld: Thank you. I think that probably Ms Blakeman is correct because – and I'll say it in a lot fewer words than she did – I'm sure that this would put us at some cross-purposes with our own act at this time. We certainly would have to study this a whole lot more. I agree that we couldn't just add it on because we'd have to wipe out our own first and then put this in. I couldn't support this at this stage.

Mrs. Forsyth: Just for the record, Mr. Chair, I support what George and Laurie have said.

The Chair: Okay.

Dr. Sherman: I liked the comments from Ms Blakeman and Mr. Groeneveld and Heather. We've heard from everybody. This act was, for the most part, one of the best acts in Canada, amongst the best in the world, and in Alberta we're one of the best in Canada. I think we've done a lot of good work here. There's no reason to overturn anything that's working well. We've done fantastic things, things that we've come to agreement on, for the most part, to make tweaks. I'm speaking against it.

Ms Notley: Well, I certainly understand the points made by Ms Blakeman. I kind of think that maybe some of her points have been mischaracterized subsequently. I mean, that's why I sort of said, "Along the lines of" although perhaps that's not helpful. I don't want to get into a situation where we're writing legislation here, and I certainly agree with Ms Blakeman that the last thing I want to do is add a test or raise the bar in terms of people's ability to access information where no test previously existed. That's certainly not what's intended either. Rather, the reference to this was this idea that if it's understood that one of the objectives of this act is to promote public accountability, government transparency, yada, yada, yada, that's something that would inform the interpretation of the act subsequently, when we've got this plethora of exceptions that are constantly being applied and considered.

It was certainly not my idea to somehow craft this in a way to reduce the scope of access or to apply a test that didn't exist before. I absolutely agree with Ms Blakeman to the extent that with the language as it exists right now, if it were to simply be plopped on top of what we've got now, if it were somehow to be seen by a lawyer to be the outcome, then it should be rejected. My point was not to do that. My point was to make a motherhood-and-apple-pie kind of statement that reinforces what it is this act is designed to do. You know, I think many of us are aware of what some people refer to the FOIP Act as instead of freedom of information and privacy, you know. Blank off; it's private: that's what some people refer to this act as.

The idea is to perhaps reshift its focus and put some language in that will remind people that what this is really supposed to be about is enhancing access, enhancing transparency, enhancing the access of citizens to the information that has been created through the application of their taxpayers' dollars under the guidance of those for whom they have voted. That's what I'm trying to achieve. I passed out the Nova Scotia language as an example, but it certainly is not definitive.

What I would like this committee to vote on is not necessarily the Nova Scotia language but the idea of revising the section to maintain all the current access but to emphasize and state the principle of the need to enable transparency and all those things I just talked about.

The Chair: I think the committee clerk, with respect, kind of lost it about three-quarters of the way through what your motion actually says.

Ms Notley: I haven't made a motion yet. I just passed the Nova Scotia piece around to show people. It might have created more confusion than I meant it to.

The Chair: Okay. So it was more of an informational, hope-you-take-the-hint prod.

2:00

Ms Notley: Would you like me to write a motion? My motion is that the purpose section of the act be amended to maintain all access and protection which currently exists but to reaffirm and clearly state the important role of the act in providing citizens . . .

Ms Blakeman: Slow down.

The Chair: I'm as far as "currently exists." How far are you?

Mrs. Sawchuk: The same. That's it.

The Chair: Can't write any faster. I'm sorry. "Be amended to maintain all access and protection which currently exists . . ."

Mrs. Forsyth: To reaffirm.

Ms Notley: To reaffirm, yes, and to add the principle – I think I liked what I had before better, but I can't remember what it was now. Forget "add the principle." And to emphasize the role the act plays in promoting public access to public body records to build democracy and transparency. How about that? Public participation in democracy and transparency. To build public participation and governance. Shall we put it like that? How about that?

The Chair: That's called making legislation on the fly.

Ms Notley: Again, it's not the language that you would use; it's just the point. I'm not suggesting language. I'm just trying to write my point.

The Chair: Would the committee clerk care to read back her scribble, please?

Mrs. Sawchuk: I will definitely give it a shot, Mr. Chair. Moved by Ms Notley that the act be amended to maintain all access and protections that currently exist and to emphasize the role the act plays in promoting public access to public body records and to build public participation, democracy, and governance. There's something missing there.

Ms Notley: A couple of little changes there: amend the purpose section of the act as opposed to the whole act and then, yeah, public participation in democracy and governance.

Mrs. Sawchuk: Ah. There we go. Thank you.

The Chair: Dr. Sherman, please.

Dr. Sherman: Thank you, Mr. Chair. All the blood flow is sitting in my stomach, and I don't think anything is getting to my brain. I'm one of those people who has to visually see things. I'm not prepared to vote on something where Ms Notley is throwing in kitchen sinks at the last minute without actually seeing it on paper.

Ms Blakeman: Let's take a wee break while we write it down.

The Chair: A wee break?

Ms Blakeman: Yeah, a wee break.

The Chair: Oh, as in a Scottish short one.

Ms Blakeman: Yes. Being a short, Scottish woman, I can say that, yes.

The Chair: We will do that for four minutes and 69 seconds.

[The committee adjourned from 2:03 p.m. to 2:09 p.m.]

The Chair: Thank you, everyone. We've now got the printed version of Ms Notley's motion. Moved by Ms Notley that

> the purpose section of the act be amended to maintain all access and protections that currently exist and to emphasize the role the act plays in promoting public participation in democracy and governance through public access to public body records.

After having read it – I believe we've had the discussion – I'll call the question. All in favour of Ms Notley's motion? Opposed? Motion is defeated.

At this stage I think we are finished other than that we've got two items here. The first will be kind of an overview, but before we get there, I just want to take a moment to thank the committee here for what I think has been a very co-operative demeanour and everyone working together and a lot of obviously well-prepared preparation and contributions made by all the committee members. So I would like everyone to pat themselves on the back, and I thank you sincerely for your co-operation and the help from all our support people as well.

Having said that, Dr. Massolin, I would like you to explain what has been done in the past historically with the reports that you and the committee clerk and others have helped develop both on field policy committees and special statute reviews. If you give us that outline, then we can maybe discuss as a committee the content and format for the final draft report that I hope you guys are going to be able to put together for us by the 25th.

Dr. Massolin: Okay. Thank you, Mr. Chair. I'd be happy to provide the committee some information as to what format and contents went into the previous policy field committee reports that have been generated for this and other committees and then also to talk about the 2002 report for the Select Special Freedom of Information and Protection of Privacy Act Review Committee.

First of all, I think that as most committee members around the table are aware, the policy field committee reports contain basic information on the mandate of the committee, basic things like committee membership, introduction, and of course a summary of the public consultation phase, a list of submitters and presenters, that sort of thing. The main section, of course, has been the recommendations and the amendments proposed. That is one form of committee report that has historically been drafted.

Another possible direction that the committee may want to consider is the most recent report that's been drafted, and I'm referring to the November 2002 final report. I think committee members have this report. I'm just showing it to you now. The reason why I'm highlighting this one, of course, is because it's the most recent report, but it also has a few different things that we have not included in policy field committee final reports to date.

If committee members would like to follow along, this report contains an executive summary, for instance, something that we haven't included in the policy field committee reports to this point. The executive summary of the committee recommendations contains only the recommendations themselves, not the rationale. The committee's mandate, an introductory section, and an acknowledgement section are also included. I'm not sure whether the committee would like us to include an acknowledgement section. We'll await direction on that as well. There's a section on the public consultation process, which is pretty standard. Then the most substantive section, of course, is the committee recommendations.

Now, I'd like to take a moment or two to discuss that specifically. Here in this 2002 report we have the recommendations set out according to the general categories, which fall along, of course, the structure of the FOIP Act. Then within those categories there are subheadings of the specific issues that were raised by the committee and potentially the recommendations which, again, fall under that basic category.

Now, what this report appears to do under those subheadings is to provide a bit of background information on the issue by way of providing a little bit of information on what the act actually says currently or perhaps that it's silent on a certain issue. Then it goes into a description of the public consultation; in other words, what the committee has heard, a paragraph on what the submitters and presenters have said. Then the next paragraph or two deal with a summary of the committee's deliberations and discussions. Finally, the last portion of the recommendation piece would include exactly that, the committee's recommendation.

At this point, Mr. Chair, we will of course await the committee's direction on how to format and also what to include in this final report. We're looking for direction. Thank you.

The Chair: Okay.

2:15

Ms Blakeman: This is the first time that a committee required by legislation to review an act has been delegated to a standing policy committee, and I think it is important because we don't know that it will continue to be delegated to a standing policy committee. I think it is important that we try to maintain the same kind of format that has been used for act reviews rather than submitting this act review to the format of the standing policy committees.

I asked to be heard under a different section because I have some concerns about doing an act review in this format, which I will leave to the appropriate time, but I think it's important that we have some consistency. Most of you were not here at the time this November 2002 report was done. It's ancient history to you. There is a previous report, from '98 or '99 I think, which would have been the establishment of it, actually, wouldn't it? Oh, '94. Sorry. So there was one review before this.

The next review committee, which is probably another eight or 10 years down the road, is going to look at a series of these. I think it's important that there be some consistency in the way they're presented rather than this traditional structure – as long as it is tradition, and what's it been: two years that these standing policy committees have been in place? – and that the consistency is maintained in following the way the act review reports have been done. As you look back over the years, you get a better idea, and you can compare one to the next. But they are very different, as Dr. Massolin has just put forward to us. They're quite different formats, and I think it's important to maintain the integrity of the act review format, which would follow exactly along the lines of the previous report, in November of 2002.

The Chair: Are there any firm recommendations you've got?

Ms Blakeman: I would firmly recommend that we follow the format of the previous reports from select special Freedom of Information and Protection of Privacy Act review committees.

The Chair: The 2002 version?

Ms Blakeman: Yes, 2002 is an example, but to follow the select special committee report formatting rather than follow the standing policy committee report formatting.

The Chair: Okay. I believe our committee clerk and Dr. Massolin would be quite familiar with that to which you refer.

Ms Blakeman: Thank you.

The Chair: Do you have any further comments, Dr. Massolin?

Dr. Massolin: No. I think it's pretty clear.

The Chair: Are you satisfied with the way it was presented in the past?

Dr. Massolin: Well, yes.

The Chair: Then pat yourself on the back.

Dr. Massolin: At any rate, I think we've got our direction.

The Chair: Do you get a raise for that?

Dr. Massolin: A recommendation for it?

Ms Blakeman: Essentially, you can do anything; you just need direction on what it is. You can do anything, and your team can do anything. You are so wonderful. You just need direction on what it is the committee wants you to do, correct?

Dr. Massolin: Yeah, precisely, and if there are any specific directions. I think we've talked about format, and of course we can follow this format. It's not a problem. I mean, there are certainly crossovers between the PFC-type reports and this report. However, there are some key differences, which I've outlined. The formatting is not a problem, but if there are any recommendations in terms of what the committee would like to see in terms of the content – and I specifically think that the recommendation section would be at

issue here. You know, I outlined my reading of the way it's been set out in the 2002 report. If that's acceptable to the committee or if there are any additions or subtractions from that or if there's anything to that effect that we could receive direction on now so that we're fully equipped to present the committee with what it wants the next time around, that would be helpful.

Mr. Olson: When I look at the 2002 report, I have to confess that I end up flipping back and forth a little bit trying to get a sense of what fits within what topic. Maybe all of my colleagues will disagree with me on this, but I find it helpful to organize a document by lettering and numbering rather than not. I see some headings that have boldface or they've got shading or they've got a square beside them, but if you open up a page, I find it a little bit hard to figure out. Is this a topic, is this the beginning of a topic, or is this part of something that came before it? If I find a 3(b) on a page, I know that it's part of something bigger. That's just my own little kind of pet thing. Others may disagree.

The Chair: Dr. Massolin.

Dr. Massolin: I can speak to that, yeah. The scheme, I believe, that they followed last time around was basically enumerating the recommendations. For instance, if you turn to page 6, you can see, you know, committee recommendation 1 and then on the following page recommendation 2, and then you can follow it along that way. That's the numbering scheme. The point is well taken in the sense that there is no numbering scheme that's associated with the larger categories and the subcategories, so if the committee wishes us to follow that sort of formatting.

The other point to be made, too, of course, is that the next meeting, I believe, is for the committee to respond. I mean, certain things are changeable or revisable, too.

The Chair: Would there have been a need, Mr. Olson, for a table of contents per se?

Mr. Olson: Well, there is a table of contents, but it doesn't come at the beginning, which was another thing I found a little bit curious. The recommendations are summarized, and probably a lot of us who have a lot of stuff to read, you know, immediately go looking for the executive summary. I'm not so sure it's a bad idea to have that right at the beginning of the document, but typically you'd probably be looking for a table of contents and then an executive summary. The executive summary jumps right out at you as soon as you open the cover.

The Chair: I see Dr. Massolin nodding his head.

Who did I just miss? Ms Blakeman.

Ms Blakeman: A couple of changes or deviations from what was in the November meeting. I'd like to see the information assembled in the way that we have actually addressed it, which is following the numbering of the act. Right from the get-go we started dealing with any reference for a change to section 1, the definitions section; then 2, the scope; then 3. It should flow that way through. I would like to see a clear numbering system to help me relate back to what part of the act is being changed. If the printing costs don't get too high, I would like to see a copy of the act in the back so that if you wanted to reference that, you could, but if it gets too expensive, I'll understand if it's not there.

Definitely, where you see a discussion of something, I'd like the reference to be in there to what we were discussing, at least a numerical reference that this is, you know, scope of the act, section 2, right up at the top. And please bold the recommendations. For people that are trying to read fast, you need that stuff to jump off the page at you. For readability and quick grasp I might refer you to the Auditor General's reports. They've done a lot of work over the last 10 years, some at my insistence, to make their reports more readable and easier to find things in. They've worked with colours and highlighting and bolding and things like that, and it's much more readable.

Also, I'm assuming that the précis of the discussion is pulled from *Hansard*, is actually pulled from the discussion that happened. Yes?

Dr. Massolin: Definitely, yeah.

Ms Blakeman: Good. Thank you.

The Chair: Any other constructive comments?

The committee clerk has indicated they've made a note of all the suggestions that have come forward, and I see Dr. Massolin nodding in recognition of those. I think they've got quite a bit of direction here.

2:25

As far as the acknowledgement of those involved that helped, I think that's important. After all, the committee clerk advised me that '02 was her fifth statute review. Maybe for those that have been involved with more than one, you could put, you know, number so-and-so. I suppose that now she's going to want a picture in the back for posterity's sake. I don't know.

Dr. Massolin: Is that FOIP compliant?

The Chair: I don't know. We'll get her permission.

I think that's enough on that topic unless you have any other requests, Dr. Massolin or Stephanie.

Then we'll move on to Ms Blakeman's other business, item 5, format for upcoming statute reviews. Similar to what you just talked about, Laurie?

Ms Blakeman: Yeah. It's connected. I'm not convinced that the standing policy committee format serves act review well. You know, both of them have all-party committee representation and are done to the best attempt of everyone in a nonpartisan way. We accept that from the get-go.

In the standing policy committees the research team that is available to us are generalists. They have done Herculean work, I think we all agree, in trying to muscle all of the many recommendations that came to us through the written submissions and the oral submissions into the document that we worked from, but to expect them to do a more in-depth analysis or to provide the kind of possible wording on resolutions or motions that has been done to previous act review committees is not a fair request to make of them. They just don't have that expertise coming from the department. Actually, if you look at the people that were involved on the technical support team before, there were a fair number of them. There are definitely fewer of you here today.

I wanted to put on record my concerns that I am as yet unconvinced that the standing policy committee is the best way to review acts because of the way the research is set up. I think that the team that we've got is really good, but in some cases, particularly when you're talking about something this specific, you're asking them for a specialty that they don't have. They're generalists. They work for every policy field committee that comes in front of them and every ministry that those serve.

Usually when you do an act review committee, the actual policy writers that work in the department are there to assist you. Now, interestingly, what's happened to us over the course of this particular review is that of the two Service Alberta staff that were here, the one that started with us, I believe, is no longer with the department, and the two people that replaced her have not been in their positions a particularly long time. Don't take that as me defeating my own argument. I'm just noting that we went through here with not the same level of expertise that was offered to previous committees or to other act review committees I've been on, like HIA or PIPA. That makes a difference in how fast we can do our work.

I know that all of you kept looking at me funny when I kept saying that it's going to take us at least two days to get through these recommendations. In fact, it did. When you look at all of those recommendations just lined up and we have to plow through them, it does take that long. It's a shorter period of time and we can have more intense discussion if we have the expertise available to us to sort of manage those into debatable sections, if I can put it that way.

I just wanted to put my concerns. I'm not convinced that this is the best way to do act reviews, and I'll raise this with the Government House Leader when I get an opportunity as well. I think we need to be very careful that we're serving the legislation in the best way possible, and I'm not convinced that this is the way to do it.

The Chair: Ms Blakeman, thank you for that. Again, it's not an argumentative question to you, but were you suggesting that the field policy committee structure itself isn't the proper one, or were you suggesting that maybe the field policy committee didn't have adequate resources to assist the folks that are here?

Ms Blakeman: No. It's the fact that the standing policy committees, the field policy committees, are structured in a very particular way now. The staff that are available as research are defined. They are generalists. They serve everybody. There's no expectation that they could possibly have the level of expertise.

The Chair: I understand that part. I just didn't know if you thought the all-party field policy committee was a structure that wasn't adequate.

Ms Blakeman: It's because that's the set-up that we have; that's our research staff. It's also things like, you know, the way these policy field committees have worked. The precedent that's now been set is that, you know, if we want additional research done, it has to be agreed upon by the whole committee. That's the precedent that was set, that it becomes a motion. If I, for example, wanted to request research, I had to put it forward as a motion, and it had to be agreed upon by the whole committee whereas in a special select committee that's not the precedent, and that's not the way research was requested. There are different rules that we're working by here than what you would usually have, and that's why I'm making the distinction.

The Chair: I hear you. Okay. Good comments.

Anyone else?

Well, may I once again repeat: thank you very much for the really fine, co-operative work and the spirit in which we've I think done really good work so far.

Ms Blakeman: I'm sorry. I just had one very brief thing. The second thing that I needed to report back was that I did have the opportunity when I was in another policy field committee meeting – yes, that is the sound of my life getting sucked into committee meetings – to question representatives from both Enmax and EPCOR on whether they felt that being included under FOIP legislation would impair their ability to function at all. The response from both representatives was in the negative, that they did not feel that being under FOIP would have been a problem for them as any of their commercial or trade secrets were already protected under FOIP. Although you voted down my motion, I did follow through, and they didn't see that there would have been a problem with it.

Thank you.

The Chair: It's on the record.

Okay. Just a reminder that our next meeting is Monday night, the first night of session, October 25, at 6:30.

Did we agree on two hours?

Mrs. Sawchuk: For that meeting, yes.

The Chair: Okay. And if we happen to go an extra 15, is that okay? Okay.

Then our second meeting would be Tuesday, November 2, again at 6:30, again in this committee room.

Thank you for your patience, guys. Thanks again to all the staff for the support that you've given us, and thanks to *Hansard* for taking us through here.

Can I have a motion to adjourn? Thank you, Mr. Olson. All in favour? We're adjourned.

[The committee adjourned at 2:33 p.m.]

Published under the Authority of the Speaker
of the Legislative Assembly of Alberta