Title: Wednesday, August 8, 2007 PIPA Review Committee
Date: 07/08/08
Time: 9:31 a.m.
[Mr. VanderBurg in the chair]

The Deputy Chair: Well, good morning, everyone. Let's get started. We have a full agenda, and we're going to have a working lunch as well. I'd like first of all to welcome everybody to Laurie's fabulous constituency before she does.

[The following committee members introduced themselves: Ms Blakeman, Mr. Coutts, Mr. Ducharme, Mr. Lund, Mr. MacDonald, Mr. Martin, Mr. VanderBurg, and Mr. Webber]

[The following departmental support staff introduced themselves: Ms Kreutzer Work, Ms Lynas, Ms Lynn-George, and Mr. Thackeray]

[The following staff of the office of the Information and Privacy Commissioner introduced themselves: Ms Ashmore and Ms Clayton]

Mrs. Sawchuk: Karen Sawchuk, committee clerk.

Mr. Thackeray: Mr. Chairman, there are two individuals in the gallery, so to speak, that work in our area, within Service Alberta, and I just wanted to take the opportunity to introduce them because they have worked diligently assisting others in preparing the information that is before the committee today and was before the committee earlier. Leanne Bruce is a research analyst with Service Alberta, and Yuk-Sing Cheng is a research officer. Yuk-Sing is also a third-year law student and is with us over the summer. I just wanted to introduce them.

The Deputy Chair: Good. Welcome to both of you, and thank you for the good work.

We're going to get started with item 2, the adoption of the agenda, and I'd ask someone to move thus, to adopt the agenda as amended. Laurie has comments under 7(b) that we'll add. Moved by Ms Blakeman that the agenda for the August 8 meeting of the Select Special Personal Information Protection Act Review Committee be adopted as amended. All those in favour? Carried. Thank you.

Business Arising from the Last Meeting: Kim, do you want to carry us through that?

Ms Kreutzer Work: Yes. I'm speaking to briefing E, personal information and personal employee information, requested by the committee. You would just have been handed out a chart that's got a lot of green and pale blue and pale yellow information on it.

During the discussion of personal employee information at the June 21 meeting there was some question about what types of personal information could be considered to be personal employee information. We have prepared a chart for you to help answer this question. The chart illustrates two key concepts with respect to personal employee information. The first, whether a particular piece of personal information can be treated as personal employee information, depends on the circumstances. In other words, you have to look at the particular relationship between the organization and the individual in question and ask: does the organization reasonably require this piece of information for hiring the individual or for managing or terminating the employment relationship with that individual? If the answer is yes, then the information can be considered to be personal employee information for that purpose. The information that an employer needs may vary from one employee to the next.

The second key concept is that just because a piece of personal information was collected as personal employee information does not mean that the organization can automatically disclose the information under the heading of personal employee information. Again, you must look at the circumstances and ask: is there a reasonable employment purpose for which the employer needs to disclose this piece of information about this employee to a particular third party? If the answer is no, then the organization could not use the personal employee information provisions in the act to disclose that information to the third party.

So let's take a look at the chart. We have two employees of the same organization. One is the senior financial officer, and one is the delivery driver. On the left-hand side of the chart you'll see a list of different types of personal information starting with the education information. In both cases it would reasonable for the organization to collect information about the individual's education in order to determine his or her suitability for the job. The information would be personal employee information and could be collected without consent under the act. The organization may reasonably need to use that information down the road to determine the training or professional development that the employee requires. Again, the information would be considered personal employee information for that use. But generally speaking, there would be no reasonable employment-related purpose for disclosing that information, so the organization in general terms could not disclose that information under the personal employee information provisions.

Now, looking at the credit report, it might be reasonable to collect a credit check about the financial officer, who's dealing with the company's accounts and finances, but the organization would not reasonably need that information about the delivery driver, who is not dealing with money. Similarly, it might be reasonable to require a driver's abstract for the delivery driver but not for the senior financial officer. Now, the organization may reasonably need to use and disclose the driver's abstract for insurance purposes, but with respect to the financial officer's credit check it is only a picture of the employee's creditworthiness at that particular moment, and generally there would be no reasonable purpose related to the employment relationship between the organization and the financial officer for disclosing that information to a third party.

An employee number is created by the organization, and it's used for its internal processes. There would be no reasonable employment purpose for disclosing that number outside the organization.

With respect to the social insurance number the organization would reasonably require the SINs of both employees for income tax purposes. Note that the organization would only be disclosing the social insurance number as personal employee information when the disclosure is to Canada Revenue Agency.

Date of birth may also be treated as personal employee information when the information is being collected, used, or disclosed for purposes relating to pension plans.

The Deputy Chair: Ty.

Mr. Lund: Thanks, and thanks for the information. I'm curious about the senior officer and the driver abstract. I would think that if the company is providing a vehicle for the senior financial officer – and a lot of them do – then it's imperative that they know the driver abstract.

Ms Kreutzer Work: It's quite possible that that organization in those particular circumstances may require a driver's abstract. I was

just talking in general terms, trying to contrast general scenarios. But, again, the whole point of what I was saying is that it's the context of that particular relationship between that individual and that organization, so it could very well be in that particular context that a driver abstract . . .

Mr. Lund: Well, thanks for the clarification.

9:40

Ms Blakeman: I'm curious whether there's any monitoring over any of the organizations that are captured under PIPA of their collection of this information. Is there any sort of audit process or educational process where someone goes into an organization and looks at the kind of information they've actually collected on their employees?

Part of what I'm seeing is that people tend to overcollect information. They take more than they need because they can always justify to themselves that: well, we might need it for something or another. Now they've collected a whole wealth of information about an individual, and I'm sure they'll figure out a way to use it that would be handy too.

We have this legislation in place, but my impression, having sat through these meetings and read all of this stuff now, is that we don't actually have any way of monitoring and enforcing how the groups that are covered under the act actually do it. Am I correct in that? There is no monitoring or enforcement.

Ms Kreutzer Work: The oversight belongs with the commissioner's office, so if someone made a complaint to the commissioner's office or if he initiated an investigation on his own – the purpose of the act is exactly what you said, to limit organizations to collecting only what they need for their particular purposes, not overcollecting.

Ms Blakeman: But it is complaint driven. That's what I was looking for. There's no ongoing monitoring. It's only complaint driven.

Ms Lynn-George: Could I just add a comment to that? We participate in a number of groups that have an interest in this legislation, and one of them is the CBA privacy subsection. We're meeting with a lot of legal advisers to organizations, so in a lot of ways the impetus for change is coming from those legal advisers, who are getting a better and better understanding of the act and telling organizations what they need to do to avoid being in the commissioner's office.

The Deputy Chair: Hugh.

Mr. MacDonald: Thank you, Mr. Chairman. I find this interesting. However, what would happen if either of these individuals, the senior financial officer or the delivery driver, as part of their employment had to have a drug and alcohol test? Whose information would that be, and what could it be used for?

Ms Kreutzer Work: The general collection provisions under the act would apply to drug and alcohol collecting as well as any other collection of personal information, so it is personal information about the individual. You'd have to look at whether or not the organization reasonably requires that information for that particular employment relationship.

Ms Clayton: If the individual makes a complaint to the commissioner's office, then the commissioner could open an investigation and look at all of the circumstances, as Kim and Jann were discussing, and look at the relationship between the individual and the organization's purpose for collecting that information to decide whether or not it's reasonable in the circumstances. So the commissioner's role if we received a complaint would be to look at that matter and make a determination whether or not it was reasonably required.

Mr. MacDonald: And in the case of the delivery driver if this was to go to an insurance company or to an auto leasing company, would that be reasonable?

Ms Clayton: The test results?

Mr. MacDonald: Yeah.

Ms Clayton: If we received a complaint like that, then we would be looking at those circumstances to determine if it was reasonable in those circumstances.

Mr. MacDonald: Thank you.

The Deputy Chair: Kim, carry on.

Ms Kreutzer Work: I'm done the briefing. Thank you.

The Deputy Chair: Thank you.

For information purposes only we'll move on to the next one. Tom.

Mr. Thackeray: Thank you, Mr. Chairman. At the last meeting during the discussion of the impact of transferring personal information out of the country, the committee acknowledged the role of the federal government. The committee asked that the technical team draft some recommendations to encourage the federal government to act on this issue. In the binder under Briefing Requested by Review Committee point F is a briefing note talking about the transborder data flow issue. I won't go through it. It's fairly self-explanatory.

The issue of protecting the personal information of Albertans being transferred across international borders by Canadian businesses is being addressed at the national level through the activities of the federal government and the Privacy Commissioner of Canada. What we have put before the committee is a couple of recommended motions if they prefer to go that way. The first one is that the federal government amend the federal act, PIPEDA, to require organizations to notify individuals when they will be transferring the individuals' personal information to a third-party service provider outside Canada.

The second recommendation for the committee's deliberation is that the federal government continue to work with foreign governments to address the privacy issues relating to transborder data flows. This is a federal issue, not a provincial issue.

Those are the suggested recommendations if the committee wishes to go that way.

The Deputy Chair: Does the committee have any preference to deal with it or not, you know, or either motion?

Ms Blakeman: I think we should be dealing with it to protect the people that we're charged with protecting, which is, specifically, Albertans here. My concern here is that we're seeing two scenarios happening increasingly in Alberta and within the last six months.

I'm sure we can all come up with definitive examples. We have an increase in contracting to a U.S. subsidiary. So work that used to be done by the government or was done by a local firm is now being contracted to a company that is a subsidiary of an American company. Aon comes to mind quickly. So now we have that information transferred to an American company, for all intents and purposes, and it's now under their rules, not under our rules.

The other thing we're seeing is companies that used to be owned and based in Alberta being bought by transborder companies, if we want to use the language of today. Once again, our information has moved out of our control and the control of our laws and is now under the control of somebody else's laws.

So I think it's incumbent upon this committee to bring forward some recommendations to the Legislature on how this needs to be handled. I think that individuals need to be given the opportunity to reclaim their personal information and move it to a different provider without any kind of penalty. If Telus is going to get bought by Ma Bell out of the States, or wherever the heck it's from, I think we need to be able to notify people that have a contract with Telus for telephone provision to go, "No, I don't want my information crossing that border. I have a right to take it back right now and move it," so that it never gets across that border. Because as soon as it does, we've lost control of this, and we are helpless to protect our own constituents.

The Deputy Chair: Laurie, I think you're right. You know, we have a couple of motions here. That first one pretty well covers what you've said. Do you want to move that?

Ms Blakeman: Yes, I'm happy to.

The Deputy Chair: Moved by Laurie Blakeman that

> we recommend that the federal government amend PIPEDA to require organizations to notify individuals when they'll be transferring the individuals' personal information to a third-party service provider outside Canada.

I've got some speakers on that before I call the question. Hugh.

Mr. MacDonald: Yeah. Mine, Mr. Chairman, was on a different note, but perhaps it would be advantageous for the entire committee if we could hear an answer to this question. It is this: how does this first recommendation affect, if at all, our new relationship with TILMA?

The Deputy Chair: Tom, go ahead.

Mr. Thackeray: Thank you, Mr. Chairman. TILMA is a relationship between the governments of Alberta and British Columbia. The issue before the committee is the information held by private-sector organizations, not by government. Because information could travel across the border under TILMA, the appropriate legislation dealing with that would be the federal legislation.

The Alberta Personal Information Protection Act deals with the collection, use, and disclosure of personal information by the private sector within the borders of Alberta. B.C. has a similar piece of legislation that deals with the collection, use, and disclosure of personal information by the private sector within the borders of British Columbia. Both acts are substantially similar because we drafted them together back in 2003. It was important, we felt, that there shouldn't be any major discrepancies between private-sector legislation between provinces.

Both acts are also substantially similar to the federal act, PIPEDA, Personal Information Protection and Electronic Documents Act. That would be the act that would govern the transfer of information across the provincial boundary. I think that the recommendation to suggest to the federal government that their act be amended would deal with the issue of any transborder data flow through TILMA.

9:50

Mr. Martin: Well, I think the second recommendation is basically status quo; we're not doing anything. We have no control over it, but if we think it's important, I think it's a stronger recommendation to say that federally they should take a look at it. I think that if we think this is important, we should support the motion that is on the floor.

The Deputy Chair: I'll call the question moved by Laurie Blakeman. All those in favour? Carried. Thank you, Laurie.

Ms Blakeman: Can I put a couple of questions to Mr. Thackeray? Mr. Thackeray, I appreciate that you got blindsided a bit with that question and may not have been prepared for it. I'm just wondering if you have had legal advice and if that forms the basis of the statement that you just gave us. Or did you do the best you could under the circumstances to answer our question?

Mr. Thackeray: I'm not a lawyer, and I did not receive any legal advice. I did the best I could under the circumstances.

Ms Blakeman: Thank you.

The Deputy Chair: Yeah. It did make sense.

Mr. Martin: This is outside of Canada, so it has nothing to do with TILMA. Right.

The Deputy Chair: Anyways, we'll move on now to item 4, Summary and Analysis of Responses. We have a long agenda. We have quite a few issues that we're going to go through. The procedure: I'll have Hilary talk a little bit about the summaries, and then we're going to move one at a time and deal with it.

Hilary.

Ms Lynas: Thank you. We're moving on now to question 12, so we're rapidly nearing the end of our original list of issues. Question 12 invited respondents to comment on the process for independent review by the Information and Privacy Commissioner.

There is a brief summary of what PIPA says about the powers, duties, and functions of the commissioner on page 2 of the summary of responses that you have. There are many different proposals for changes to the commissioner's powers, and quite a few of the participants indicated that they had participated in a process of an investigation or a review. So I'm just going to summarize some of the comments that we received.

Several respondents suggested that the commissioner should be required to provide a copy of a complaint to an organization. At present the commissioner may give a copy of the complaint to the organization concerned and to any other person that the commissioner considers appropriate. The commissioner may also sever information in the complaint.

Several respondents offered suggestions to allow for the early dismissal of complaints. They were concerned about the resources that are required to present a defence against a complaint that was clearly without merit. Some respondents believed that the solution to this problem was placing a burden of proof on the complainant in most cases or at least providing greater clarity as to which party has the burden of proof. This issue will be considered in one of the

briefings on complaints we're going to talk about in a few minutes that considers recommendations made by the commissioner.

There were a number of suggestions for changes to the mediation process, including separation of the mediation and investigation functions within the commissioner's office and making agreement of the parties a precondition of mediation. There were also recommendations to limit the ability of complainants to pursue grievances in more than one forum.

The subject of investigations and reviews attracted the greatest number of comments, but there was no real consensus. Some respondents were concerned about their access to information during the proceedings and about the confidentiality of information disclosed during proceedings.

Several professional regulatory organizations had concerns about the differences between their own processes and the commissioner's process when an individual was pursuing a complaint under PIPA in the course of some kind of disciplinary proceeding. One individual complained that the commissioner seems to be too forgiving of privacy breaches. Another individual wanted the commissioner to take a more expansive view of the scope of an investigation. Two respondents raised the issue of the commissioner's power to compel the production of records subject to solicitor/client privilege. The commissioner's submission included two recommendations on this subject, so we will be discussing that in more detail this morning.

There were several comments about the time required for the commissioner to deal with complaints and reviews and suggestions that time limits should be respected. There were three suggestions that the commissioner should have audit powers, and we have prepared a briefing on this for consideration by the committee.

Finally, there were a number of comments on the office of the Privacy Commissioner, mostly quite positive. For example, one business commented that the investigation reports and rulings have been very balanced and have clarified key points for businesses and individuals. An association commented that the office has been effective in identifying and resolving personal information breaches. Another association commented that the independent oversight by the commissioner is the most effective way to balance the rights of individuals and businesses when dealing with privacy-related disputes.

We included 13 questions at the end of the summary based on the commissioner's and government's recommendations. So we're going to be working through those now.

The Deputy Chair: Thank you. Under 12A, you know, how should we deal with frivolous or vexatious complaints? Should we amend the act or not? Leave things alone? Jann, are you going to help us out with that?

Ms Lynn-George: Yes. I'm going to address the topic of complaints. We have one briefing that will consider two of these recommendations from the commissioner. We are going to try and encapsulate the whole topic here.

The Information and Privacy Commissioner has made two recommendations for amendments to PIPA that would allow the early dismissal of complaints when those complaints are clearly without merit. The commissioner has reported that his office receives complaints from individuals when there is not enough evidence to justify investigation of the allegation. He has also observed that sometimes it becomes apparent after an investigation has begun, so in the course of the investigation or review, that the complaint or the request for review has no merit. The commissioner is concerned that organizations and his own office are both sometimes wasting resources on these matters.

So he's recommended amending PIPA in two ways. The first is to allow an organization to apply to the commissioner for authorization to disregard a complaint that it believes is frivolous or vexatious. The second is to authorize the commissioner to discontinue an investigation or review when the commissioner believes the complaint or request for review is without merit or where there's insufficient evidence to proceed.

So there are two quite distinct issues here, although they both relate to complaints. First, let's look at how the act applies to complaints to an organization. What we find, in fact, is that the act is silent on this point. The act does not actually say what is expected of an organization that receives a complaint.

Now, when it comes to complaints to the commissioner, there is a clear process set out in the act. The act establishes two ways in which an individual can ask the commissioner to exercise his powers under the act. The first is by making a complaint, and this occurs most commonly when an individual believes that his or her personal information has been collected, used, or disclosed in contravention of the act. The second way in which an individual can ask the commissioner to exercise his powers is by requesting a review. This occurs most commonly when an individual has requested access to personal information and is not satisfied with the organization's response.

Now, in the case of a complaint the commissioner has the discretion under the act to investigate and mediate. The investigator will produce an investigation report with recommendations. If this doesn't resolve the dispute, the commissioner may conduct an inquiry; there's no obligation on the commissioner. In the case of a request for review there is no investigation report. If mediation is unsuccessful, the matter normally goes to inquiry. However, again, the commissioner is not required to conduct an inquiry.

10:00

In the briefing that we provided, you have an analysis of some related law, but the most significant item in the list for present purposes is the FOIP Act, which provided the model for PIPA's provisions respecting the powers, duties, and functions of the commissioner. The FOIP Act is interesting because this very issue has twice been considered by select special committees that were reviewing that act. The last time this was considered was in 2001-02. The select special committee on that occasion agreed that the commissioner should be permitted to consider certain issues before he began an inquiry: whether the public body had responded adequately to an access request or complaint, whether a complaint could be more appropriately dealt with under other legislation, whether the length of time that had elapsed between the subject matter of a complaint and the inquiry made doing an inquiry somewhat pointless, and whether a complaint was frivolous, vexatious, or made in bad faith.

What the committee decided on that occasion was to give the commissioner the power to refuse to conduct an inquiry if the circumstances warrant. The committee didn't want to really specify exactly what the circumstances needed to be. They wanted to provide the commissioner with some discretion in that area. There isn't any express power under the FOIP Act to refuse to investigate a complaint. So it's this business with the inquiry where he has the discretion.

The commissioner has given some examples of other legislation that supports his recommendation to allow him to discontinue a proceeding that he believes is without merit. That's the Alberta Human Rights, Citizenship and Multiculturalism Act, the Ombudsman Act, and the Police Act. They all allow for discontinuation of proceedings under specified circumstances and subject to some conditions.

So are amendments needed to PIPA? With respect to the issue of complaints to organizations the case for amending the act was unclear to us, and we believe that the commissioner's office may be able to explain further. Perhaps we'll come to that. But we did note that there were no requests from organizations for an amendment along the lines suggested by the commissioner; that is, when the complaint is in the hands of the organization. When the complaint was in the hands of the commissioner, organizations expressed a great many opinions about early dismissal of unsupported complaints. The main concern was the expenditure of resources on an investigation or inquiry that wasn't going to have any sort of satisfactory outcome.

It may be helpful to provide express authority for the commissioner to discontinue an inquiry under PIPA on the same basis as the commissioner can refuse to conduct an inquiry under the FOIP Act; that is, if the circumstances warrant discontinuing the inquiry. The three Alberta acts that I mentioned offer some models for legislative language, and we note that they include specific criteria for ceasing a proceeding, a requirement to notify the parties in writing, and to give reasons for the decision. We should also note that a person who is not satisfied with the commissioner dismissing a complaint would always have the ability to seek judicial review.

We have two questions for the committee, and the first one is about complaints to organizations. As I said, this was not clear to us, and the commissioner's office may be able to explain it a little better. The question is: should the act be amended to make it clear that an organization is not required to respond to a complaint if the organization reasonably believes that the complaint is frivolous or vexatious?

The Deputy Chair: Right.

Go ahead.

Ms Clayton: I'd just like to clarify the commissioner's recommendation. As Jann has pointed out, we did make two recommendations, the first one requesting that the act be amended to make it clear that the organization is not required to respond to a complaint if the organization reasonably believes that it is frivolous or vexatious. As Jann has pointed out, there is no duty in the act for an organization to respond to a complaint when it comes directly to the organization.

We've made these two recommendations intending that they would go hand in hand and that that first recommendation would refer to a complaint that has come to our office and there is an investigation about to commence or that has commenced, the idea being that either the organization could apply to the commissioner noting that the complaint is repetitious or frivolous or vexatious and therefore the commissioner could authorize the organization not to respond and the second piece being that the commissioner on his own could decide that the complaint is without merit or that there is not sufficient evidence to proceed with an investigation and thereby dismiss the complaint in the early stages, before the organization invests resources and before our office invests resources.

The Deputy Chair: Jill, you know, on question 12A we really don't need a motion, but on 12B, or recommendation 12, we do need a motion for the commissioner to discontinue an investigation.

Ms Clayton: That would be sufficient for the commissioner's purposes. Yes.

The Deputy Chair: Okay.

Mr. Lund: Well, I would like to think that we would deal with the recommendation under 12A and follow through on the recommendation of the commissioner, which basically says, "Amend section 37 of PIPA to allow organizations to apply to the Commissioner for authorization to disregard certain complaints, in addition to the requests for access." If the organization realizes that this is vexatious or frivolous, I think we should allow them the avenue to disregard it under the authorization of the commissioner so that neither is spending a lot of funds on this. I think there is enough distinction between the two recommendations. I would prefer that we would pass both of them, but I would move the one that I just read.

The Deputy Chair: Recommendation 11, I guess it is.

Mr. Lund: The recommendation to amend section 37.

Ms Blakeman: Can I get an explanation of how that would work, then? I'm mindful of trying to provide a balance between the individuals and the organizations and that it not be too onerous, but I do find that, generally speaking, organizations have more resources than individuals do. I'm wondering what kinds of tests would be involved for an organization in applying to the commissioner for authorization to disregard certain complaints. What would be the process that would be involved here?

So I'm an organization. I've decided that somebody is being frivolous. I apply to the commissioner's office and say that I want to disregard this. I don't want to do any more work at all; I want out of this one. What kinds of tests do we have in place to make sure that it isn't just an organization going, "Oh, this guy makes me work too hard, and I don't want to do it"? What are the tests that are in place?

Ms Clayton: I would imagine that the tests would be very similar to when an organization now makes use of section 37 and applies to the commissioner for authorization to disregard a request for review. The organization is required to make an argument to the commissioner. The commissioner will weigh the factors that the organization presents and make a decision. There is a decision on our website involving Manulife, where the commissioner disregarded a request for review based on the fact that there had been many, many years of litigation preceding, that it was apparent that all of the documents had already been disclosed to the complainants. There was consideration of a number of factors before the commissioner arrived at his decision, and that was a decision published on our website. Of course, a decision of the commissioner along those lines would also be subject to judicial review.

10:10

Ms Blakeman: So they would apply. The commissioner would look at things using some tests available to him or her and would say: "Okay. I'll give you permission to disregard this." But no matter what happens, that organization is going to have to do some work to prove that this is vexatious.

Ms Clayton: Yes.

Ms Blakeman: Okay.

The Deputy Chair: I think the motion is saying that the organization is not required to respond to it. That's what you're in favour of.

Mr. Lund: Well, they still have to apply to the commissioner to get

permission to discontinue whatever it is that they're doing, but it's the commissioner that makes the decision, not the organization.

Mr. Ducharme: I'd like to speak against requiring a motion for 12A. Basically, I think the comments that we've received across the way have been quite clear, that if we pass 12B, the powers needed by the commissioner will be there, and rather than putting all the onus on an organization, there's a third party that has that opportunity to review. So I feel that 12A is just not required at all.

The Deputy Chair: We have a motion by Ty Lund which reads that
> the act be amended to make it clear that an organization is not required to respond to a complaint if the organization reasonably believes that the complaint is frivolous or vexatious.

Right, Ty?

Mr. Lund: Yes. That's the one I moved.

The Deputy Chair: All those in favour? Those opposed? It's defeated, so we will move on to 12B. We'll just say that no motion is required. Right?

Mr. Ducharme: Right.

The Deputy Chair: Okay. To 12B. We have an opportunity that the act be amended to clearly authorize the commissioner to discontinue an investigation or review where the commissioner believes that the complaint or request for review is without merit or where there is insufficient evidence to proceed. Do I have anyone wanting to deal with that motion? Ray.

Mr. Martin: Question.

The Deputy Chair: So moved by Ray. All those in favour? Those opposed? We need you too.

Mr. Coutts: Mr. Chairman, could you go back and explain that for me? I wasn't paying attention.

The Deputy Chair: Moved by Ray that
> the act be amended to clearly authorize the commissioner to discontinue an investigation or review when the commissioner believes that the complaint or request for review is without merit or where there is insufficient evidence to proceed.

So it clearly authorizes the commissioner a little more leeway. All those in favour? Those opposed? Ty, I didn't get your vote on that.

Mr. Lund: That's the second time I've had my hand up for that motion in the affirmative.

The Deputy Chair: I needed to get it again. Okay. It's carried. I'm sorry.

Mr. Martin: They were paying attention this time.

The Deputy Chair: Yeah. Okay.
Briefing 6.

Ms Lynn-George: The next briefing is number 6, and it's entitled Solicitor-Client Privilege. This also deals with two recommendations of the commissioner. I would like to provide some general information and then deal with the specific questions separately. I might just note that the first issue here is probably the most significant of the commissioner's recommendations, and it's also the most complex. In fact, it's currently before the Supreme Court of Canada as well as this committee.

There are several situations in which the commissioner might need to examine a document during an investigation or inquiry. PIPA gives the commissioner the ability to require an organization or an individual to produce and examine any record during an investigation or inquiry.

Consider an example. An individual who has requested access to his personal information is not satisfied with an organization's response. He asks the commissioner to conduct a review of their response. The organization says that PIPA's exceptions to access apply because the record is subject to legal privilege. The role of the commissioner in conducting a review in this situation is to determine whether the organization is properly applying the exceptions to access. So to do this, the commissioner would need to look at the documents at issue.

This is where solicitor/client privilege comes in. The commissioner noted in his submission that some organizations claim that the commissioner does not have the authority to require an organization to give the commissioner access to records that they claim are subject to solicitor/client privilege. These organizations say that only the courts can determine whether solicitor/client privilege applies to a record. They argue that the commissioner should have to apply to the courts to determine whether solicitor/client privilege applies to documents that are subject to an access request. There is a concern that if this is indeed the case, the commissioner would not have the ability to determine whether an organization properly applied the exception to access for information that is protected by legal privilege.

Before we look at this in a little bit more detail, just a few points on solicitor/client privilege. Solicitor/client privilege falls within a broader category of legal privilege. These privileges are sometimes referred to as privileges of the laws of evidence; however, solicitor/client privilege is often seen as the most important of these privileges, and it's given the most protection. Information that's protected by solicitor/client privilege is generally not subject to normal disclosure rules under the law and is inadmissible in a court of law. The Supreme Court of Canada has stated on several occasions that solicitor/client privilege can only be interfered with where absolutely necessary.

Now, legislation can require that documents subject to solicitor/client privilege be disclosed to a particular personal body in certain circumstances, but when there is this kind of legislation, the courts will interpret it very narrowly. Currently what PIPA says is that when conducting an investigation or inquiry, the commissioner can require an organization to produce records to the commissioner notwithstanding any privilege of the law of evidence. So that's quite specific, but it doesn't actually get as specific as to say that an organization must produce records that are subject to solicitor/client privilege.

Courts in Canada have consistently said that information and privacy commissioners acting under public-sector access and privacy legislation have the ability to examine records that parties claim are subject to solicitor/client privilege. If the government receives an access request and the matter goes to the commissioner's office, privileged records are put before the commissioner for his decision on whether they are in fact privileged.

Now, why this has become an issue is because there has been a recent decision of the Federal Court of Appeal under the federal act, PIPEDA, that's raised questions whether the commissioner is really authorized to see those privileged records. There are some distinctions that would apply here that will probably become issues in the legal case, but regardless of those distinctions some organizations

are pointing to this decision and saying that they are not going to provide these privileged records to the commissioner. So there's some uncertainty about.

Now, this uncertainty may be resolved to some extent by a decision of the Supreme Court of Canada, which is expected to hear an appeal on this matter early in 2008, but the court is going to be constrained by the specific legal issues in that case. So this committee is being asked to provide direction on the policy issues.

10:20

The commissioner's recommendation would create a new provision in PIPA, and it would authorize the commissioner to require an organization to give him access to records that are subject to solicitor/client privilege in addition to the existing provision for documents that are subject to the more general provision of privilege of the law of evidence.

So the question is: should PIPA be amended to explicitly provide the Information and Privacy Commissioner with the power to compel the production of documents subject to solicitor/client privilege in order to carry out the statutory review processes under the act?

The Deputy Chair: And you're saying that it should?

Ms Lynn-George: I'm not expressing an opinion, but I think that the commissioner's office may wish to.

The second issue is about waiver, and we can talk about that later.

Mr. Martin: Well, it seems to me that no matter what we do here, recommendation or not, it'll end up in the courts. I guess that what we would be doing by passing a recommendation is saying that we believe it should not apply, you know, with the commissioner. But I think that if an organization is serious about it, they'll say: "Well, we don't care. We're going to do this because we think the courts will overrule it." I guess what I'm wondering in my own mind is if it's worth dealing with or not. I see it more as just a recommendation rather than something that we can actually enforce within our mandate.

The Deputy Chair: Jill, do you want to answer that? Then you can put your comments into that too.

Ms Clayton: Sure. As Jann has pointed out, the act right now does give the commissioner the ability to compel records notwithstanding any privilege of the law of evidence. Certainly, our office operates on the assumption that that does include records that are subject to solicitor/client privilege. If our office receives a request for review – so an individual has applied to an organization for access to documents. The organization may refuse them access based on one of the exceptions in the act that says that these records are subject to solicitor/client privilege. The commissioner needs to be able to compel the production of those records in order to make a determination whether or not privilege does in fact apply. Without that ability to review the records, then there is no oversight of the organization's decision to withhold those documents.

Mr. Martin: I understand that, but let's say that we pass these two recommendations. It seems to me that that's not going to necessarily solve the problem. If they're serious about it, they will still refuse and have it go to the courts. That was my point.

Ms Clayton: That is true, but it would be clear in the legislation what the committee intended.

The Deputy Chair: Hilary, you have some comments?

Ms Lynas: Yes. Just to say that in the interim the organizations will certainly challenge it. We wouldn't be making any amendments to PIPA until that court case is decided. What it would do is if the committee does go ahead and make these recommendations, then we would take that as being the desire of the committee that the commissioner should have the ability to compel these documents. If the Supreme Court decision means there's no way that amending the act would have any effect, we would not proceed with it, but if the Supreme Court decision still leaves it open, then we would make the amendment to PIPA, and it would have some effect.

Ms Clayton: If I could just add one more comment. That case that is before the Supreme Court right now involves the federal commissioner and the federal legislation, and that piece of federal legislation does not include the statement: notwithstanding any privilege of the law of evidence. So it's even less clear in that federal legislation whether or not the federal commissioner has that ability to compel the production. That's one of the reasons why it's being challenged.

The Deputy Chair: Denis, you have some comments?

Mr. Ducharme: I would personally feel a lot more comfortable if we were mute on this point at this time. If the Supreme Court is making a decision, as was indicated, hopefully the decision would be coming down prior to this new legislation going through the House, and if it's necessary to make a change at that time, then an amendment can be made at Committee of the Whole to reflect the decision that was made by the Supreme Court. So I'd prefer to stay mute on it at this point.

The Deputy Chair: Anyway, we have a decision. Should PIPA be amended?

Ms Blakeman: Just further to the discussion that's on the floor right now around this issue. If the committee makes no recommendation, is mute, as my colleague has suggested, how are those that follow after us that are sitting on the floor of the Assembly when they have PIPA legislation in front of them supposed to know that this is one of the things that they should be considering if it's not part of our recommendations? Do we have another process or avenue in which to say: we put the following issues in the parking lot because we were awaiting something, court rulings or whatever, but we felt they should be dealt with? Because if we don't do a recommendation and a report comes out and it's not in there, we don't give any direction to the Legislative Assembly. So given the razor-sharp memories of everyone at this table, I'm sure that somebody will remember to bring this forward as a motion in Committee of the Whole, but God forbid any of us wouldn't be sitting here and would forget somehow.

The Deputy Chair: Do you want to respond, Denis?

Mr. Ducharme: Yes, I'd like to respond in this way. I would hope that we all have research budgets in our various caucuses and that when legislation comes forward in the House, I'm sure that someone would be taking the time to read the transcripts and see the discussion that took place around this table when we were reviewing the act. Therefore, I don't think it'll be lost. I think that with the discussion we're having now, it's certainly been flagged.

Ms Blakeman: I had an earlier answer, but is there any other way to mark it aside from an official recommendation of the committee, aside from reading the transcripts?

The Deputy Chair: Well, I think not. It's either a motion or no motion as far as I see. You know, you can park it or you can deal with it.

Ms Blakeman: I think I'd rather deal with it, then. So I'll put forward the motion to support the recommendation of the office of the Information and Privacy Commissioner. I think it's 13. Am I right?

The Deputy Chair: So moved by Laurie that

> the act be amended to provide the commissioner with the power to compel documents subject to solicitor/client privilege in order to carry out his review process.

Ms Blakeman: Yeah. I think it's important for the individuals that we're here to represent that we make every attempt to try and ensure that they have access to the process, and that's what this one is about.

The Deputy Chair: Right.

We have a motion. All those in favour? Those opposed? The motion is defeated. So at least by that it's marked.

Ms Blakeman: Thank you. It is indeed.

The Deputy Chair: The next question we have, recommendation 14: should we amend to state that when information to which solicitor/client privilege applies is disclosed to the commissioner at his request, the solicitor/client privilege is not affected? We could amend to state that when the information to which solicitor/client privilege applies is disclosed to the commissioner at his request, the solicitor/client privilege is not affected. So we could amend the act.

Ms Lynn-George: Could I just make a couple of comments on this point?

The Deputy Chair: Sure, Jann.

Ms Lynn-George: When information that's subject to solicitor/client privilege is disclosed to third parties, the privilege is normally waived. This means that the information is no longer protected by the privilege in any context.

The commissioner noted in his submission that some organizations are concerned that if they give the commissioner documents that are subject to solicitor-client privilege, the organization will have waived this privilege, that it's gone forever. So the commissioner has recommended that PIPA be amended to explicitly state that solicitor/client privilege is not waived when documents subject to privilege are disclosed to the commissioner during an investigation or inquiry. This would ensure that organizations are not losing that significant protection by complying with a commissioner's order to produce documents. We noted that B.C.'s PIPA and FOIP Act both contain a provision that is along those lines.

10:30

Courts have considered the issue of waiving privilege when documents must be disclosed to someone under a statute. These cases indicate that when the disclosure is required, the privilege will not be waived; however, the recommendation here would mean that in any case where an organization provided privileged records to the commissioner, whether voluntarily or under compulsion, there would be no waiver of privilege.

Mr. VanderBurg has already stated the question: should PIPA be amended to state that solicitor/client privilege is not waived when documents subject to privilege are disclosed to the Information and Privacy Commissioner as necessary for the purpose of an investigation or inquiry by the commissioner?

Ms Blakeman: Is there a downside?

Ms Lynn-George: No. There's no downside.

Ms Blakeman: Okay. Well, that's the question because you've said, "Well, what we have to keep in mind is that all records that had some sort of protection on them would remain that way," which sounds like a good thing to me, but I've learned to ask the question: is there a downside? The answer is no. I think we should go with this recommendation.

The Deputy Chair: David.

Mr. Coutts: Thank you, Mr. Chairman. Just a question. You mentioned that B.C. has addressed this and put it into its PIPA Act as well as the FOIP Act. I just wanted you to be able to get the whole question here. In Alberta, if we made this recommendation, would this be substantially similar to our FOIP Act as well?

Ms Lynn-George: This would be a difference from our FOIP Act. It's a difference which probably is not terribly significant insofar as the FOIP Act deals with public bodies, and public bodies don't have the same concerns, I guess, about the privilege issue. Some might disagree with that, but organizations are much more inclined to be very protective because, you know, they have private interests, whereas everything that is in the public sector is exposed to some sort of scrutiny.

Mr. Coutts: Thank you very much.

The Deputy Chair: Laurie, did you say you wanted to make a motion to deal with this?

Ms Blakeman: Well, I'm happy to have someone else do it if they're interested, but if you need me to make a motion, yes, I'm happy to do that.

The Deputy Chair: Well, I thought I heard you say that we . . .

Ms Blakeman: Oh, I think we should.

The Deputy Chair: Okay. Moved by Laurie that we recommend that

> the act be amended to state that when information to which solicitor/client privilege applies is disclosed to the commissioner at his request, this solicitor/client privilege is not affected.

Right?

Ms Blakeman: Yup.

The Deputy Chair: All those in favour? Those opposed? It's carried.

Jann, you're going to carry us into briefing 7?

Ms Lynn-George: Yes. This is about disclosure of evidence of an offence to the Attorney General. The Information and Privacy Commissioner has proposed an amendment to PIPA that would allow him to disclose to the Minister of Justice and Attorney General information relating to the commission of an offence against any law

of Alberta or Canada if the commissioner considers there is evidence of an offence. The government's submission made the same recommendation. It's notable that this power is included in the FOIP Act, but it's not in PIPA.

Before we consider the advantages and disadvantages of this recommendation, I'll just give you a brief outline of how PIPA works with respect to offences. This should come in handy for some later discussion of offences and penalties as well.

The commissioner has the power to determine whether a person contravened PIPA, but he does not have the power to determine whether a person committed an offence or to levy any fines for committing an offence. An offence must be prosecuted in the Alberta court system according to procedures set out in Alberta's Provincial Offences Procedure Act. Normally a Crown prosecutor acting on behalf of the Attorney General begins the prosecution by bringing the matter before a provincial court judge. The commissioner can't disclose the information obtained during an investigation or an inquiry under PIPA except in specific circumstances. So it's not actually clear that the commissioner can disclose information to the Attorney General before a prosecution has actually been commenced.

At present the Attorney General could be made aware of a possible PIPA offence or any other offence that the commissioner discovered only if the details of the possible offence were included in an investigation report or an order of the commissioner. However, in these reports and orders the commissioner can only disclose what's necessary for the purposes of establishing the grounds for findings and recommendations.

Both B.C. PIPA and the federal PIPEDA permit the commissioner to disclose information relating to an offence to the Attorney General. This is also the case under B.C. and federal public-sector legislation governing access to information and the protection of privacy. But in some other jurisdictions, including Ontario, the commissioner is not permitted to disclose this information to the Attorney General. We put a little chart in this briefing which has got yes and no mixed up all down the page. There are quite divergent views on this subject.

Why should this be the case? Why should jurisdictions be taking very different views on this question of whether the commissioner can report an offence? Well, first of all, we need to bear in mind that the commissioner has the power to compel the production of any record for the purposes of an investigation or an inquiry, and this includes information that would almost never be disclosed in response to a request under the applicable act. So that's privileged information, which we've just discussed, or information that could harm the health or safety of a person, and it includes information that's not even subject to the act, so some very sensitive personal information that might be subject to the Health Information Act. The commissioner can compel the production of all this information, so he has a lot of information that's very sensitive.

Now, to counterbalance that, the Legislature has said in PIPA that the commissioner cannot disclose information as a general rule except in very limited circumstances. The restrictions on disclosure of information by the commissioner are intended to limit the risk that information that's being provided to promote privacy purposes is not disclosed in a way that could be harmful to other important interests. So privacy is not the only consideration here. A power to disclose information to the Attorney General would be a very significant exception to the general rule of nondisclosure.

But, at the same time, there are some exceptions already in the act. For example, disclosure is permitted for prosecutions for perjury or for offences under PIPA. All the exceptions in the act have a shared rationale. They are there to further the administration of justice.

Creating a disclosure provision for information related to the commission of an offence could also further the administration of justice. At present, even if the commissioner had substantial evidence of the commission of a PIPA offence, the commissioner could only bring this information to the Attorney General's attention for possible prosecution in an investigation report or an order. In a case where an investigation or an inquiry brought to light evidence of the possible commission of an offence under another act, the same limitation would apply.

Just to give you an example. If the commissioner conducted an investigation and found that an organization had improperly disposed of personal information in sales receipts – so the information has ended up in a dumpster or something – and then he found that this information had probably been used by individuals for criminal purpose, the commissioner might not be able to disclose the evidence about the possible criminal offence in a report or in an order or directly to the Attorney General.

10:40

As I mentioned, disclosure to the Attorney General is permitted under the FOIP Act, so we do know something about how this would work. There are two orders under the FOIP Act in which the commissioner was asked to use this disclosure power. In both cases the applicants made allegations that offences were committed under Alberta acts. The commissioner refused the request in each of these cases. He said that mere allegations of wrongdoing were not sufficient to justify disclosure of information to the Attorney General.

In another case where the commissioner did disclose evidence of the offence, he only did so after a very thorough investigation of the matter by a private investigator and after performing a forensic audit. The amount of evidence indicating that the offence had been committed was therefore substantially higher than in the other two cases that I mentioned, and it could reasonably be assumed that this high standard would apply to any disclosure under PIPA.

The question for the committee is: should PIPA be amended to allow the Information and Privacy Commissioner to disclose to the Minister of Justice and Attorney General information relating to the commission of an offence under an enactment of Alberta or Canada if the commissioner considers that there is evidence of an offence?

The Deputy Chair: Thanks, Jann.

We have recommendation 15 to deal with and a suggested motion. What's your pleasure?

Mr. Webber: Can I make a motion, then, Mr. Chair, that

> PIPA be amended to provide the commissioner with the power to disclose information to the Minister of Justice and the Attorney General to provide for efficient preprosecution assessment of cases.

The Deputy Chair: Comments?

All those in favour? Carried. Thank you.

Go ahead, Hugh.

Mr. MacDonald: Please note, Mr. Chairman, that I'm not for this motion.

The Deputy Chair: You're not?

Mr. MacDonald: No.

The Deputy Chair: Oh, sorry.

We'll move on to recommendation 16. You have some more information that you wanted to hand out on this? Like we haven't

got enough reading material on this one. Jann, you're going to speak on this as well?

Ms Lynn-George: Tom will.

Mr. Thackeray: Mr. Chairman, I believe members of the committee just received a copy of a revised submission from the Information and Privacy Commissioner dealing with section 50(5) of the Personal Information Protection Act. In the documentation that was just handed out, the commissioner talks about a recent court decision that had an impact on his original recommendation to this committee.

The decision by the court is that the section referred, 50(5), is mandatory. This means that any complaint file in the commissioner's office must be completed within 90 days of receipt or the commissioner loses jurisdiction over it and it is a nullity. The decision of the court does not expand on what completed means. Caution would suggest that it means either closed by mediation or an inquiry held and a signed order issued. He goes on to further advise that it's the intent of his office to appeal this decision, and of course there is no guarantee as to when an appeal will be heard or what the outcome may be.

In the initial submission dated November 23, 2006, the commissioner asked that the 90-day timeline be amended to a one-year timeline. He also asked to retain the ability to extend any deadline.

> Very few, if any, complaints can be mediated to completion within 90 days of receipt. Furthermore, it is utterly impossible to schedule an inquiry, hear the parties and write an order within 90 days. Even if the Commissioner had unlimited resources, this would be the case: the process depends on the availability of the parties and their lawyers, the complexity of the issues, the willingness of the parties to mediate and a host of other factors specific to any one complaint.

In the initial submission the commissioner's office had asked the committee to consider recommending extending the 90-day period to one year, as I mentioned earlier. "By this revision to our submission, we are asking the Committee to recommend that section 50(5) be repealed." He goes on to say that there are several reasons for now seeking the repeal of the section.

> First, as the decision of the Court says, any time period imposed will be regarded as a deadline. If the deadline is missed, it may be that the issue is dead and the complainant has to start over again. This deprives or at least delays the complainant with respect to the rights given under the act. Second, depending on the circumstances and the ability to predict completion dates, a constant flow of extension letters is confusing and provides a distraction from the actual issues that need to be resolved. Third, we are not aware of a similar deadline having been imposed on other tribunals in Alberta such as the Workers' Compensation Board, Ombudsman, Human Rights, Occupational Health and Safety. We are aware that there are similar deadlines in access and privacy laws in other jurisdictions. We are given to understand that these deadlines are equally problematic in those jurisdictions. Indeed, the Alberta Queen's Bench decision at issue here may have implications for those other jurisdictions as well. Fourth, having to monitor hundreds of files, even [with] computerized tracking systems, has resource implications for this [office].

So the commissioner has revised his recommendation and suggested that section 50(5) be repealed.

The Deputy Chair: Okay. Thank you.

Mr. Thackeray: I'm not sure, Mr. Chairman, if someone from the commissioner's office wants to speak to this if I haven't done a good enough job representing their revised submission.

The Deputy Chair: Well, we have it in writing here as well. We don't have to agree with it, but we can hear it out.

The federal act is one year, right?

Mr. Thackeray: That is correct.

The Deputy Chair: Sharon, did you want to say something? You have that look on your face.

Ms Ashmore: Unfortunately, I may be long-winded on this one.

The Deputy Chair: Oh, no. We don't allow you to be long-winded.

Ms Ashmore: That's what I thought.

By way of explanation of course PIPA is similar to the FOIP Act and the Health Information Act in regard to the 90-day timeline. Going back to 1999, the former commissioner, Robert Clark, had originally dealt with this issue in Order 99-011. That particular case, though, was an access request. In that decision he quoted a Supreme Court of Canada decision that found that when it would work serious injustice to a party and when it wouldn't achieve the purposes of the legislation, these provisions were to be read as directory only, meaning they were "may." They weren't a mandatory "must" that you had to meet the deadline.

The office operated on that order ever since because that order was never appealed or never taken to judicial review. So the basis of the office's operations have followed from that decision, which was not ever decided at the court level.

What has happened now is that we are attempting to determine whether that means that other parties have lost rights under our legislation as a result. Our outside counsel, who argued this before the court, has said that, of course, every court case that comes before the court is decided on the particular facts of that case. This is under PIPA, and this is particularly a complaint and not an access request. So there is some question now as to whether this applies only to access requests or whether it applies to just the complaints.

In our office we have what we regard as our informal processes, and those include things like mediation and investigation. We have a fairly good success rate at completing those processes sometimes within 90 days, sometimes beyond the 90 days. The success rate is somewhere between 91 and 95 per cent. If you look at our annual reports, we do report these in our annual reports. We give those cases as much time as it takes to properly have the matters decided informally. For instance, if we're at day 89 and it looks like this matter will be concluded and the parties will be satisfied with what the commissioner's office has mediated or investigated, we don't chop it off and say: "Look. Sorry. We've got this deadline that we have to meet. It's the 90th day. Too bad. We're not mediating any further. Off to inquiry we go." In fact, we conclude most things in that informal process usually within the 90 days but not always, depending on the complexity of the issues.

10:50

Now what you have is the court telling us that not only do we have to conclude the informal process – in other words, conclude the mediation and investigation of a complaint – but we also have to conclude the inquiry that will happen within 90 days. Of course, an inquiry will only happen if the parties are not satisfied with what happened in the mediation or investigation process.

As I said, our success rate is high to conclude those matters, so only somewhere between about 5 per cent and 9 per cent of cases actually go to inquiry. We consider the inquiry to be the formal process of the office. It is an adjudication process. It is very similar

to a court process. The parties have the right to provide submissions to the commissioner. The parties have the right in oral inquiries to call witnesses. Sometimes the parties will ask for extensions of time to file submissions and, in cases where we have the oral inquiries, time to call additional witnesses.

Usually the issues are complex at inquiry because, remember, they're the issues that cannot be decided and cannot be concluded in the informal mediation and investigation process. So the issues tend to be very complex. We are often dealing with parties' lawyers, who have their own schedules, who sometimes are asking for extensions. Occasionally the commissioner will ask the parties to file additional submissions. On a rare occasion the commissioner will put an inquiry in abeyance to do an offence investigation.

So it is impossible to complete an inquiry within 90 days, never mind the informal mediation/investigation process. It's impossible.

Now, the commissioner could continue to send out extension letter after extension letter after extension letter, which in the really early days under the FOIP Act we did. It caused no end of confusion to the parties because they would say to us: "Well, I thought we had completed this inquiry. Why are you now extending the inquiry?" In fact, it was a form letter to comply with that provision. So we had stopped doing that a long time ago when we were in the inquiry process because of the confusion that it caused to the parties.

What the commissioner is saying is that while we're able to conclude probably mediation and investigation, the informal process, it is not possible to conclude inquiries within 90 days. It's unfair to parties, as well, to constrain them within a 90-day process and then to have parties told that because of processes they have no control over, they've lost rights under our legislation to have a matter concluded by either our informal process, as the court would suggest, or our formal process because the commissioner didn't comply with the 90-day provision.

So the commissioner is recommending that this be repealed. In the alternative he's recommending that the matter be given a reasonable time frame given the informal process and the formal process of the office. The reasonable time frame from all of our assessment would be about two years. That would allow for the informal process to be completed and the formal inquiry process to be completed, including the order to be written. That is the commissioner's alternative recommendation to a repeal if the committee is not in acceptance of a repeal.

The Deputy Chair: Thanks, Sharon. Now, I know why you were quiet earlier. It's because you saved it all up for this one.

I don't agree with the commissioner on repealing this section because I believe there needs to be some accountability and some time frame set so we can get some answers. I do understand that 90 days is short. The feds seem to deal with it within a one-year period, and we're not hearing about any recommendations to extend that. I'm thinking that I'm more in favour of extending the period from the 90 days that we have presently to one year and to work with that. It's consistent with the federal regulations, and I think it provides that accountability to the people that are sitting here in the process, that they know that they're going to get an answer. Two years is a long time to wait.

Ms Ashmore: May I comment?

The Deputy Chair: I'm expecting a comment from you.

Ms Ashmore: The federal process. Remember that the federal Privacy Commissioner has no ability to conduct inquiries and issue orders. She only has the ability to conduct investigations and to write an investigation report. So that one year is confined to that time period.

The Deputy Chair: To that process.

Ms Ashmore: That's right.

Mr. MacDonald: I would just like, Mr. Chairman, initially to get on the record that I would have really appreciated having this information before the meeting. The court case was decided, I believe, on the 30th of July, and to be given this information now, I feel that I'm only getting one side of the story. I would really appreciate it if in the next hour, maybe over the lunchtime, we could request that we each receive a copy of the written decision, Action 0603 12633, from the Court of Queen's Bench. I would like to understand the reasons why the justice ruled in this way before we proceed any further with this.

The Deputy Chair: I don't think that any decision by the justice we could read in an hour or understand it in an hour. I've gone through lots of those recommendations. I mean, that's fine. I don't know if we have that information at our fingertips.

Ms Ashmore: I have a copy of the decision with me. Do you people as well? All right. We do have a copy.

The Deputy Chair: Maybe just pass it to Karen, and she'll get some copies made.

Mr. MacDonald: I'd appreciate that.

Ms Ashmore: It's about 13 pages. That's not a long decision.

The Deputy Chair: Did you want to wait to deal with this matter until after lunch?

Mr. MacDonald: If we could have a look at that, it would be . . .

The Deputy Chair: Is that what you're preferring?

Mr. MacDonald: Yes, please, if that's okay.

Ms Ashmore: I also have the ability to comment to Mr. MacDonald. There are some unusual interpretations in the case that are peculiar to PIPA that don't exist in the FOIP Act and in the Health Information Act, and I can point those out as well if you like.

Mr. MacDonald: Also, in the annual reports that you referenced earlier, the office of the Privacy Commissioner seems to take great pride in the turnaround time on so many files. If we could have a copy of that too, I'd appreciate it.

Ms Ashmore: We have the previous year's annual report. The current year's annual report will be out about the end of September, but we've done some of the preliminary statistics on that, so we know where we stand not on completion times but on success rates for mediation/investigation versus inquiry. I already know from our stats that we're running a 95 per cent success rate on mediating and investigating matters versus having to send matters to the formal process, which is 5 per cent of our cases.

Mr. MacDonald: So that's in there. Am I correct or incorrect in thinking that there's a performance measure in there on the turnaround time?

Ms Ashmore: There's not a performance measure on the turnaround time.

Mr. MacDonald: There's not a performance measure on the 90-day deadline?

Ms Ashmore: No.

Mr. MacDonald: Okay. So we have no idea how successful or unsuccessful we are?

Ms Clayton: Well, I can tell that in PIPA of our closed cases, both requests for review and complaints, with requests for review we run at about three and a half months. That's the average to complete them. Many of them are completed in a week or two weeks, three weeks. Sometimes they do take longer, which brings us to three and a half months. Investigations typically take longer, and we run at about four and a half months to complete those. Again, sometimes they're completed in a day or a week with a phone call. Sometimes, depending on the complexity of the issues, if we've dealt with it before or not in a previous file, there might be research involved; there might be consultation involved; we might be preparing to publish an investigation report. Those kinds of complaints take longer.

11:00

The Deputy Chair: Thanks, Jill.

Ray, comments?

Mr. Martin: Well, I look at the original recommendation of a year, also respecting the commissioner's ability to extend the timelines, and even though there's been a court case, it was on the 90 days, and 90 days is dramatically different from a year. So I'm like the chair. I think that there has to be some reasonable time frame on both ends to deal with these issues.

The commissioner obviously thought that a year was sufficient to begin with, and the court case seems to have him spooked, but I don't think it necessarily should because, as I say, 90 days is a huge difference from a year. Then, you know, rather than just going to two years, if it does run over, the commissioner still has the ability to extend the timelines when necessary. So I would argue that to me the court case is largely irrelevant because it wasn't dealing with a year. It was dealing with 90 days.

I think that his original recommendation still makes sense because it doesn't hamstring him, as I say, to say that it has to be done in a year. If some other circumstances came up, he can still extend it. So before we move off that, I don't see the need at this point just because of the court case.

The Deputy Chair: Okay. Denis.

Mr. Ducharme: Thank you, Chair. I guess I've got two questions. One has to do with process. As you've indicated in the presentation, 95 per cent of the complaints or concerns that are received by the commissioner's office are basically dealt with within a short time period, having to do in the phase of review. If I understand it correctly, if there's an inquiry to occur – basically, you've stated that 5 per cent of the cases that come through go to inquiry – is it not the commissioner that decides that an inquiry has to be made? If so, he has all the information necessary in the review that if he should decide that he wants to go to an inquiry, he can set up a deadline in regard to being able to achieve it. It's very close to what's been said. If it needs to go to another nine months or a year, I feel that he's got that power in his hands. So I guess I just need clarification if I'm understanding the process correctly.

The second point is that I'd just like to echo the points of the chair and Mr. Martin in regard to the one year rather than the two years.

Ms Clayton: I'll just comment on the first piece. If I'm understanding you correctly, I think you're suggesting that if there's been a mediation or investigation, then the commissioner has all of that information at his disposal when he decides to go and hear the inquiry.

Mr. Ducharme: I guess I may have gone around in that area, but basically is it the commissioner that instigates the inquiry?

Ms Clayton: If a matter is not resolved in mediation or investigation, then the complainant has the ability to ask for an inquiry. The commissioner does have discretion to hear an inquiry or not, but generally he does hear the matter because it hasn't been resolved, and the attempt is to resolve it.

Mr. Ducharme: So ultimately he makes the decision.

Ms Clayton: To have it or not, but it's a de novo process. The commissioner starts from the very beginning. He doesn't get a copy of the investigator's report, if one had been issued. The parties all make brand new submissions during the inquiry, and the parties, as Sharon has explained, may ask for extensions. They may bring witnesses. They have an opportunity to rebut the other party's submission, and of course if there's legal counsel involved, then the inquiry is scheduled to make sure that all the parties are represented.

Mr. Ducharme: Okay. Now, in the case that went to the courts – so the inquiry was set. Was there no notice of the commissioner requiring extra time in this case and that's why it went to the courts, that it wasn't dealt with in the 90 days?

Ms Ashmore: That's it, yes.

Mr. Ducharme: So, in essence, he hadn't confirmed that he was going to need more than 90 days?

Ms Ashmore: That's right.

Mr. Ducharme: So he didn't follow the act?

Ms Ashmore: That would be correct on the basis of the previous order that the commissioner had issued back in 1999 that that provision was not mandatory under our legislation, and that decision was never challenged.

There is something else, though, that I'd like to bring forward. PIPA is unique in giving the commissioner the discretion to conduct an inquiry. That doesn't exist in FOIP and HIA, and when the office is looking at matters generally, including this court case, we can't exclude the impact on FOIP and HIA. Under those two pieces of legislation the commissioner must conduct an inquiry. That's the requirement. There isn't the exception built in now, though, for the commissioner to refuse to conduct an inquiry if the circumstances warrant or if, for instance, he's already dealt with that issue in a previous investigation report or in one of his previous orders.

So we are dealing with some differences between the two pieces of legislation here, and remember that the decision that was issued in 1999 was under the FOIP Act, and it was under the access provisions of the FOIP Act as opposed to now, this being a PIPA issue, being under the supposedly discretionary provisions to

conduct an inquiry being a complaint. There are differences, but the commissioner believes that that case will be applied to all three pieces of legislation regardless of whether we're dealing with a complaint, regardless of whether we're dealing with an access request.

Mr. Ducharme: So if I understand correctly, if the process would have been followed, it wouldn't have been a court case. Section 50(5) states that you've got 90 days. If you need more than 90 days, you advise the people. From what I understand, this did not occur in this case, so the people brought this issue to the courts to say: you didn't follow through with your 90-day timeline.

Ms Clayton: As Sharon has mentioned, our office was operating based on the commissioner's decision in '99 that it was discretionary and not mandatory and also that it was applying to reviews and not complaints, and this was a complaint.

The Deputy Chair: In the court ruling, Denis, it says that the wording of 50(5)

> clearly signifies that the section was designed to give the Commissioner maximum flexibility and has a built-in saving provision in that if the inquiry cannot be completed within 90 days, the Commissioner merely has to give notice of an anticipated completion date. Not only does the Commissioner control the timing, there is no need to set a definite response time but only an anticipated response time, which provides even more flexibility.

Anyway, we can deal with this after lunch, or we can deal with it now.

Mr. Martin: Let's deal with it now.

The Deputy Chair: Okay. Do you want to make a motion, then? We have recommendation 16.

Mr. Martin: Yeah. Well, I would move that we go to the original recommendation, without reading it, of it to be completed within one year of a complaint or request. Do you want me to read it all out?

The Deputy Chair: I can read it. Moved by Ray Martin that the Select Special Personal Information Protection Act Review Committee recommend that

> the act be amended to provide that all processes relating to a complaint or request for review must be completed within one year of receiving the complaint or request for review where practicable.

And that's consistent with the federal regulations.

Mr. Thackeray: Mr. Chairman, a suggestion. You may want in the motion to also indicate the commissioner's ability to extend the timelines if necessary.

Mr. Martin: It's in the recommendation.

Mr. Thackeray: It wasn't in the motion that the chairman read.

The Deputy Chair: Okay.

Mr. Lund: Well, Mr. Chairman, in the court ruling, the section that you read, 48 – I'm wondering why we really have to do anything if we're going to say a year instead of 90 days but still say: oh, by the way, if you have a problem, you can just extend it.

The Deputy Chair: I guess it keeps us consistent with the federal regulations.

Mr. Lund: Really, all we are doing is changing the 90 days to one year.

11:10

Mr. Coutts: I wonder if I might ask: what timeline does the British Columbia legislation have on this issue?

Mr. Thackeray: Ninety days.

Mr. Coutts: Thank you.

The Deputy Chair: So we have a motion by Ray Martin extending it to one year. All those in favour? Those opposed? It's carried.

Ms Blakeman: I'm sorry. What was the count?

Mrs. Sawchuk: It was 3 and 3. The chair just voted, so it's carried.

Ms Blakeman: Okay. Thank you.

Mr. MacDonald: How can we have 3 and 3? There are eight of us here.

Mrs. Sawchuk: That was my mistake, Mr. Chairman. Who didn't vote?

The Deputy Chair: I saw 5 and 3.

Mr. MacDonald: I didn't. Could we vote again, please?

The Deputy Chair: Okay. Sorry. We'll get it clarified. All those in favour of Ray Martin's motion? That's 5.

Mrs. Sawchuk: Where's 5? You can't vote, Mr. Chair.

The Deputy Chair: Well, I thought you needed my vote. You said that you wanted my vote.

Mrs. Sawchuk: Only if it was a tie.
It's 4 and 3. It's still carried.

The Deputy Chair: Briefing 8.

Ms Lynn-George: Okay. Briefing 8. We'll be posing questions 12H and 12I. This is about two somewhat related issues but not as closely related as some of the others we've put together: audits and the power to enter premises. The commissioner has recommended that PIPA be amended to empower the commissioner to initiate an audit of an organization and also to allow the commissioner to enter an organization's premises and inspect or copy documents found there to ensure an organization's compliance with PIPA. That second recommendation is not exclusively in the case where there's an audit. I just want to clarify that they're separate recommendations.

In his submission to the committee the commissioner indicated two scenarios in which he believes an audit power may be used: first, to enable the commissioner to determine whether an organization is complying with an order following an inquiry. So it's a kind of follow-up. The second is to enable the commissioner to assess an organization's general compliance with PIPA if the organization's activities warrant an audit.

With respect to power to enter premises the commissioner noted that many investigations conducted under PIPA have required his staff to visit an organization's premises to collect information, to

interview employees, and to review record keeping systems. He says that organizations have generally co-operated with OIPC staff on this point. However, it is the case that an organization can currently refuse to allow the commissioner or his staff to visit its premises even in the course of an investigation or an inquiry.

Currently under PIPA the commissioner can conduct an investigation to determine whether an organization is in compliance with the act, but there has to be a complaint or a request for review, or he has to do this on his own initiative. If the matter under investigation is not settled, the commissioner can conduct an inquiry and can order the organization to perform a particular action or discontinue a particular practice.

In the course of an investigation or inquiry the commissioner can compel the production of records and examine them regardless of whether the records are subject to the act. The commissioner does not currently have the ability to enter an organization's premises during an investigation or inquiry unless permission is given by the organization. The commissioner also doesn't have the ability to conduct any follow-up examination of the organization after an inquiry to determine whether orders have been implemented.

B.C. PIPA and PIPEDA both allow for orders subject to certain conditions. All of the private-sector privacy statutes in Canada except Alberta's PIPA authorize the commissioner to enter the premises occupied by an organization in the course of an investigation, and that's usually made subject to some conditions.

First, a few points on this ordered power. The commissioner has suggested that an ordered power might be used to follow up an order to ensure compliance or where the organization's activities warrant an order. They're the commissioner's words. The issue with a general ordered power might be that it could be perceived as undue interference with the operation of a private-sector organization.

There is the possibility that there could be a somewhat less general ordered power, something a little more limited. What are the options? First, the power could be limited to the situations that have been suggested by the commissioner. Using an audit as a follow-up to an order would broaden the scope of the ordered power beyond what appears in B.C. PIPA and PIPEDA; however, this ordered power would likely apply only where an organization has already been found in breach of the act through an inquiry by the OIPC.

There's not much precedent for that particular proposal, but there are some precedents for the second. Auditing an organization's activities where an audit is warranted – that's the commissioner's language again – would seem more clearly in line with other comparable legislation since this would seem to imply a reasonableness requirement as is the case in B.C. PIPA and PIPEDA. An extra condition could be incorporated into an audit provision requiring the commissioner to give the organization reasonable notice of the audit.

So the commissioner has made a very general recommendation. We're just suggesting here that there are some ways in which the committee could put some fences around that.

On the power to enter premises. Adding a power to enter an organization's premises to the commissioner's powers might also be perceived as undue interference with private-sector organizations. However, the commissioner noted that many organizations have voluntarily allowed his staff to enter their premises and to examine documents and record systems and to interview employees during investigations and inquiries.

All other private-sector privacy statutes across Canada authorize the respective commissioner to enter premises subject to certain conditions. If the committee thinks that the general power to enter premises is a little broad, it could propose adding some of these conditions to a recommendation on this point; for example, the power could be exercised only during the course of an investigation, inquiry, or audit; it could be a condition that the power to enter be exercised at a reasonable time; and it could also be subject to the condition that the commissioner must satisfy any reasonable security requirements of the organization. Another important condition could be to exclude a personal residence or dwelling from the scope of the power.

We've got to two questions for the committee, and the first one is in two parts. Perhaps if we were to start with that one, the commissioner's office might have some comments as well. Should PIPA be amended to empower the commissioner to initiate an audit of an organization where the commissioner has reasonable grounds to believe that the organization may have contravened the act? That's the first point. That's the one we have suggested has a solid precedence in other jurisdictions. Then the second part is an and/or, so you could make this recommendation with one or the other. The second part is to ensure compliance with an order made to the organization under PIPA.

11:20

The second question is 12H: should PIPA be amended to provide the commissioner with the power to enter premises occupied by an organization – and here you'll notice that we have put these conditions into the question; they weren't in the recommendation – except a personal residence, at a reasonable time and after satisfying any reasonable security requirements of the organization relating to the premises and inspect or copy documents found there?

The Deputy Chair: So two parts to this.

Ms Blakeman: I'm interested in this idea of an audit. Was any consideration given to doing educational audits, which is one of the services that's offered by Revenue Canada, for example, to not-for-profits that have charitable status? That is another area where there's a complexity of rules that particularly not-for-profits have to deal with in issuing charitable receipts and under what circumstances. Lots of mistakes are made. Very difficult to understand. They offer an educational audit where, literally, staff come in and work their way through the organization, but if they find any wrongdoing, there are no penalties assessed at that time. The idea is that it's to discover problems, help them be corrected, and move on. I've been through one of those audits, and I found it very helpful. I learned a lot and made use of that information for many years after the actual audit.

My ongoing concern, as I keep raising, is that we have no way of knowing how many people are actually complying with this legislation because we don't monitor them in any way, and an educational audit is a way of doing that without being quite so – I'm trying to chose my words carefully here – heavy handed as what we're anticipating here. So would an educational audit be able to accomplish many of the same goals that you're trying to achieve with this recommendation?

Ms Clayton: I would just like to comment that the commissioner, of course, does have a mandate to provide education and raise awareness, and the commissioner does not have the ability to assess penalties. So I would certainly think that we could exercise an audit power in the manner that you're describing, where we would make recommendations to the organization, a nonprofit, for example, on what needs to be done to bring them into compliance with the act. But we wouldn't be in a position to assess penalties. The commissioner doesn't do that.

Ms Blakeman: Right. So it is an educational audit at that point. Would it be sufficient to achieve the goals that are being anticipated under OIPC recommendation 10?

Ms Clayton: I think so. Certainly, we wouldn't have any objections to the suggestions that Service Alberta has put forward that an audit power be subject to where there are reasonable grounds and with reasonable notice, those kinds of conditions.

Ms Blakeman: Thank you.

The Deputy Chair: In order to move on, we can deal with recommendation 10, to empower the commissioner to initiate an audit of an organization or not. What are your wishes, committee?

Ms Blakeman: To the lawyers that we have here: would we need to amend this to say educational audit, or would the way it's worded accomplish it?

The Deputy Chair: I would think it would accomplish it.

Ms Clayton: I wouldn't want to limit it to just educational but certainly to be inclusive of educational.

Ms Blakeman: That's different.

Ms Clayton: And that's partly related to the second point, where perhaps if the commissioner has already made an order or an investigation report has been issued with recommendations, an audit power would be an effective way of going in to make sure that those recommendations have been complied with. Again, with respect to an investigation report we would have no ability to assess penalties if the matter was whether or not the organization was complying with an order. Then there's an offence provision for failure to comply with an order, which would lead down the road to possible prosecution.

Ms Blakeman: Okay.

The Deputy Chair: I don't think we have a motion on the floor.

Mr. Webber: I'll get the motion on the floor to amend section 36(1) of PIPA to empower the commissioner to initiate audits to ensure compliance with any provision of PIPA.

The Deputy Chair: Okay. I have some other wording that may even clarify it that recommends that the act be amended to empower the commissioner to initiate an audit of an organization where the commissioner has reasonable grounds to believe that an organization may have contravened the act and/or to ensure compliance with an order issued to the organization under PIPA. I don't know if that helps you out.

Mr. Webber: We can include that in my motion. Sure.

The Deputy Chair: All those in favour?

Ms Blakeman: Sorry, what's the motion now reading? If you've just tagged on the last two points, that would preclude an educational audit being performed.

The Deputy Chair: That's right. I didn't hear anything from you on the education audit after the comment.

Ms Blakeman: Because it was deemed that it could be included in the existing wording that was first read out. When my colleague added in the two extra sentences, that changed the intent of the first part of the motion and would preclude an educational audit. So what's the motion on the floor?

The Deputy Chair: Do you want to read it back?

Mrs. Sawchuk: The motion on the floor, Mr. Chair, is that

> the committee recommend that the act be amended to empower the commissioner to initiate an audit of an organization where the commissioner has reasonable grounds to believe that an organization may have contravened the act and/or to ensure compliance with an order issued to the organization under PIPA.

Ms Blakeman: Well, that means that there are no educational audits possible. It doesn't empower them to do it.

Mr. Martin: Why don't you make another recommendation?

Ms Blakeman: Yeah. I'd want another.

The Deputy Chair: Tom, did you have a comment?

Mr. Thackeray: Yeah. I appreciate the point that it doesn't encompass the educational audits, but I would suggest that the section of the act – and I'm not good with numbers – that talks about the commissioner's responsibility for educating the public about the act could encompass educational audits.

One of the challenges that we had when we rolled out the legislation was to ensure that organizations understood what their responsibilities were. The mantra was basically: collect as little as you need; don't collect too much. Both the commissioner's office and Service Alberta entered into a partnership to try to promote an education of the responsibilities under the legislation. One of the things that we did was that we entered into a partnership with a private-sector organization that is developing an education audit type of program to assist organizations in understanding what their responsibilities are to be able to audit their collection practices to ensure that they're in compliance with the legislation. One of the key points when we entered into that arrangement was that whatever they developed had to be reasonable pricewise for small- and medium-sized businesses.

So that's one of the steps that we have taken in an educational audit type of process to assist organizations to understand what they are collecting, whether or not they are collecting too much, and whether they have the authority to collect what they are.

The Deputy Chair: Thanks, Tom.

We have the motion as stated by Len Webber. I'll call the question. All those in favour? Those opposed? It's defeated.

We'll move on to the next part and whether or not we need a motion again to amend the act to provide the commissioner with the power to enter premises occupied by an organization.

11:30

Ms Clayton: Could I just comment?

The Deputy Chair: Yes.

Ms Clayton: The circumstances when our office would actually attend at an organization's premises for an investigation – the kinds of complaints we are investigating are things like surveillance cameras, so we would go to the premises to find out where the cameras are positioned, to see how much information they're capturing, to verify and confirm whether or not there's audio as well as images being collected, to see who would have access to that

information. Commonly that's the kind of thing. Or if we're investigating an allegation that the organization doesn't have proper security measures in place to protect the information, we might want to go to the premises and see shredders and locked cabinets and things like that. So it's certainly not every complaint where we go out to an organization's premises but those kinds of complaints where it's a part of the investigation, a necessary part.

Ms Blakeman: The way this question 12H is worded, it does not allow you to remove anything. It allows you to inspect it there or copy it, but it doesn't give you permission to remove. Clearly, you did that for a reason.

Ms Clayton: Well, I think what we would like to see is harmonization with B.C.'s legislation, which also gives the ability to enter premises and review documents there. The commissioner already has an ability to compel the production of documents. That's already in our act.

Ms Blakeman: Okay. Thank you.

The Deputy Chair: So we have two options: we can either deal with this or not. What are your wishes?

Mr. Ducharme: Just a question if I may. If I remember correctly, when the presentation was made on this issue, from what I understand, we don't have any major concerns at this point in time in terms of entering premises. Basically, the businesses or the organizations have allowed you to go forward with your work. I'm just worried that this is using the big hand of government in terms of, you know, extra powers: I have this right, that right. I don't even know if our police forces have that type of jurisdiction. It scares me at this time when I read the way that the motion is presented.

The Deputy Chair: Well, good comment.

I'm not seeing anybody putting up their hand willing to make a motion to change things.

Mr. MacDonald: Mr. Chairman, I'd like to get on the record that I agree with Mr. Ducharme.

The Deputy Chair: Okay. I guess we're happy the way things are, right?

Ms Blakeman: I don't know that we're happy, but we're not willing to do that motion.

The Deputy Chair: Okay. So no motion required then. Is that enough, or do you need . . .

Mrs. Sawchuk: No, that's fine, Mr. Chair.

The Deputy Chair: Witnesses, briefing 9.

Ms Lynn-George: This is a fairly straightforward issue.

The Deputy Chair: Nothing is straightforward in this. Let's get that straight.

Ms Lynn-George: The commissioner has made a recommendation that would limit the ability of any person to compel him or his staff as witnesses in court or other proceedings. So why would the commissioner be asking for this? When would the issue of compellability arise? A person who has been involved in an investigation or review conducted by the commissioner or his staff may also be subject to another proceeding, such as a disciplinary or law enforcement proceeding, and the person may wish to have the commissioner or a portfolio officer from the commissioner's office testify in the other proceeding with respect to information obtained in the course of the proceeding under PIPA.

[Mr. Ducharme in the chair]

The commissioner has recommended that PIPA be amended to explicitly state that neither the commissioner nor anyone acting under his direction can be compelled to give evidence in a court or in other proceedings. PIPA states that statements made by a person during an investigation or inquiry by the commissioner are inadmissible as evidence in court or in any other proceeding except in very limited circumstances, such as a prosecution of an offence under the act. The act also prohibits the commissioner and anyone acting under his direction disclosing any information obtained in the performance of their duties except in similarly limited circumstances.

Alberta's other privacy legislation is the same as PIPA. The B.C. act is also similar except that the B.C. act expressly states that the commissioner and anyone acting under his direction "must not give or be compelled to give evidence in a court or in any other proceedings in respect of any information obtained in performing their duties" except in circumstances where disclosure is expressly permitted. Again, this would be cases like prosecution for an offence under the act. PIPEDA is similar, as is the Ontario Personal Health Information Protection Act.

The restrictions on disclosure of information under PIPA are intended to preserve the confidentiality of investigations and proceedings before the commissioner. A fear that evidence given during the course of an investigation or inquiry will be used in other proceedings could cause people to withhold relevant information from the commissioner. The prohibition in the act against the commissioner or his staff disclosing any information obtained in the performance of their duties except in specified circumstances may by itself be sufficient to keep the commissioner and his staff out of these other proceedings. However, there is some uncertainty. The matter hasn't been tested in a court.

The amendment proposed by the commissioner would bring a greater degree of certainty to the act that the commissioner and anyone acting under his direction cannot be compelled to give evidence in a court or other proceedings with respect to information that they've obtained in the course of performing their duties under PIPA, and the amendment would be consistent with legislation in other jurisdictions. Essentially, we think it's probably already the case that there is no ability to compel the commissioner or his staff, but this recommendation would make it more abundantly clear that that was the case.

[Mr. VanderBurg in the chair]

So the question for the committee is: should PIPA be amended to explicitly state that neither the commissioner nor anyone acting on his behalf or under his direction can be compelled to give evidence in a court or in any other proceedings except as specified in the act?

The Deputy Chair: We have a recommended motion that

> the act be amended to state that neither the commissioner nor anyone acting on his behalf or under his direction can be compelled to give evidence in a court or in any other proceedings except as specified in the act.

Is anybody willing to make that motion? Ray?

Mr. Martin: Yes. I'll do that.

The Deputy Chair: All those in favour? Carried.

The next one is the review process.

Ms Lynn-George: This is the last briefing on the commissioner's powers. After that there are just a couple of technical issues. Thank you very much for your patience. We'll try and wrap this one up with the two questions.

The Information and Privacy Commissioner has made two recommendations for amending PIPA in relation to the process for an application for judicial review of a commissioner's order. PIPA requires the commissioner to issue an order upon completing an inquiry, and as I've mentioned before, a person can apply to the Court of Queen's Bench for judicial review of an order.

Just a little explanation of what judicial review is. It's the power of the court to determine whether the commissioner acted within his jurisdiction under PIPA. It's different from an appeal in that the court cannot substitute its own decision for that of the commissioner. What the court does is review the decision of the commissioner to determine whether he properly exercised his authority, whether he followed the rules of natural justice – that's fairness, to you and me – or whether he made an error of law.

11:40

The way this currently works under PIPA – just a couple of procedural points here – is that a person wanting to apply for judicial review of a commissioner's order gets 45 days from the date of the order to make the application. Now, an organization mustn't take any action on the order for that 45 days, and then it gets five days after the expiry of that deadline to comply with the order. So it's got that five-day window before it would be in breach of the commissioner's order, before it's failed to comply with an order, and that would be an offence under the act.

If an application for judicial review is made, the commissioner's order is stayed until the court has dealt with the matter. The court can extend the 45-day time limit for applying for judicial review. The request for an extension can be made before or after the 45-day period has expired.

The commissioner has noted that an application for judicial review may be commenced but not be heard by the court for various reasons. When this happens, the order that was stayed, or suspended, when the application for judicial review was made is stayed indefinitely. Even though the court doesn't actually make any ruling on the matter, the commissioner's order never takes effect. This situation has occurred in the context of the FOIP Act. So that's our first issue. The commissioner has recommended amending PIPA to delete the provision that a commissioner's order is stayed until an application for judicial review is dealt with by the court. I will come back to that in a minute.

Just on the second issue, the commissioner has commented that the ability of the court to extend the time period for applying for judicial review creates uncertainty regarding the timeline for an organization to comply with a commissioner's order. So that's our second issue.

The commissioner has recommended removing the court's power to extend the 45-day period for bringing an application for judicial review of a commissioner's order. Before you respond to the commissioner's recommendations, I'd just like to highlight a few of the key points that we put into this briefing. First, the issue of stays is important because a stay affects the rights of the parties that have taken a dispute to the commissioner. A stay allows the parties to exhaust all their legal remedies before a commissioner's order is complied with. At present PIPA stays a commissioner's order once an application for judicial review has been filed, and the stay remains in place until the judicial review is over. The courts consider stays an effective way to preserve the rights of the party that's been ordered to do something that the party believes it should not be required to do.

Let's give an example. If the commissioner directed an organization to grant an individual access to his or her personal information, staying that order would allow the organization to withhold the information until the matter had been decided. If the order were not stayed, the organization would have to give out the information, and then the application for judicial review would serve no purpose. You would be contesting a decision on disclosure of the information when the matter was already decided by the simple fact that you had to give out the information. There would be no point in pursuing it.

A stay can also cause hardship. Here's another example. If the commissioner has ordered an organization to stop disclosing an individual's personal information, the stay of the order would allow the organization to continue to disclose the information. You could have serious, even irreparable harm occurring to the individual while the review was being completed.

It seems that there is a need for a general rule on stays because you need some certainty as to how the filing of an application for judicial review affects the operation of a commissioner's order. There would appear to be a need for a process to enable the parties to apply for a stay to be imposed or to be lifted on the basis of the facts of the case.

One approach would be to keep the existing rule – that is, the order is stayed on an application for judicial review – but add that the court has the power to lift the stay, so just adding some flexibility. But it is important to note that the courts are reluctant to lift a stay unless there are very pressing circumstances.

Another approach would be the opposite. That would be to remove the existing rule, so no stay on an application for judicial review, but allow the applicant for judicial review to apply to the court for a stay of the commissioner's order pending final determination of the application for judicial review.

So it comes down to deciding what the general rule should be, stay or no stay, and then whether the court should be able to depart from the general rule.

Now, with respect to time extensions for making an application for judicial review, under the commissioner's proposal the court would likely not have the ability to extend the time for making the application unless PIPA allowed the court to extend. So if you say that it's 45 days in the act, that's it. If there's no specific statement that the court can extend, then the court can't extend. They don't have any sort of discretion in that area.

There are two questions, and I would like to try and give the committee a little help on the first one. The question is: should PIPA be amended with respect to stays such that an organization must comply with an order of the commissioner unless the court grants a stay at the request of an applicant for judicial review? Now, you may notice that the wording of this question does not quite correspond to the wording of the commissioner's recommendation. By way of explanation of what this question means, if you answer yes, you're agreeing with the commissioner that the order remains in effect, but you are also specifying that the court can decide otherwise. That's the yes answer. You're also leaving it open to how this would actually be set out in the law. You're not saying how; you're just giving the policy direction. If you answer no, you're voting for the status quo, a stay with no exceptions.

Then the second question is: should PIPA be amended to delete the provision allowing the court to extend the 45-day period for

bringing an application for judicial review of a commissioner's order?

The Deputy Chair: So two items to deal with, Jann, the first one being that the act be amended such that an organization must apply with an order of the commissioner unless the court grants a stay at the request of the applicant for judicial review. That's our first one.

Mr. Lund: Just a question. How many days does the applicant have to apply to the court for a judicial review?

Ms Lynn-George: Forty-five days, and there is an ability in the act for the court to extend that period before or after expiry of that deadline.

The Deputy Chair: We'll deal with the time period in the second part.

Mr. Lund: But the time frame bothers me. If we just said no to the stays, then basically we're giving the commissioner a privative clause, in my opinion. So I believe there needs to be the ability to go to the court and get a stay. But I have difficulty wrestling in my mind why there would be 45 days that an individual would have to even go to the court and ask for a stay. How can you enforce the order while that 45 days is there? After the order you've got 45 days, and then the clock starts ticking on the court.

The Deputy Chair: I think what we'd have to do is deal with the first part and then extend the 45-day period.

Mr. Lund: Yeah. Okay.

The Deputy Chair: That's how I would see it, and I think that's the recommended approach. Right, Jann?

11:50

Ms Lynn-George: I've kind of got these as two separate questions in my mind, and I'm not quite sure how the time limit affects the first part unless you're talking about: at what point does the obligation to comply kick in?

Mr. Lund: Well, Mr. Chairman, if I might, maybe I should simplify my question a little bit. The commissioner makes an order. I would believe that the person to which the order applies should not have anywhere near 45 days to go to the court.

Ms Lynn-George: That was a matter that was actually raised at the FOIP Act review in 2001-02 or maybe in '99, and at that time the courts said that they wanted to see 45 days.

Mr. Lund: But, Mr. Chairman, if I could, so that I understand this correctly. Then basically what we're saying is that the commissioner's order does not take effect for at least 45 days. It could be less if the recipient went to the court earlier, but they do have 45 days. So if they think that the order is not in their best interest, why would they bother going to the court for a judicial review until at least the 45 days have gone by? Then they go, or maybe they go on the 44th day. Then the court would have a period of time in order to do the review. So you could go a very substantial amount of time past once the commissioner has given his order before, in fact, it's carried out.

In the example you gave, where giving out information of an individual or refusing information to an individual – it seems to me that we're just extending the time out an awfully long time, and I would like to see that shortened up considerably. I don't understand why the court would be concerned about having to have 45 days for the individual to make a decision of whether they want to get a judicial review. That seems excessive, in my opinion.

Ms Blakeman: I'm just wondering if part of the courts wanting the 45 days is about a court process, you know, getting all the lawyers lined up and all their calendars happening and all that hoo-ha. I don't understand why the courts would allow such a long period. I'm with you, Ty. Basically, it's saying that none of these things come into effect until we've passed six weeks and exhausted that appeal period, in essence. So is there something we can do around wording for applying for the stay versus the way it's worded now, which is putting us in a six-week waiting period? Help.

The Deputy Chair: Well, you know, the recommended approach for the first part of the question is to keep the timelines out of it, and the second part of the recommendation is to extend the 45-day period for bringing the application for the judicial review of the commissioner's order. So I don't know if there's anything else.

Jann, do you have any other comments? You see it as two approaches, right?

Ms Lynn-George: Perhaps Sharon may have some comment on this.

Ms Ashmore: Right now, as the legislation stands, there is a stay in place during that 45 days, so nobody can do anything until the 45 days are up. The 45 days, my understanding as to why it exists, is to allow the time for the application to be brought. For instance, an organization that decides that they are not satisfied with the commissioner's decision has time to bring its resources to bear to get that application filed, and 45 days is ample time to file that, to make a decision to take an order to judicial review and file the application. In any event, nothing happens within the 45-day period.

I'm only going to speak to the 45 days because what happens beyond the 45 days is a problem from the point of view of persons not knowing, then, if the commissioner's order is in effect. So you could have a situation, as Jann mentioned, where the commissioner has ordered documents to be disclosed, the organization has not brought the application for judicial review – it must disclose within the 45 days – and then subsequently the organization decides that they're not going to disclose.

I'm not explaining this very well, but we have had a couple of situations where we believe that, especially with third parties' personal information under the FOIP Act, if there's an extension of time that happens beyond the 45 days, a public body ordered to disclose will have to disclose. They will not know that this application is about to be extended, and it will make a judicial review moot beyond the 45-day period. So that speaks to the 45 days.

The stay is problematic. This is the first recommendation. The stay is problematic in situations, as Jann mentioned, where there's an order not to disclose personal information or to collect and use it, for that matter, and the organization can put the stay in place just by bringing the application for judicial review and continue to collect, use, and disclose that personal information during that time. The stay allows the organization to continue to do what the commissioner has ordered it not to do pending a court's decision.

The Deputy Chair: Clear as mud.

Mr. Martin: Just one other question. We have the 45 days for bringing an application, right? Then there's a stay. What happens

after that? Do we still have to wait until the courts make a decision on it, you know, before the commissioner's order could be followed? I mean, we could be looking – could we not? – at another 45 days or whenever the courts get around to it. So we're not just talking about 45 days; we don't know how long we're talking about.

Ms Clayton: That's my understanding, that the 45 days is to bring the application for judicial review, and then the order would be stayed throughout that judicial review process. What has occurred under FOIP legislation is that applications have been brought but never carried forward, such that the court has never made the decision. So the commissioner's order is stayed indefinitely.

Mr. Martin: So it's waiting. Yeah.

Ms Clayton: Yeah. Because it's an automatic stay in the legislation right now.

The Deputy Chair: Okay. Since the completion of these two motions is between us and lunch, let's move on. We have a recommendation that the act be amended such that an organization must comply with an order of the commissioner unless the court grants a stay at the request of an application for judicial review.

Mr. Ducharme: Mr. Chairman, that seems where the stalemate is on this. What I'm hearing from comments is that we're saying that the commissioner's ruling should go into effect until such a time that the judiciary should deem it otherwise. The way that this motion is set up now is that basically once anyone, an applicant, puts in a stay, the ruling doesn't count. I think that from what I'm hearing around the table, they'd like to change the motion to reflect that the commissioner's decision stands unless it's overturned by the judicial process. I'd like to make a motion to that effect.

The Deputy Chair: Okay.

Ms Blakeman: So you're actually responding in the affirmative to question 12J?

Mr. Ducharme: No. I'm making it tighter than what 12J is because once an applicant goes to ask the judiciary for a stay, then the orders that the commissioner has placed are void. I think what I heard around the table is that the decision that is made by the commissioner, the order by the commissioner, becomes law unless it's overturned by the judicial process. That's, in essence, the motion that I've made.

12:00

Ms Blakeman: Okay.

Mr. Lund: Well, there's where I have some difficulty with it. Really what we're then doing is giving the commissioner a privative clause because his order automatically stands, and going to the court could be a very moot point. We're really taking away the ability of an individual to go to court. In some cases I guess that's a good thing; in some cases it's a bad thing. That's why I still would argue that we need to close this 45 days, that initial 45 days. We need to close that gap. There's no reason in the world why, if an individual is inclined to go to a judicial review, they need 45 days to get their act together. They can file that before they've got their act together, and then they get their act together before the court hears it. That's true. I don't want to see this stay in place for real long periods of time, but I also don't like the idea of taking away the ability of an individual to have the opportunity to get a judicial review that might make quite a difference to their situation.

The Deputy Chair: I don't think your motion is saying that, though. Is it?

Mr. Lund: Yes, it is.

Mr. Ducharme: Mr. Chairman, I think we have to keep in context that we're dealing with personal information and that we're not dealing in a situation where we have a murder conviction. I think we're just saying that if there's a decision that's been made, you'd have to hope that the wisdom of the commissioner's office when they issued that order is for the protection of that personal information. If I understood from the staff, once the stay is in place, they can continue to gather information, and they can continue to distribute personal information. That's why I'm just tightening up the loophole and saying: well, I don't think it's a life-and-death type of situation in regard to the matter that we're dealing with.

Mr. Martin: Well, I think, too, it's not only the 45 days. That's the point that worries me: sometimes the stay lasts indefinitely. Let's face it: courts can take a long time to make a decision. So without something there, that we have some means of following the commissioner's recommendation, this could be an effective way around the spirit of the law. I think that's what Mr. Ducharme is trying to allude to. I mean, there's no easy answer here. We want access to the courts, but we don't want it as a way to abuse the system, to avoid the recommendations. Apparently that's happened in the past. That's a serious matter.

Ms Lynn-George: We did suggest here that whichever way you go, stay or no stay, there should be a provision for an exception. So the commissioner is saying: don't stay the order. But we're suggesting that you could still, as part of the process, make an application to stay the order. So always the general rule and the ability to deal with exceptions. That's what this is saying: unless the court grants a stay at the request of an applicant. It becomes part of the process that you ask for a stay if it's going to affect your rights.

Mr. Ducharme: In essence, I believe that my motion is saying that, but I've added the other proviso that a stay can be asked for; however, the order stays in place until the judicial decision is made.

Mr. Martin: Can I make a suggestion that maybe some heads work around the intent of your motion with the two, and then we come back after lunch with the motion tightly worded.

The Deputy Chair: Yup. Jann and Denis, you don't get lunch until we have that. I'll move to break for half an hour or until 12:30. Thank you. We'll reconvene at 12:30 except for Denis and Jann.

[The committee adjourned from 12:05 p.m. to 12:42 p.m.]

The Deputy Chair: We'll reconvene our meeting from where we left off. Denis Ducharme, do you have some recommended wording, or has Jann got some recommendations?

Mr. Ducharme: Jann, sir.

Ms Lynn-George: We had an in-depth discussion of this, and basically the agreement with Mr. Lund and Mr. Ducharme is to not have an ability to add a stay. The question would be: should PIPA

be amended with respect to stays such that an organization must comply with an order of the commissioner? So the order remains in effect no matter what.

The Deputy Chair: Go ahead, Laurie.

Ms Blakeman: If they still really, really wanted to, they could use the *Rules of Court*.

Ms Lynn-George: No.

Ms Blakeman: No? If it's written that way, they couldn't even use that? Okay.

The Deputy Chair: Denis, first of all, you made a motion. So are you asking to withdraw your original motion?

Mr. Ducharme: Yes, sir.

The Deputy Chair: Okay. That would be a friendly withdrawal. The new wording . . .

Mr. Ducharme: Ty will make it.

Mr. Lund: I don't have the wording in front of me. I think Jann was . . .

Ms Lynn-George: It stops at "commissioner."

The Deputy Chair: Okay. I'd rather it be read fully by Karen.

Mrs. Sawchuk: That the committee recommend that
> the act be amended such that an organization must comply with an order of the commissioner.

The Deputy Chair: Right. Okay. All those in favour? Those opposed? Sorry. Are you in favour?

Ms Blakeman: Yep.

The Deputy Chair: Okay. It's unanimous.
That should deal with the second part of it as well, Jann?

Ms Lynn-George: Well, I think there was one point that perhaps needed to be explained. When the commissioner makes an order, at present the order doesn't take effect for that 45-day period at all, so regardless of whether you have a stay or no stay, that's a period in which nothing happens. What we were hearing, I think, was that there was some dissatisfaction with the amount of time that an order could be without effect.

The recommendation was to delete the provision allowing the court to extend the 45-day period. So no extension, but we seem to be hearing a desire for a shorter period to make an application for judicial review. If that's the case, a person may wish to move a motion to reduce that time period.

The Deputy Chair: Reduce the 45 days.
Committee members, what are your wishes?

Mr. Lund: Mr. Chairman, I would move that
> we reduce the 45 days to five working days.

The Deputy Chair: Okay. Any comments?

A motion by Ty Lund to reduce the period to five working days. All those in favour? Those opposed? It's carried.

Hilary, you're going to guide us into 12L?

Ms Lynas: Right.

The Deputy Chair: Okay.

Ms Lynas: There are three recommendations from the government's submission to the committee to look at. The first one is recommendation 19. Currently when the commissioner hears an inquiry, he's required to dispose of a matter relating to access to personal information by making an order, and when he does so, he must either direct an organization to give access, refuse access, confirm a decision, or require the organization to reconsider its decision. So there are certain boxes that the outcome of the inquiry must be directed to. It doesn't allow the commissioner the flexibility to dispose of a matter in any other way. There can be instances where, for example, if all the records the individual was looking for have been disclosed to them during the course of the inquiry, there's nothing really left for the commissioner to order the organization to do.

So the recommendation is that the provision for orders that may be issued after an inquiry be amended to allow the commissioner to not issue an order so as to remove the necessity of an order on a matter where none of the options for orders is applicable under the circumstances.

The Deputy Chair: Can we have a mover of that recommendation? Moved by Denis Ducharme that the review committee recommend that
> the provision for an order to be issued after an inquiry be amended to allow the commissioner to not issue an order.

All those in favour?

Mr. MacDonald: I have some discussion on this. I have some questions, Mr. Chairman.

The Deputy Chair: Okay. Go ahead and have the discussion before we have the vote, then.

Mr. MacDonald: If you don't mind, yeah, I'd appreciate that.
Does the ministry consider this to be a minor change?

Ms Lynas: Well, we haven't called it a technical amendment because it's not strictly just correcting wording. It does change how inquiries are disposed of, so it's not purely a technical matter, but it is something that would matter fairly rarely.

Mr. MacDonald: Am I right in assuming that if we pass this amendment, this proposal would serve to effectively strip the privacy rights of individuals by allowing the Privacy Commissioner here in Alberta the ability to conveniently dispose of an inquiry without ever addressing any of the issues?

Ms Lynas: It would allow the commissioner to hold an inquiry but not write an order at the end of it.

Mr. MacDonald: Well, if there's no mandatory written decision, there is no accountability of the office of the Information and Privacy Commissioner to abide by PIPA, right?

Ms Lynn-George: In cases where an inquiry is suspended or where there's some decision taken by the commissioner, the commis-

sioner's office always, I think, issues some kind of written reasons or statement of the decision, and that becomes reviewable on judicial review. Is that correct, Sharon or Jill?

Ms Ashmore: Yeah.

Ms Lynn-George: So the commissioner would be accountable by virtue of issuing that document, which could be taken to judicial review.

12:50

Mr. MacDonald: So how is the commissioner accountable if there is no mandatory written decision? Thus an individual would not have the ability to appeal or request adjudication as is currently provided under section 54(4).

Ms Lynn-George: The commissioner would have to say something as to why he was not issuing an order, and that would be the reviewable decision, and then the court would decide whether he had properly exercised his discretion on that matter.

Sharon, is that correct?

Ms Ashmore: That would be one of the examples. I think that would be a fairly rare example. The usual situation we find ourselves in is – I have two examples. The one is where, for instance, the issue before the commissioner is something like: did the organization conduct an adequate search for responsive records? When the commissioner finds that that was so, there really is no order to be issued to that organization. It's simply a finding: yes, they have conducted an adequate search for responsive records.

Another example is a recent situation where the inquiry has been held, the commissioner has made a decision, the order is in progress, and the applicant, who drives our process, has decided that he wants to stop the entire process and not have an order issued. The commissioner is in the process right now of consulting with the parties to find out whether they are all in agreement that an order should not issue in that situation.

Mr. MacDonald: Do you agree that if there is no mandatory written decision, there is no ability for the individual to proceed with damages for breach of this act under section 60?

Ms Ashmore: The provision for damages does require an order of the commissioner.

The Deputy Chair: Okay. We called the vote on this. It was unanimous. Do you want me to call it again?

Mr. MacDonald: Yes, please, because I cannot accept this. This is not a minor change. In my opinion, Mr. Chairman, this is a major change.

The Deputy Chair: I'll call the vote again. All those in favour? Those opposed? It's carried.

Hilary, to the next one.

Ms Lynas: Okay. The next one is what we've categorized as a technical amendment. The commissioner has the power to hold an inquiry and make an order respecting an organization's decision to give or refuse access to personal information. Other provisions of the act that refer to access requests make it clear that the right of access is limited to recorded information. We believe that all the provisions that talk about access should be consistent in referring to personal information that is in a record. So the recommendation is that

> the provisions referring to the commissioner's powers to hold inquiries and make orders relating to access requests be amended for consistency to refer to requests for recorded personal information.

The Deputy Chair: Could I have a mover of that recommendation? Ray. Any discussion? All those in favour? Those opposed?

Laurie, I didn't see your vote.

Ms Blakeman: Sorry. I've missed all the rest of the discussion.

The Deputy Chair: Okay. That's fine.

It's carried. Thank you.

Ms Lynas: The next one, 12N, is the independent review. When a person makes a request for a review or makes a request that starts a complaint, the commissioner must give a copy of the request to the organization concerned and to any other person that the commissioner considers appropriate. Individuals sometimes put more information in their complaint than is needed, and the act allows the commissioner to sever information before providing a copy of their written request to other parties.

There's an inconsistency in the drafting of the provision. One section refers to giving a copy of the request for a review or complaint to a person affected by the request. It would be more consistent to replace the reference to a person affected by the request with a reference to a person given a copy of the written request under sections 48(1) and (2). So the recommendation is that the provision for severing a request for a review or complaint before providing it to other persons be amended to refer to the organization concerned and any other person that will receive a copy of the request.

The Deputy Chair: Again, do I hear a mover of that recommendation?

Mr. Lund: I will move that the provision for severing a request for review or complaint before providing it to other persons

> be amended to refer to the organization concerned and to any other person that will receive a copy of their request.

The Deputy Chair: Discussion? All those in favour? Those opposed? It's carried. Thank you.

Question 13. Hilary, you're going to guide us on this again?

Ms Lynas: Right.

The Deputy Chair: Go for it.

Ms Lynas: This was the broad question on our public consultation paper: do you have any other suggestions or comments regarding the act? You can see on page 2 that we have put the comments into a number of categories. I'll only highlight a few comments, but I can elaborate on others if committee members have questions.

One of the categories that was raised was – there were comments about the scope of PIPA as it relates to health information and also about the interaction between PIPA and health information legislation. We do have an agenda item on that coming up and a bit of an issue paper where I'll deal with some of those comments.

Another was the responsibility for compliance by contractors. Several organizations commented on the responsibilities organiza-

tions have when they use a contractor. A few of them felt that it may not be appropriate to have those same responsibilities when the contractor has been engaged in order to provide an employee assistance program to their employees.

There were a number of comments on records management and suggestions to make PIPA more specific: for example, including specific retention periods for records and adopting specific records destruction practices.

There were a few comments on offences and penalties, which we will talk about in more detail as well. One industry association stated that organizations should not be strictly liable for privacy breaches and also suggested amending the offence provision for wilfully attempting to gain access to personal information in contravention of the act. That organization argued that offences should be restricted to what actually takes place and not what might have taken place.

Another individual whose personal information had been breached recommended that current privacy legislation should include increased penalties for noncompliance. We will be discussing these topics in terms of the standard of proof required to prosecute an offence and another briefing on prosecutions.

Under education and public awareness the Canadian Federation of Independent Business said that they had surveyed their Alberta members in 2005. Their survey revealed that almost 80 per cent of members were aware of their obligations under PIPA but that about 35 per cent had developed a written policy for customer information. Thirty-five per cent had also done so for employee information. A business requested additional interpretive guidance for private-sector organizations either through legislation or procedural documentation.

1:00

There were several comments indicating support for PIPA and privacy legislation generally. A few organizations supported the balance that PIPA's provisions allow with respect to personal employee information and business transactions. Another association stated that PIPA was well drafted in simple language and provided sufficient flexibility. Another group of organizations indicated that PIPA does not require major revisions.

That's my summary of the comments that we received.

The Deputy Chair: Okay. So under the issue paper 7 we have some suggested recommendations on page 11 of question 13. It's recommended that the committee make some recommendations to the Minister of Health and Wellness.

Mr. Ducharme: I'd be prepared to make a motion that

> all personal information about individuals that is collected, used, or disclosed for diagnostic treatment or care purposes be brought within the scope of the Health Information Act regardless of how these health services are funded.

The Deputy Chair: I believe that would serve Albertans well.

Any comments?

Ms Blakeman: You know, having sat on both the Health Information Act review and this one, I have to say that I'm alarmed by how much health information is not captured under the Health Information Act right now and is essentially unprotected. So I think this is a good motion, and I fully support it.

The Deputy Chair: I'll call the question. All those in favour? Carried.

We'll move on to the next recommendation. It's the interaction issue. Again, we have a recommendation to the Minister of Health and Wellness that

> in cases where an amendment to the scope of the Health Information Act affects organizations currently subject to PIPA, consideration be given to whether it is necessary to authorize personal health information to flow between custodians and organizations.

What's your pleasure, committee?

Mr. Ducharme: I so move.

The Deputy Chair: Moved by Denis Ducharme. Any comments? All those in favour? It's carried.

Then on the records. Kim, you're going to speak on that?

Ms Kreutzer Work: Yes, I am. I'm speaking about briefing 11. It addresses two recommendations of the commissioner that relate to the disposition of records under PIPA, and this, in turn, will bring out questions 13C and 13D on the agenda.

The first recommendation relates to the retention of personal information by an organization. The act states that an organization may retain personal information for as long as is reasonable for legal or business purposes; however, there is no specific requirement in the act that organizations anonymize, deidentify, or destroy the information when it is no longer required for legal or business purposes. The commissioner has suggested that this is a deficiency in the act.

The commissioner can order an organization to destroy personal information that has been collected in circumstances that are not in compliance with the act; however, it is not clear whether the commissioner could order an organization to destroy personal information that was no longer needed for legal or business purposes. Furthermore, the commissioner believes that retaining personal information that is no longer required for legal or business purposes exposes the information to the risk of improper use by the organization and to the risk of a security breach.

Requiring a more active obligation on the part of organizations to dispose of personal information that is no longer needed could be achieved by specifying in the act that personal information must be destroyed or anonymized within a reasonable time when the information is no longer required. The addition of such a provision would allow the commissioner to require an organization to destroy personal information if there was a complaint that the organization had kept the information for longer than was needed.

The B.C. PIPA requires the destruction or anonymization of personal information as soon as it is no longer needed. PIPA does state that personal information that is no longer required should be destroyed, erased, or made anonymous. This brings us to question 13C, that

> the act be amended to require an organization to destroy or anonymize within a reasonable time personal information that an organization no longer requires for legal or business purposes.

The Deputy Chair: We have a recommendation.

Mr. Martin: So moved.

The Deputy Chair: Moved by Ray.

Are there any comments?

Mr. Coutts: Just a question. Any suggestions as to what might be classified as a reasonable time? Having been in business and closed businesses down under one company and had three or four busi-

nesses going and trying to consolidate all of that, we kept stuff for seven years because that appeared to be the tax laws of the day. The information out there for the ordinary businessperson – they might not understand reasonable. So is there any recommendation?

Ms Kreutzer Work: The act defines reasonable as what a reasonable person would consider appropriate in the circumstances. The organization would retain the information for as long as it needs for legal or business purposes, so you would take into account any sort of requirements under the Income Tax Act or employment standards act or whatever other legislative retention periods there might be. Once you no longer have a legal or business purpose, then you must destroy it within a reasonable time. That's going to depend on the organization; it's going to be on a circumstance by circumstance basis.

Mr. Coutts: Thank you.

The Deputy Chair: I'll call the question. All those in favour? It's carried.

Ms Kreutzer Work: The second recommendation of the commissioner addressed in briefing 11 is that the act be amended to require organizations to retain records relating to an investigation by the commissioner for at least one year from the conclusion of the investigation. As mentioned previously, PIPA allows organizations to retain personal information for as long as is reasonable for legal or business purposes. Therefore, PIPA would authorize an organization to retain records that were the subject of an investigation by the commissioner. It would be reasonable for an organization to retain records that could be required if a complainant requested a review by the commissioner or applied for a judicial review of a decision by the commissioner.

It is unclear whether investigation records make up such a special category of records that a specific retention period is needed. The danger with such an amendment is that it could be read to imply that organizations are not required to retain any other category of records. For example, it might be reasonable in a particular set of circumstances for the commissioner to find that an organization should have retained a record of a request for personal information by a law enforcement agency as evidence that the information was properly disclosed. The organization could then argue that if the Legislature intended to require the retention of records other than investigation records, it would have said so.

PIPA already makes it an offence for a person to obstruct the commissioner or his delegate in the performance of the commissioner's duties under the act. If the commissioner requested that an organization retain records relating to an investigation for a specific period or until all legal rights were exhausted, disposal or destruction of the records within that period might be considered an offence of obstruction. So the question before the committee is question 13D, that

> the act be amended to require an organization to retain records relating to an investigation by the commission for a year after the conclusion of an investigation.

The Deputy Chair: So again, by your comments, it's unclear whether we should or shouldn't. Given the previous motion, you know, I wonder whether it's wise to put in a period or not. Committee, it's up to you.

Mr. Ducharme: Silence is golden.

The Deputy Chair: Silence is golden. I'm getting that there's no support for it.

1:10

Mr. Martin: I mean, we're saying that it would be required to retain records for at least one year following the investigation. Is that after he's decided that there is no order? Is that what it means? I'm wondering what the purpose would be of a year after it actually ended. What would be the purpose of it?

The Deputy Chair: I think, Ray, that's what Kim had said earlier. It was unclear whether there was a purpose in keeping or not, but, Kim, I'll get you to clarify that.

Ms Kreutzer Work: Actually, I was just going to pass it over to Jill. She seems ready to answer.

Ms Clayton: I'll just comment on that. That referred to an investigation having been concluded. There is still the possibility that an individual might want to apply to the commissioner for an inquiry. Usually that would have to happen within a reasonable period of time, but the commissioner would have discretion to decide whether or not to hold an inquiry. That's one of the reasons. The other reason is to allow an individual a right of access to information that may have been used to make a decision about them, which would be consistent with provisions in FOIP legislation, for example.

The Deputy Chair: So, committee, a motion or silence?

Mr. Martin: I'll so move it to get it on the table. In other words, we're saying that if some new information came in an investigation, this just gives them a year to try to get their act together to come back with some new information.

The Deputy Chair: Moved by Ray. All those in favour? Those opposed? That's carried.

Ms Kreutzer Work: I think the next item is 13E, which is Hilary.

Ms Lynas: Okay. So 13E is about the accuracy of information. An organization is required to make a reasonable effort to ensure that the personal information that it collects, uses, or discloses is accurate and complete. B.C.'s PIPA and PIPEDA limit the requirement to ensure accuracy and completeness to discourage organizations from maintaining personal information unnecessarily. PIPEDA has a standard that requires personal information to be as accurate, complete, and up to date as is necessary for the purposes for which it is to be used. The reason is that limiting updating will minimize the possibility that inappropriate information will be used to make a decision about an individual. B.C. has also incorporated this reasoning into its accuracy provisions, requiring accuracy and completeness if the information is likely to be used to make a decision affecting the individual or if the information is likely to be disclosed.

It's proposed to amend Alberta's act to require accuracy and completeness to the extent that is reasonable for the purposes for which the organization will use the information. So the recommendation is that

> the provision requiring an organization to ensure the accuracy and completeness of personal information be amended to state that an organization must ensure that personal information is accurate and complete to the extent that is reasonable for the organization's purpose in collecting, using, or disclosing the information.

The Deputy Chair: Can I have a mover for that recommendation? Len. Any discussion? All those in favour? Carried.

Now 13F.

Ms Kreutzer Work: This is briefing 12, and it encompasses questions 13F, 13G, and 13H. It discusses the commissioner's recommendations to create three new offences under PIPA. The briefing has an appendix at the back that sets out in chart form whether or not legislation of other jurisdictions contains the offences that I'm about to speak to.

The first offence recommended by the commissioner is an offence for an organization to fail to make reasonable security arrangements to protect personal information in its custody or under its control. The act presently requires organizations to make reasonable security arrangements to protect the personal information against such risks as unauthorized access, collection, use, disclosure, copying, modification, disposal, or destruction. If an organization fails to make reasonable security arrangements, the commissioner can conduct an inquiry into the matter and can order the organization to make such arrangements. However, the organization cannot be prosecuted for an offence under the act unless it fails to follow the commissioner's order to make those reasonable security arrangements. It is because the failure to comply with a commissioner's order is an offence under PIPA.

So, in essence, the current provisions in PIPA give organizations a second chance to make reasonable security arrangements. The organization cannot be prosecuted for its initial failure to make those security arrangements. Prosecution can only occur if the organization ignores the commissioner's order to implement the security measures. Creating a new offence in PIPA for the failure to make reasonable security arrangements would eliminate this second chance. Once the commissioner finds that an organization has failed to make proper security arrangements, the organization could be prosecuted for the new offence even when the organization subsequently follows the commissioner's order.

Now, some might argue that PIPA's security provision is vital for ensuring the protection of personal information in an organization's custody or control. Eliminating the second chance could provide motivation for compliance that is more proportionate to the importance of the security provision. On the other hand, others might argue that this approach could be heavy handed. Some organizations might underestimate the level of security required to protect their personal information.

With a new offence, even where an organization has implemented security measures in good faith, the organization could be prosecuted for violating PIPA's security provision if the commissioner found that the measures were not reasonably adequate. However, no prosecutions have taken place under PIPA to date, and it is the Crown, not the commissioner, who decides whether a matter should be prosecuted. Prosecution would likely be initiated only in circumstances where the contravention is egregious.

So the first question for the committee to consider is 13F: should PIPA be amended to make it an offence to fail to make reasonable security arrangements as required under the act?

The Deputy Chair: So, committee, I guess it's pretty straightforward. I mean, do we want to recommend that the act be amended to make it an offence to fail to make reasonable security arrangements as required under the act or not?

Ms Blakeman: I'll move that.

The Deputy Chair: Laurie.

Denis, you have a comment?

Mr. Ducharme: I'd like to speak against it, and the reason I speak against it is that the concern comes from the not-for-profits. If we start getting so heavy handed, all of a sudden I fear that we may just run out of volunteers that might want to come forward to help in these different agencies. At least you've got that second chance. By passing this, there's no opportunity for that second chance. Let's hope that our education system – I think we had spoken about that at one of our previous meetings, that we do more in educating the not-for-profits and our voluntary organizations so that they'll understand the seriousness in terms of being able to keep these documents secure. I'd rather still give that opportunity for a second chance than possibly destroying the good volunteer system that we have in this province.

The Deputy Chair: Any other comments?

Ms Blakeman: Well, I would argue that this legislation has been active for some time now and that there should be a fairly strong awareness in the sectors that are affected by this legislation that there is an expectation and a requirement that they take steps to protect people's personal information. While I appreciate that what we had in place before was a second chance clause, as it's been called, I still think it's important that we make it very clear that there is an expectation of compliance and that steps are taken not only when you're found out but proactively. I think they've had enough time to understand that there's legislation there, to take some steps. Now we need to be clear that there are penalties for not protecting people's personal information in that sector, and I would argue that in the volunteer sector some of the information that's being protected is that of the volunteers.

1:20

The Deputy Chair: I guess that I can agree with arguments both ways.

I'll call the question moved by Laurie that

> the act be amended to make it an offence to fail to make reasonable security arrangements.

All those in favour? Those opposed? It's defeated.

Kim on 13G.

Ms Kreutzer Work: Yes. The second recommendation of the commissioner is that an offence be established for an organization taking action against an employee in contravention of the whistle-blower provisions in PIPA. The whistle-blower protection provisions in PIPA state that an organization cannot take adverse employment action against an employee or deny an employee a benefit for reporting a contravention of the act to the commissioner, for refusing to do something that would contravene the act, or for doing something required to be done in order to avoid contravening the act.

The commissioner can issue an order stating that an organization has contravened the whistle-blower provisions and require the organization to cease further activities that contravene that provision. However, the organization cannot be prosecuted for the initial contravention of the whistle-blower provisions as it is currently not an offence. Only if the organization continues to take adverse action against the employee can it be prosecuted because then it would be acting in breach of a commissioner's order, and it's an offence to fail to comply with a commissioner's order. A commissioner's order finding that an organization has contravened PIPA's whistle-blower protection provisions could still result in legal and financial consequences for the organization.

An employee who suffers a loss as a result of the contravention could bring a cause of action for damages against the organization

or could possibly initiate an action against the organization under employment legislation or common law. Other privacy statutes in Canada that contain whistle-blower protection provisions have an offence provision for contravening those provisions.

So this brings us to question 13G: should PIPA be amended to make it an offence to contravene the whistle-blower protection provisions under the act?

The Deputy Chair: If the committee so wishes, we could recommend that

> the act be amended to make it an offence to contravene the whistle-blower protection provisions under the act.

What are your wishes?

Mr. Martin: So moved.

The Deputy Chair: Moved by Ray. Any discussion? All those in favour? It's carried.

On 13H. Kim?

Ms Kreutzer Work: Yes. The third recommended offence is for destroying, altering, falsifying, or concealing evidentiary records during an investigation or inquiry conducted by the commissioner. This proposal clarifies the scope of an existing offence provision in the act. It is currently an offence under PIPA to obstruct the commissioner in the course of the performance of his duties under the act, but there is no offence under the act specifically addressing the destruction, alteration, or concealment of evidentiary records during an investigation or an inquiry. All the public- and private-sector privacy statutes in Alberta, B.C., and Ontario as well as the federal Privacy Act and the federal Access to Information Act contain offence provisions for obstructing the respective commissioner in the course of his or her duties. None of those acts contain a specific offence for altering, falsifying, or destroying evidentiary records. PIPEDA contains neither an offence provision for obstruction or for altering or falsifying the records.

All of the commissioners under the acts that have an offence for obstruction have the power to conduct investigations into matters arising under their acts. Once the commissioner has initiated an investigation into a matter, it seems likely that destroying or altering a document that may be relevant to that matter would be considered an obstruction of the commissioner and therefore an offence for obstructing the commissioner that already exists under the act.

The question for the committee, then, is 13H: should PIPA be amended to make it an offence for a person to dispose of, alter, falsify, conceal, or destroy evidence during an investigation or inquiry by the commissioner?

The Deputy Chair: Kim, you already said that it is an offence.

Ms Kreutzer Work: There's an offence for obstructing the commissioner, though the offence does not specifically address destroying or concealing evidentiary records.

The Deputy Chair: But isn't all of that obstructing the commissioner?

Ms Kreutzer Work: It could very well be interpreted that way, yes.

The Deputy Chair: Okay.

Mr. Coutts: Just to clarify. Did you mention that PIPEDA does not have this provision in it?

Ms Kreutzer Work: It doesn't have an obstruction of the commissioner provision either, but the private-sector acts in the other provinces and the public-sector acts all have an obstructing the commissioner provision. They don't have a specific evidentiary one, just the general obstruction of a commissioner provision.

Mr. Coutts: Thank you.

Mr. Lund: Kim, if obstructing the commissioner is, in fact, an offence, can you then tell me what we are doing here? Are we just trying to clarify all of the things that would be classified as obstruction? Is that what we're doing?

Ms Kreutzer Work: We're certainly adding clarification. Perhaps I can ask Jill to expand.

Ms Clayton: That was the idea, to clarify that that was an offence. It has come up on a couple of occasions, fairly rarely though, where information that would have been very relevant to an investigation is no longer available during the investigation. I'm not sure that organizations necessarily realize that "obstruct the commissioner" means to keep those records on hand that will be required for the investigation. So it was really about clarifying.

Mr. Lund: Well, Mr. Chairman, if, in fact, this would help the organizations realize what could cause a problem for them if there was an investigation, I will move that we recommend that

> the act be amended to make it an offence for a person to dispose of, alter, falsify, conceal, or destroy evidence during an investigation or inquiry by the commissioner.

The Deputy Chair: Laurie, you had a comment?

Ms Blakeman: It was answered by Jill. Thank you.

The Deputy Chair: Call the question. All those in favour? Carried.

Kim, are you going to carry on?

Ms Kreutzer Work: I am indeed. Moving right along to briefing 13, prosecution of PIPA offences. This is going to address question 13I. The briefing discusses the commissioner's recommendation regarding the standard of proof required for an offence under PIPA. I'm going to get into a bit of legalese here, so please bear with me. We are concerned here with two types of offences, each having a different level of proof. The first type is the mental element offence. Here there must be proof that the act was committed and that the accused also acted wilfully with intent or with the knowledge that his or her conduct would cause the prohibited act.

The second type of offence is a strict liability offence where the Crown first must prove beyond a reasonable doubt that the accused committed the prohibited act. This sets up a presumption that the accused acted negligently. Then the accused is given the opportunity to respond by establishing on a balance of probabilities that it was not negligence; i.e., that it took reasonable care. That's called a defence of due diligence.

Now, regulatory offences are presumed to be strict liability offences unless the Legislature indicates otherwise. This is because the aim of regulatory offences is to promote compliance with the framework and to protect the public from social harms as opposed to punishing inherently wrongful conduct, which is typically the goal of criminal law.

PIPA establishes the framework for protecting personal informa-

tion in the private sector. The objective in legislating in this area is to encourage compliance and to promote good practices. The offence provisions in PIPA are only for the most serious of cases. The offences act as a deterrent, but to be effective they must not be impossible or extremely difficult to prosecute. Offences requiring a mental element are often difficult for the Crown to prosecute because of the need to prove intent. This is particularly problematic when the accused is a corporation.

The wording of several of the offences under PIPA would seem to indicate the need for mental intent. For example, there's an offence for wilfully collecting, using, or disclosing personal information in contravention of the act or wilfully attempting to gain access to personal information or disposing of, altering, or falsifying personal information with the intent to evade an access request.

However, there are other indications in the act that the Legislature intended the offences to be one of strict liability. For example, the act states that an individual or organization is not guilty of an offence if it can establish that it acted reasonably in the circumstances that gave rise to the offence. This is, in fact, a codification of the defence of due diligence, which is a defence only for strict liability offences. Also, the act limits punishments to a fine when imprisonment is often used with mental element offences.

Now, a change to strict liability offences would not place a greater administration burden on organizations. The act already requires organizations to act reasonably with respect to the personal information of their customers, employees, and clients. The defence of due diligence gives organizations the opportunity to establish that they acted reasonably in the circumstances.

Also, there are certain built-in processes that ensure that the prosecution of strict liability offences under PIPA would occur only in the most serious of cases. First, in deciding to prosecute, the Crown would consider whether there is sufficient evidence to support a reasonable likelihood of conviction, and they would consider whether it is in the public interest to prosecute. The Crown must also establish beyond a reasonable doubt that the prohibited act was committed by the accused.

1:30

So the question I put before the committee is 13I: should the act be amended to change the standard required to find an offence under the act from intentional to negligent? I'll just give a little bit of an explanation here. If you answer yes to the question, you'll be voting to make all offences strict liability offences with the defence of due diligence. If you answer no, you'll be voting for the status quo. Some offences will be mental element offences, some will be strict liability offences, and there will still be a need to resolve a lack of clarity in the language of the provision.

The Deputy Chair: Thanks, Kim. We have in front of us that the act be amended to

> change the standard required to find an offence under the act from intentional to negligent.

Committee members, what are your wishes?

Mr. Ducharme: So moved.

The Deputy Chair: Any comments? I'll call the question. All those in favour? Those opposed? That's carried.

Kim, carry on.

Ms Kreutzer Work: I'm just getting ahead of myself here. There's no briefing attached to this, but this is question 13J. It's a two-year limitation period for prosecuting offences. The commissioner has recommended establishing a two-year limitation period for prosecution of offences under the act. The commissioner states that the current six-month limitation period for prosecutions by the Minister of Justice is too short as privacy violations often do not come to light for some time. For example, a violation may only come to light during an annual audit or in the course of a complaint in another context. A two-year period is suggested as being a reasonable amount of time to proceed through the initial discovery, review of materials, referral of the matter to the Minister of Justice and Attorney General to the laying of a charge.

The commissioner in his recommendation provides the examples of other legislation where such a limitation period for the prosecution of offence already exists, including the FOIP Act, HIA, and other provincial legislation such as the Occupational Health and Safety Act. The commissioner suggests that amending PIPA to include such a provision would make PIPA consistent with these other statutes.

The Deputy Chair: Thank you. So it's recommended that the act be amended

> to establish a two-year limitation period for the prosecution of offences.

Mr. Coutts: I'll move it.

The Deputy Chair: Comments?

All those in favour? Carried.

Jann, do you want to speak on this next one?

Ms Lynn-George: Yes. This is briefing 14, and we have one question here with two parts. The Information and Privacy Commissioner has recommended amending PIPA to allow the courts to direct a person convicted of an offence under the Personal Information Protection Act to take some action that promotes the purposes of the act and to direct that a fine imposed under the act be used for a program or activity that supports or promotes the purposes of the act.

Just to sketch the present situation, PIPA permits the courts to impose a fine on a person found guilty of an offence under the act. The maximum fine is $10,000 for an individual and $100,000 for an organization. What happens with these fines is that they would be paid into the general revenue fund. There haven't been any so far. So a legislative amendment would be required to divert funds, as the commissioner proposes, to fund privacy-related programs or activities.

It's been suggested that there are advantages in directing fines to projects that serve the public interest. Organizations that have been found guilty of negligence have an opportunity to make amends in a positive way, and judges are able to impose meaningful penalties that are well regarded by victims of offences as well as the general public. There is some evidence that this approach to penalties for regulatory offences is favoured by both organizations and the courts.

Under the commissioner's creative sentencing proposal if a Crown prosecutor intended to ask a judge to direct a fine to a particular purpose, the prosecutor would consult with Service Alberta on the most appropriate use of the funds in the circumstances. It would probably not be appropriate for the funds to go either to the department or to the office of the commissioner, so somebody at arm's length.

If the committee wished to recommend empowering the court to direct fines under PIPA to program-related purposes, there would be

two possible approaches. The first would be to establish a fund in PIPA to be used for this purpose, and this would have to be done in legislation. This is the approach that's been taken for fines under environmental legislation. In that case, the fund is part of the general revenue fund, and while the fund can only be used for environmental projects, the allocation of monies for specific projects is part of the annual appropriation process.

Fines under environmental legislation are significant – I understand about $150 million last year – warranting the kind of scrutiny that occurs with respect to spending from the general revenue fund in general. It's been suggested that this would not be the case with fines under PIPA and that the reporting and administrative costs may not be justified. Treasury Board cites about $15,000 to audit a fund every year, so unless you're getting some significant amounts of money, it just may not be justified, and there have been no prosecutions, as we've said, under PIPA since the act came into force in 2004. That's the approach, that doesn't seem to be the best approach, but it is used in Environment.

The other approach would be to give the courts the discretion to direct fines to privacy-related programs and activities directly. The fines would then be subject to court-tracking processes. The body to which the funds were payable would be entered into the court's database, and the funds would just be disbursed directly to that body. Just one point of interest. If the fines were not paid, the minister would have to go after them. The courts don't track these fines except in cases under the Criminal Code and traffic fines and bail forfeitures.

It's been suggested that one disadvantage of giving the courts discretion to direct funds away from the general revenue fund is that it reduces transparency and accountability in the allocation and spending of such funds by taking them out of that annual appropriation process, but as I mentioned, the amounts of money are not very large. That's the first part.

With respect to the commissioner's proposal to allow the courts to direct a person convicted of an offence to take some action that promotes the purposes of the act, the rationale is less clear. The commissioner already has the power to require that a duty imposed by the act be performed, and the order, as soon as it's filed with the Court of Queen's Bench, is enforceable as a judgment or order of that court. So the commissioner's staff may be able to explain what they meant by that, but we couldn't really see what the rationale was.

1:40

For that reason we divided this question into two parts. Should PIPA be amended to allow the courts the discretion to direct that a fine imposed under the act be used for a program or activity that supports or promotes the purposes of the act? The second part, which relates to what I've just been speaking about: to direct a person convicted of an offence under the act to take some action that promotes the purposes of the act.

The Deputy Chair: Okay. You heard the recommendations. I think, Ty, you had some comments.

Mr. Lund: Yes. I really think that this an excellent idea. Creative sentencing is something that you mentioned in Environment, and it works very well. I've been trying to think of the vehicle that could be used to administer these funds. Of course, on the environmental side the money is allocated to various organizations. The university, for example, has gotten a lot of money out of the fund to do research on environmental issues and those kinds of things.

A designated administrative organization is the best vehicle to use. I don't know what we would call this one in this field. You would have the money ordered by the courts to that organization. But it doesn't show up in our overall budget. That's the advantage of it. If there was some vehicle that we have that makes sure that the money went for the purposes around the act, to education, those kinds of things, to assist in getting our message out, what the act is all about – I don't know the vehicle exactly, but I would think that we need to do some work on that, on how exactly the vehicle would be there to administer the money from the court.

I would move that we

> amend PIPA to allow the court the ability to make an order directing a person convicted of an offence under PIPA to take specific action that supports the overall purpose, the objective of PIPA, including payment of the fine towards specific programs or activities.

The Deputy Chair: Okay. It's got two parts, and that's the first part.

Mr. Lund: It doesn't totally capture what I just said because I don't know the vehicle.

The Deputy Chair: Right.

Laurie.

Ms Blakeman: Well, thanks. I don't know that we need to know the vehicle now. What's been pointed out to us a couple of times is that there really haven't been any fines that have actually been levied by the courts as a result of any cases at this time. So I don't know that we need to completely tie that one up.

One of the examples of where this does work is the john school tuition fees that are then directed to PAAFE, the Prostitution Awareness and Action Foundation of Edmonton, which does excellent work. That money allows them to provide the services that they are then providing. I don't know that that organization existed at the time the courts just gave themselves the discretion to allocate the tuition for the john school that way.

I'm certainly supportive of the motion that's been brought forward. I don't think that at this point we need to worry about the conduit or the recipient of the money, specifically. I think that could come later.

Mr. Martin: I guess that if there was a lot of money involved, I'd be for it, like Environment and the rest of it, but it seems to me that they haven't charged anybody. If there is, it would probably be $500. Five hundred dollars that they have to jack around and figure what they're going to do with it. I mean, if at some point this becomes a major issue, I can see dealing with it. Then it makes sense. But for no fines and the possibility that maybe we'll get $500 in the next three years – and then who's going to administer it and all the rest of it, you know, at $500? I just don't think it makes sense at this stage. It's not something we would rule out in the future if there are thousands of dollars coming in. But to say that we're going to do this when we haven't charged anybody and it's unlikely we will in the next couple or three years – if we do, it's going to be, you know, a minor amount of money – I don't think it's worth it.

The Deputy Chair: We have a recommendation by Ty Lund. I'll call the question. All those in favour? Those opposed? It's carried.

Now that we've got all that money in the pool, we'll talk about administration. Kim, are you carrying on now?

Ms Kreutzer Work: Yes. This is government recommendation 20,

and this is a technical amendment. After PIPA was passed, there was a need to define several words and phrases that were used in the act. These definitions were included in the PIPA regulation; for example, the regulation clarifies that in the definition of personal employee information the word "managing" also includes administering in order to capture the employer's responsibilities with respect to administering pension and benefit funds. Another example is that the regulation clarifies that a collection, use, or disclosure of personal information authorized by a statute would include a collection, use, or disclosure required under a collective agreement under the labour relations code.

It would be more convenient for users of the act if those definitions that are in the regulation were moved into the act itself. So the government recommendation is that definitions in the regulation that apply to the whole act or to a section of the act be established in the definitions section of the act or the relevant section as appropriate to bring them more easily to the attention of users.

The Deputy Chair: Thank you.

Dave makes a motion that the committee recommend that

> definitions in the regulation that apply to the whole act or to a section of the act be established in the definitions section of the act or the relevant section as appropriate to bring them more easily to the attention of users.

All those in favour? Carried.

To 21. Tom?

Mr. Thackeray: Thank you. The Personal Information Protection Act requires a special committee of the Legislative Assembly to begin a comprehensive review of the act by July 1, 2006, of which you all are a part, and at least once every three years after that and to submit a report to the Legislative Assembly within 18 months after beginning the review.

In view of the general support that we have seen through the responses to the discussion paper and the discussions at this committee, it is proposed to extend the time between reviews to six years from the submission of the report of the special committee. This time frame will allow for the amendment of the act following a review and for assessment of the effect of the amendments before a subsequent review.

The Deputy Chair: Thanks, Tom.

The recommendation is to extend the time between reviews to six years.

Mr. Martin: I was going to make a motion that after two years.

The Deputy Chair: You like the process so much that you just wanted to do it again.

Mr. Martin: That's right. Spend quality time with you people.

Mr. Lund: Mr. Chairman, I assume that when we say a review of the act, that also means a review of the regulations. Mind you, I haven't been on the committee long, but I don't know how much review there's been of the regulations pertaining to this act in this whole process.

Ms Blakeman: None.

Mr. Lund: Well, I would like to make sure that it includes the regulations under the act in this six-year review, and I would move the six years.

The Deputy Chair: Tom, you had comments?

Mr. Thackeray: No.

The Deputy Chair: Moved by Ty Lund to

> extend the time between reviews to six years from the submission of a report from the special committee and to include the regulations.

Ms Blakeman: Well, I'm certainly supportive of seeing the review of the regulations added in. I'm a little concerned about the timeline, just given how quickly technology is moving on us these days and how the opportunity for collection, use, and disclosure of people's personal information, particularly connected with marketing, is increasing exponentially. I'm a little concerned that six years from now an awful lot of stuff could have happened before we look at this act again. I guess I'd be more comfortable at a four-year mark than a six.

So now you've got me in a quandary because I want to support the regulations being added in, but I think the six years could be problematic for us. If I thought I could trust the government to understand that we needed to open up the act and do some revisions, I'd be more comfortable with this, but I think we're leaving ourselves open to not protecting Albertans adequately just given the rate at which technology is advancing, particularly in these areas.

1:50

The Deputy Chair: Given that you and Ty have agreed on every motion to date and we're at the last motion, I'd hate to see something change, but I'll call the question. All those in favour? Opposed? It's carried.

We will move on to the last few items. The preparation of the draft final report. Hilary, there are some hoops that you have to go through yet?

Ms Lynas: Right. At the next meeting the main agenda item will be reviewing and approving the final report. What we are proposing is that the technical support team will provide a draft report to committee members through the LAO office. It will include an executive summary, which will contain the recommendations as well as an explanation of the mandate of the committee and so on. The body of the report would include for each recommendation a summary of the discussion, considerations of the committee leading up to the recommendations, and then appendices such as lists of submissions, anything else that we feel needs to be put in there.

The other thing we would bring back to the committee potentially once we look at the report and the recommendations is if there are any that have extra words in them or if there's a recommendation that says that we support option 3. If there's anything like that where we haven't used exactly the committee's recommendation in the report, we would bring those forward to you to review and to decide if, you know, we've interpreted them correctly, if you want to in fact approve the final wording that we've used in the report if we've done any wordsmithing on the recommendations.

The Deputy Chair: Thanks, Hilary.

Laurie, you have a couple of issues you'd like to raise.

Ms Blakeman: Yeah. I'm just trying to track the privacy issues that I've seen raised in the media and other sources and make sure that we've captured everything that we should be capturing as this committee because now our next shot at it will be six years from now. I need some help and advice from the staff support people

here. One of the issues that keeps coming up is the encryption of information on cards or passports and the fact that that encryption information can often be mined and then gathered together with other kinds of information. I'll just refer you to a couple of newspaper articles if you're trying to see what I'm talking about. On the 6th of August of 2006 in the *Edmonton Journal* there was an article on personal information stored on passports that was able to be hijacked and used for other purposes.

They were also raising the issue of radio frequency identification, which we have no laws on as far as I understand in this province, which seems to me to be an omission. Although it's a large issue and some people would say, "Well, it's too big for us to deal with," I think we've got to start someplace. So I don't know how this PIPA legislation would affect radio frequency identification, but to me it's an issue because it's about identifying somebody and then being able to market directly to them because of the information that you've now been able to gather on them. PIPA, as far as I can tell, is the only thing that could possibly control this, but I look for your advice.

An Hon. Member: CRTC?

Ms Blakeman: I'm hearing CRTC. Well, I don't know that it would be covered there, especially if you're looking at things like encryption in something that didn't have a radio frequency, for example loyalty cards and things like that or any kind of biometric information. Increasingly we're moving towards biometrics.

One of the other things that's come up and I'll point you to – I think it's July 8 of this year, again in the *Edmonton Journal* – around biometrics and access, and I'm quoting: without adequate safeguards biometric systems would enable data linkage in multiple databases that all contain the same key, which would be the biometric. You would be able to engage in and have secondary uses of the information. So that's using the same key to link information from a bunch of different sources. Again, how do we control this? What's our obligation as part of this? Have we done anything at all to try and address some of these coming technologies and how they affect Albertans?

The Deputy Chair: Kim.

Ms Kreutzer Work: Nothing like being put on the spot.

The Deputy Chair: And Jill will back you up.

Ms Kreutzer Work: I guess, just off the top of my head, my general comments on this are that no matter how the information is gathered or collected by an organization, you still go back to the basic principles of PIPA, that you could only collect it and use it and disclose it for purposes that are reasonable. And then you could get into the consent requirement. Unless you fit within one of those limited exceptions for consent, you're going to need the consent of the individual, and at that point you'll be identifying to them the purposes for which you are using that information. That's off the top of my head.

Ms Clayton: I would just back up what Kim said. That's absolutely true.

I would comment also that with respect to RFID, our office – I believe it was in 2004; it might have been in 2005 – released a news release with some information about RFIDs and the privacy concerns if the information that's being collected and monitored is somehow related to an identifiable individual. So we've come up with some comments on that. The Ontario commissioner has done research; there are papers out there and available on that. Federally I think it's either out or about to come out. There's more information on RFIDs. It's definitely a topic that has attracted the attention of regulatory officers across Canada. We've never had a complaint about RFID, so the only thing we have done is put out that news release, like I said, probably in 2004 or 2005.

With respect to biometrics, we do get calls about certain things, like fingerprinting, from individuals and organizations with questions. We've never received a complaint about something like that either, but certainly if we did, we would investigate it, as Kim mentioned, according to the principles of PIPA. We would look at the personal information that's being collected – is it collected for a reasonable purpose to an extent reasonable to meet that purpose? – consent, safeguarding, all of those issues.

Ms Blakeman: I guess I have two responses to what I've just heard. One is that we have done very little to monitor and to discourage blanket or overly broad consent forms, and I've seen far too many of them. People don't know enough to say: you don't need this information on me; I'm not giving it to you. In fact, in many cases, especially in a commercial transaction, you're told: if you don't fill out every one of these forms, we won't process your transaction. So your choice – and I put quotes around that – such as it is, is to not get the thing or to not engage in that particular procedure. I think that when we look at privacy safeguards in the province, we continue to have a problem with blanket consent forms that are issued by the commercial or corporate sector or an overly broad consent form.

Secondly, I continue to be concerned that we do not actively monitor and enforce. Your response to my questions has been: there hasn't been a complaint. So your process is complaint driven in order to investigate. You've given some commentary through information bulletins, but there is no monitoring and enforcement. So you can tell me until you're blue in the face that they're only supposed to collect the minimum amount of information, but we have no idea what they're collecting, none, because we don't monitor them right now. I think that's a huge omission in what we're doing in Alberta, and I would argue that we're not protecting Albertans if we don't know what's actually going on out there. I think we're remiss.

2:00

The Deputy Chair: Thanks, Laurie.

We're going to move on to the date of the next meeting and propose October 3, from 11 to 3, unless I hear loud objections.

Mr. Martin: I won't be here.

The Deputy Chair: You won't be here? It's a good day to have a meeting, then.

Mr. Martin: Yeah.

The Deputy Chair: October 3 it is. It's the issue of booking the room and giving the staff enough time.

Ms Blakeman: Please, please, please, can we get information faster? If there's any more information coming, can you please put it through the clerk as soon as it's ready? We received an astonishing, I mean, more than an inch of material to read on a Friday before a long weekend. The time that I had booked off to read this,

Wednesday and Thursday, was now gone and had been filled with other activities. I was booked over the long weekend, and I ended up forgoing two social opportunities to read through this stuff. So, you know, please be respectful of our trying to read your information and come prepared to this committee. I do my best to do that. You're not helping me. So, please, if we can get the information in our hands at least a week in advance to be able to read it and find time to be able to read that information.

The Deputy Chair: Laurie, I've already gone over this with Karen as well.

Ms Blakeman: Well, every meeting I raise it. It's not happened.

The Deputy Chair: I will ask for a motion to adjourn.

Mr. MacDonald: Before you do, was that 9:30 on October 3?

The Deputy Chair: No. It's 11 to 3. In October in Whitecourt, you know, it's snowing, and I need to put the chains on the car. So a little extra time to get here.

I'd like to thank the staff remaining here for the work that they've done to date. It's a lot of work. I'd like to thank the committee members. Tom, pass on to your staff: well done.

Thank you.

[The committee adjourned at 2:03 p.m.]