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SPECIAL COMMITTEE TO REVIEW THE

FREEDOM OF INFORMATION AND PROTECTION OF PRIVACY ACT

Victoria

Monday, February 9, 2004

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SPECIAL COMMITTEE TO REVIEW THE FREEDOM OF INFORMATION AND PROTECTION OF PRIVACY ACT

Victoria
Monday, February 9, 2004

Chair:	* Blair Lekstrom (Peace River South L)
Deputy Chair:	* Mike Hunter (Nanaimo L)
Members:	* Bill Belsey (North Coast L) * Harry Bloy (Burquitlam L) * Jeff Bray (Victoria–Beacon Hill L) Hon. Tom Christensen (Okanagan-Vernon L) * Ken Johnston (Vancouver-Fraserview L) * Harold Long (Powell River–Sunshine Coast L) Sheila Orr (Victoria-Hillside L) * Barry Penner (Chilliwack-Kent L) * Gillian Trumper (Alberni-Qualicum L) * John Wilson (Cariboo North L) * Joy MacPhail (Vancouver-Hastings NDP)
	* *indicates member present*
Clerk:	Kate Ryan-Lloyd
Committee Staff:	Josie Schofield (Committee Research Analyst) Mary Walter (Committee Researcher)

Witnesses:	Mary Carlson (Office of the Information and Privacy Commissioner) David Loukidelis (Information and Privacy Commissioner) Cairine MacDonald (Deputy Minister of Management Services) Chris Norman (Ministry of Management Services) Sharon Plater (Ministry of Management Services)

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SPECIAL COMMITTEE TO REVIEW THE FREEDOM OF INFORMATION AND PROTECTION OF PRIVACY ACT

Monday, February 9, 2004
4:30 p.m.
Douglas Fir Committee Room
Parliament Buildings, Victoria

Present: Blair Lekstrom, MLA (Chair); Mike Hunter, MLA, (Deputy Chair); Harry Bloy, MLA; Bill Belsey, MLA; Jeff Bray, MLA; Ken Johnston, MLA; Joy MacPhail, MLA; Harold Long, MLA; Barry Penner, MLA; Gillian Trumper, MLA; Dr. John Wilson, MLA

Unavoidably Absent: Hon. Tom Christensen, MLA; Sheila Orr, MLA

1. In the absence of the Chair, the Deputy Chair called the meeting to order at 4:37 p.m.

2. The Deputy Chair noted that Members had received copies of all written submissions received to date and an accompanying summary document.

3. The following witnesses appeared before the Committee and answered questions:
- Cairine MacDonald, Deputy Minister, Ministry of Management Services
- Chris Norman, Executive Director, Government Information Strategies, Policy and Legislation
- Sharon Plater, Director, Corporate Privacy and Information Access Branch

4. The Committee recessed from 5:41 p.m. to 5:49 p.m.

5. The following witnesses appeared before the Committee and answered questions:
- David Loukidelis, Information and Privacy Commissioner
- Mary Carlson, Director, Policy and Compliance, Office of the Information and Privacy Commissioner

6. The Committee adjourned to the call of the Chair at 7:14 p.m.

Blair Lekstrom, MLA
Chair

Craig James
Clerk Assistant and
Clerk of Committees

MONDAY, FEBRUARY 9, 2004

The committee met at 4:37 p.m.

[M. Hunter in the chair.]

M. Hunter (Deputy Chair): Members, I would like to call this meeting to order. Sorry, there was another meeting in here — the Public Accounts Committee — and Hansard has had to make sure the machinery is all in order. Our Chair, Blair Lekstrom, is en route. He's expected to be about half an hour late, and he asked me to take the chair to get this meeting underway, so I will do that.

For the information of members you have in front of you a package of documents, including an agenda. The documents contain all the written submissions this committee has received to date. There is also a summary of those submissions prepared by the Clerk's office. The submissions proper as of now, now that we have received them, will become public, as we had agreed. That's the first item of business I wanted to draw to your attention.

Unless there are any comments or questions on that, we can move to hear our first witnesses today. I would invite Cairine MacDonald and Chris Norman from the Ministry of Management Services to join us, please. Welcome. And the third person is Sharon Plater. Is that correct? Thank you.

Cairine, you're going to speak, so please, the floor is yours. Thank you.

Freedom of Information Request Tracking System

C. MacDonald: I just wanted to basically introduce the topic and introduce the team that I have here with me. My name is Cairine MacDonald, and I'm the Deputy Minister of Management Services. With me today are Chris Norman — who is the executive director of government information strategies, policies and legislation — and Sharon Plater, who is the director of the corporate privacy and information access branch. I'm going to ask Chris to walk through the information and provide you with an update on some issues which, I believe, were of interest to this committee and which we were asked to come back and speak to.

C. Norman: Thank you for the opportunity to come to the committee and address some of the questions that were raised. As you'll note in the slides we've provided, we're going to address some information on the corporate privacy and information access branch, which is a branch in the Ministry of Management Services; the corporate request tracking system; and the sensitivity rating process attached to that system.

The slide on the corporate privacy and information access branch. We wanted to be able to relate to the committee that under different names this branch has existed since 1992. It initially was created to develop and implement the Freedom of Information and Protection of Privacy Act. In fact, it was the branch, under the name of information and privacy branch, which actually worked to draft the legislation and helped to implement it.

[1640]

It is now part of an entity in the Ministry of Management Services called government information strategies, policy and legislation, which focuses on IM and has a number of pieces of legislation attached to that, including those cited before. The branch continues to support the minister responsible in her capacity as the minister responsible for a number of pieces of legislation which are listed here: Freedom of Information and Protection of Privacy Act; the new Personal Information Protection Act, which went into effect on January 1, 2004; the Electronic Transactions Act; and the Document Disposal Act.

The mandate and responsibilities of the committee are to support the minister in developing, implementing and administering the legislation — an example is the development of the Personal Information Protection Act — and managing a very active process involving 170 stakeholders and stakeholder organizations and recent amendments to the Freedom of Information and Protection of Privacy Act, which were done in the spring of 2002 and the spring 2003.

The branch also provides corporate access and privacy policies and standards — for example, the on-line policy and procedures manual. It maintains the privacy impact assessment templates and works with ministries on those and plays a strategic role in assisting ministries with e-initiatives. It also supports ministries in meeting their legislative responsibilities. Most recently it has worked very hard with private sector organizations in implementing the Personal Information Protection Act and to date has run about 100 information and training sessions for those organizations, helping them get ready for what they need to do.

Basic services of the branch are training under both PIPA and the FOI legislation; privacy impact assessments; the manual we referred to; administering the corporate request tracking system; the personal information directory, which is an on-line personal information directory, the only one of its kind in Canada; the PIPA hotline, which is, I believe, receiving 20 to 30 — it may even be more — calls a day from organizations requesting assistance; and a very active and heavily used website. And this week, as it happens, we are cohosting a security and privacy conference, which will have about 700 attendees coming to hear about various security and privacy issues, including cyberstalking, identity theft, cybercrime — those kinds of issues.

As far as the corporate request tracking system is concerned, it is a centralized system used by ministries and some Crowns to record, manage and provide statistical reports on freedom-of-information requests. This system has been in place since the act was proclaimed. The first system was a bit more rudimentary system known as the request tracking system, and it was replaced by the current corporate request tracking system, which has been operational since March 2000.

[B. Lekstrom in the chair.]

The functions of the system are tracking and managing the request process — for example, helping to administer fees, tracking and managing the various activities that are required of ministries in administering or responding to FOI requests, various tasks associated with that, dealing with extensions where the act allows a ministry to extend the time lines for responding, and administering the exceptions to the right of access.

It's also a very important time management system that allows ministries to be able to tell where they are in processing the request and to administer those time lines. It provides statistical information — a number of annual statistical reports, which we make available to interest groups and those who are interested — and responds to statistical inquiries by the media, interest groups and various researchers.

I understand Alasdair Roberts was mentioned at the previous committee meeting. Certainly, Mr. Roberts has taken advantage of the corporate request tracking system to get statistics on the request process here in B.C. The ministries can also generate statistical reports for purposes within their own ministry, and it's also used as a training database.

[1645]

I understand there were also some questions with respect to the sensitivity ratings. Again, the sensitivity rating process has been in practice since the very early years of the legislation. It's also not unique to B.C., and it's certainly not mandatory for public bodies to establish a sensitivity rating. It has an administrative value for those who are trying to administer the requests by indicating the significance, the complexity or the size of requests or, as in many cases in larger requests, if there needs to be consultation with other public bodies because the records might be held by different public bodies or because other public bodies may have an interest in it. It also assists in identifying cross-government requests, where the corporate privacy and information access branch assists when a request goes into multiple ministries. They're usually indicated as four or more ministries that would receive the same request.

Ministries enter their own rating. CPIAB can also enter in a separate rating, as I had indicated — for example, to designate cross-government requests — but I think it's important to recognize that the central agency branch cannot change the ministry rating. They are separate rating processes.

That was some of the information we welcome the opportunity to provide with respect to those three areas. We would certainly welcome any opportunity to respond to questions.

B. Lekstrom (Chair): Thank you very much, Chris. I apologize for being late — the joys of air travel in today's society.

I'm going to look to members of the committee to see if they have questions. I'll begin with Joy.

J. MacPhail: Mr. Chair, why was the minister not here? Did she say? We asked the minister, and your letter asked the minister, to appear.

B. Lekstrom (Chair): Both. The minister, and I believe….

J. MacPhail: My request was for the minister. And then your letter was….

B. Lekstrom (Chair): The minister or a designate to come.

We received the information today at 2:25 that the minister was unable to attend and that these people would be in her place to deal with the administrative questions we had regarding such things as the tracking system.

J. MacPhail: Well, my questions are not administrative. I will ask them of the bureaucrats, but they're not administrative.

Just for the record, I am very disappointed at the late regrets — and the regrets — of the minister. I think it's completely inappropriate with a government that claims to put such importance on these legislative committees that the one time we do ask a minister, with substantial notice, she fails to appear.

Thank you very much for your presentation, Mr. Norman. Where in the legislation does it allow for what you call a sensitivity rating? What section of the legislation permits that?

C. Norman: The legislation doesn't specifically address whether or not you'd have a sensitivity rating any more, I guess, than it would that you would have a request tracking system or a number of other administrative supports for the legislation. It was decided in the very early days of the legislation, as far back as '93 and '94, that there would be assists that could be offered to ministries trying to administer a fairly heavy burden of requests. At one point the ministries were required to administer up to a little over 8,000 requests a year, so we tried to offer some administrative supports to help them both administer the requests from a kind of systems standpoint and also be able to distinguish or indicate ones that might be more complex, that might take more time to respond to or that might have more complexity by way of consultations or volume of records — that kind of thing.

J. MacPhail: Yes, well, I see these. I'm curious to know why the ministry bureaucrats feel like they have to come and answer for the politicians, but nevertheless, it's the bureaucrats that have showed up.

A letter to the editor, of which a copy was sent to me by your minister, Joyce Murray, says:

> "The province of British Columbia has used a request tracking system since the Freedom of Information Act was introduced in 1993. Ministries use the system to help manage the activities they must complete in the time

> lines they must meet. The sensitivity ratings identify more complex requests where there may be third-party involvement, legal or cross-government concerns or large volumes of information requested."

Why is the system not called a complexity rating, then, as opposed to…? What does "sensitivity" mean? I don't understand that term. Why is it not a complexity rating about how long it would take, that you could then refer to the act and about time limits, etc.?

C. Norman: I'm not sure I can answer why we would have specifically chosen "sensitivity" as opposed to "complexity." I think that was a term that was used very early on in the legislation.

[1650]

J. MacPhail: Mr. Norman, I'm not concerned about the time lines here. I know that perhaps you've been given guidance to distinguish between the previous administration and this administration. I'm not distinguishing. If it occurred under the previous administration, I'm upset with it; if it occurs under this one, I'm upset with it — okay?

C. Norman: Okay. Certainly, the purpose of a designation is for the reasons that we've cited. I think the name of sensitivity rating has to this date not necessarily been challenged as to whether or not it was embracing enough to encompass all the various pieces, but certainly it has been one that has a fairly long history, so we've not challenged that particular titling.

J. MacPhail: Under my government the branches that you refer to, I think, were under ISTA. Were they?

C. Norman: They've been under a number of different ministries. Initially, there was a branch called the information and privacy branch, which existed from 1991 to 1996. It was under the Ministry of Government Services initially. Then it moved to the Information, Science and Technology Agency. During the time it was with the agency, it also was at one point called the information analysis and scheduling branch, and another time it was the information and data management branch. They performed identical functions throughout that process. There might have been other pieces attached or taken off, but in large part they were an identical branch.

J. MacPhail: The last budget prior to this department moving over to the Ministry of Management Services, the last budget under Finance for ISTA…. The total budget for corporate services, of which ISTA was a part, was $5.5 million. The budget in '02-03 for corporate and information programs under the Ministry of Management Services was $8 million.

Can you tell me what caused that increase? Is any related to the tracking system?

C. Norman: The numbers that you refer to, even the corporate and information programs budget…. The corporate privacy and information access budget was only a very small part of that total budget. That's a large division that had a number of other program areas in it. The corporate privacy and information access branch was only just a very small part of that. My recollection is that the budget of last year was about $700,000.

J. MacPhail: And previous budgets?

C. Norman: Around the same — a little higher, a little lower, over the years.

J. MacPhail: What did the tracking system CRTS cost?

C. Norman: To develop the system was $425,000.

J. MacPhail: And that was expended in '99-2000?

C. Norman: Yes.

J. MacPhail: Four hundred how much?

C. Norman: It was $425,000.

J. MacPhail: EDS did that?

C. Norman: Yes.

J. MacPhail: The statistics you have for sensitivity ratings would go back how far?

C. Norman: I believe they go back virtually to the beginning. I think we were able to pull some rating information back as far as '93.

S. Plater: Yes. We have a systems technician in the branch. She went back and looked, and she was able to pull up 800 sensitive requests between '93 and 2001. They go back to that time.

J. MacPhail: You just said there were about 8,000 requests a year. That would be a period of eight years. That would be about 64,000 requests. You pulled out 800 that had a sensitivity rating…

S. Plater: That's right.

J. MacPhail: …during that period of time.

S. Plater: That's correct.

J. MacPhail: What would that be as a percentage — 0.005 percent? Now every request has a sensitivity rating. Is that correct?

C. Norman: No, no. I think we need to distinguish, first of all…. The 8,000 requests were a high. I would

say that the average number of requests is somewhere between 5,000 and 6,000. That was a peak year.

The other thing is what Sharon was indicating. The 800 requests were a total of all the requests that had been designated as sensitive during that period of time.

[1655]

S. Plater: What happens now, when you look at the central rating, the rating that the corporate privacy and information access branch gives…. When a request comes in, there's an analyst in our branch. He's been there for ten years, so he's done this for a long time. He simply looks at it. If it happens to be what looks like a huge request or it's something that's been in the media or it's a lobby group or a media or a political party, he just checks "sensitive."

J. MacPhail: Why?

S. Plater: It was a category that was developed quite a long time ago. It has always remained the same, and nobody has bothered to change it. If it comes in, it's just checked that way. There isn't a lot of consideration given to what the request is. I mean, we don't delve into what the request is actually about. They're just ticked that way.

J. MacPhail: Okay, but it's like why the ham ends are cut off — because it used to have to go into a pot that was smaller than the pot they have now.

I am very curious as to why this system was put in place in the first place and why it continues. I submit that it's a violation of the act, especially since, unless your ministry's statistics can prove otherwise, requests labelled sensitive tend to come from the groups you just described. I have no idea why an opposition party request would be labelled as sensitive. I have no idea.

S. Plater: Some of the things that happened early on to create those distinctions were that the users from the media or from the political parties tended to have a greater depth of knowledge of issues or the types of records that would be held by government. If you got a request from the public, say, it might be, "I want my medical record" — something fairly straightforward, fairly easy to find the records to respond to.

The ones that were coming from media or political parties addressed more complex issues. I'll give an example: "I want something on the Carmanah Valley. I want all the records related to this portion of the Carmanah Valley." That type of request would have a large volume of records, but there might also be three or four ministries that would have interest in those records or have records related to that. There would be consultations involved. Both of those things take extra time, so any ministry would be given a heads-up that this is probably going to be a request that's going to take more time on their part to sort through. That was one of the considerations when it was put into play.

C. Norman: Or the ministry itself would take the opportunity to designate that the request was a very large request so that they had some way of ensuring that the processes around it accounted for the fact that this one was going to take longer. They may need to look at it very quickly to determine if they need to do an extension on the request, because the volume might require them to go longer than the 30 days. This is a way for them to manage and be able to administer what in most cases tended to be more complicated, complex requests.

The other thing we probably should do is put this in some context. Of the requests coming in, roughly 50 percent are individuals asking for their own information. When you look at some of the statistics the system is able to demonstrate, it shows that 4 percent, as an indication, are media requests, but that in no way reflects the amount of management requirement to administer those requests because they oftentimes tend to be the complicated requests or the very extensive requests.

J. MacPhail: In the corporate — what is it? CRTS? — tracking system you have now, is it inside a disk or inside a computer memory that every single rating is sensitive now, since March 2000?

S. Plater: In the request tracking system we go back and can take statistics off from…. The last ones we pulled were 1998 to 2000, but I do believe they go back to '93. So yes, we can go back in and pull statistics, and often we routinely do. For instance, when Alasdair Roberts approached us and said he wanted to do an analysis — I think this was from '97; I can't remember now — we would provide all the statistical categories that he wanted. We routinely get them from the media, from researchers and from public bodies wanting an update.

There's quite a complexity of statistics that can be drawn off the system. We not only give numbers, we give pie charts, etc., to help people understand how it's being administered.

[1700]

When this system was brought into play — and the reason it was developed in '99-2000 — there was a concern that the government wasn't able to demonstrate how well the FOI Act was being administered, and they wanted to be able to generate better statistics. That was part of the reason why the system was developed at that point, so we could generate more statistics on timeliness, fees, extensions, etc. — how many were being taken, how long it was taking for requests to be responded to, that kind of thing.

J. MacPhail: What do the trends show?

S. Plater: You know, I actually haven't sat and analyzed the trends.

J. MacPhail: But that's what the system is for. It's costing $700,000 a year. If that's not what the system is for….

S. Plater: The individual ministries use the system, so they have what they call "crystal reporting" that we developed for them so they can go in and look at their ministry's performance under the act. They can monitor those trends. We also do a compilation of annual statistics. I don't have any with me right now, so I can't recite them, but we do look at those.

J. MacPhail: Let me just tell you where I'm going with this. I'm sure you were prepared that you were to prove this system was not a Liberal government system, and therefore all would be resolved.

B. Lekstrom (Chair): Just, yes…. I'm going to….

H. Bloy: Mr. Chair, could we have the questions. Ask a question, but not attack….

B. Lekstrom (Chair): Just one minute. I'm going to bring us back on line. We've been asked by the Legislative Assembly to deal with the legislation, not the administration. If we have….

J. MacPhail: I'm saying this is a violation of the act, Mr. Chair.

B. Lekstrom (Chair): If it's a violation of the act, I believe that would be an issue for the committee to discuss rather than have invited guests here as presenters debate that issue. If you have questions directly related to the mandate of our committee under the terms of reference to this piece of legislation, that's fine.

J. MacPhail: That's why I asked the minister to come, Mr. Chair. That is why I wanted the minister here…

B. Lekstrom (Chair): That is fine, Ms. MacPhail.

J. MacPhail: …and she turned us down.

B. Lekstrom (Chair): She was unable to attend.

J. MacPhail: She turned us down.

B. Lekstrom (Chair): You can see it how you like. I'm going to approach this in a way that we were asked to do this for the people of British Columbia and not turn it into a political party issue. We can deal with issue of the legislation.

J. MacPhail: I have a letter from the minister herself who accuses me of that, Mr. Chair, so I'm responding to the minister who…. The letter was sent today.

B. Lekstrom (Chair): Ms. MacPhail, if you can keep your questions directed to the legislation and the job at hand of this legislative committee, then you can continue.

J. MacPhail: I don't know why the committee is sensitive to it. It can be that we're all under the gun here. My point here is that regardless of the minister trying to make it a previous administration–this administration, I'm saying that this does not follow the spirit of the act, and I will be proposing that to the committee, Mr. Chair. I will continue my questions along that line.

If indeed this system is set up to determine value for resources for FOI, and we have a question right now about resources going into FOI…. For instance, the FOI commissioner's budget has been cut. FOI officers in the ministries have been cut back. In fact, one FOI officer is now administering for several ministries. That's all new. That's new, Mr. Chair.

B. Lekstrom (Chair): Thank you.

J. MacPhail: If indeed that is the case, I'm trying to figure out whether this is the best use for resources and whether it actually meets the spirit of the act.

If it is a statistical tracking system, can you give to our committee the tracking system…? Can you produce from the CRTS now the statistics from '93 to 2003?

S. Plater: We can produce for you a wide range of statistics, yes.

C. Norman: I believe we already have provided the committee with a number of statistical reports or information that the committee has requested, and we would certainly be happy to do that insofar as the system is able to do those things in the future.

I did just want to mention that I heard a number cited of an annual cost of $700,000. I'm not sure where that number came from, but the annual cost of the system is nowhere near $700,000.

J. MacPhail: Well, the branch has an annual budget of $700,000, you said.

C. Norman: The annual budget of the branch was $700,000, but the corporate request tracking system is only a very small part of the operational costs of administering FOI and privacy, and it is certainly not $700,000.

J. MacPhail: What does the branch do other than that corporate tracking system then?

[1705]

S. Plater: Can I? The branch does a lot of policy and legislation, so we do all the policy manuals, the guidelines for the Freedom of Information and Protection of Privacy Act. We developed the legislation, the Personal Information Protection Act. We did all the consultation for that, and we're currently doing all the implementation tools and the training for that around the province. We also do the governance for the Electronic Transactions Act and for the Document Disposal Act, and we do other policy that's required by the Ministry of Management Services. We also run a hotline so anybody in

the province can call in about the Personal Information Protection Act. We offer advice to businesses on administering that act and to the 2,002 public bodies that are doing the FOI Act. We have what they call the personal information directory, which is the first of its kind in Canada and in which all privacy impact assessments, information-sharing agreements and personal information banks are up on a public website. We also have a very large website that provides information about privacy issues and access issues, both locally and across the country. Our manual is up there. We have quite an extensive array of things.

This actual CRTS tracking system is not funded by this ministry per se. It's something that's funded by all ministries that are using it.

J. MacPhail: If we eliminate it — the CRTS — what would be the consequences?

C. Norman: There would be a number of consequences. The first would be that ministries would no longer have a centrally run automated system that would allow them to manage their requests. In many cases, the ministries open this. When they get a request in, they immediately open that request in the system. It helps them manage it along the lines of what we described.

What would likely happen…. This was evident in the earlier system, where it was starting to not meet ministry needs, and ministries were having to go out and purchase and/or develop their own system. The difficulty with that was, of course, that it was much more costly to government to have individual ministries having to develop and run their own system than, rather, to take a corporate approach and say: "Okay. If we pool our resources, not only can we get a system which we can custom-design to meet the needs of the ministries that are trying to administer the requests under difficult circumstances, but it also provides them with some kind of a customized thing, which they might not have been able individually to afford to do." The net benefit is not only a better system which helps them to administer the requests and do the kinds of reporting and statistics that they need but a cheaper system.

J. MacPhail: No. Sorry, maybe I didn't make myself clear. What would be the consequences in terms of meeting the act?

C. Norman: I think ministries would have to have a system to meet their responsibilities under the legislation. With the volume of requests that come in, to operate and manage those requests as a paper-based process would be prohibitive. It would be extremely difficult for ministries to be able to respond, so they would need some kind of an electronic aid or electronic tool to assist them.

J. MacPhail: What if you eliminated the sensitivity rating system? What would be the consequences in terms of meeting the tests of the act?

C. Norman: Certainly, from the standpoint of the ministries, again, I think from the management of those requests that are large or complex…. Whether they called it sensitivity rating or not, they would have to have some way to distinguish those requests that were the routine requests — where it comes in and you're able to respond very quickly because it's for a very small amount of material or it's for your own records or those kinds of things — from those larger requests.

We're talking about an automated system, but what we're really talking about is a system for administering the requests, whether it's automated or not. To distinguish those that are more difficult or longer…. I believe that would have to occur in any case if you were going to be able to prioritize your application of resources. The time that would be necessary to respond is on very tight time lines.

J. MacPhail: Part of the problem with the tracking system is that it proves that requests that are rated highly sensitive aren't fulfilled within the time lines anyway. In fact, they're more than double.

S. Plater: That's one thing we'd have to look at. I'm not sure. I know that Alasdair said that's one of the things that could occur when you mark sensitivities. We actually haven't had a chance to look back and see if that is true, in fact, in B.C.

J. MacPhail: Isn't that what your system does?

C. Norman: It's a bit of a chicken-and-egg….

S. Plater: Sorry, Chris. The system does produce a lot of statistics. This was one of the values of it. It provides people like Alasdair Roberts with a way of testing the accountability and a way of testing across jurisdictions, so he can compare the performance in B.C. with the performance in Ontario and come up with some conclusions from that.

Yes, it does provide the equations that, possibly, our branch should be looking at. We don't become involved in individual ministries administering the act or how they respond to their requests. We haven't actually sat down and done an analysis, partly because we're really busy and it's not our role to interfere with their performance.

[1710]

J. MacPhail: Look, I'm trying to understand why this system is in place. I think it's a violation of the act. I think it's a violation of the act because the sensitivity rating treats applications unequally, and the consequence of treating them unequally is in the time line it takes to fulfil them and who actually makes the request.

S. Plater: We can do an analysis for you if you'd like.

J. MacPhail: I thought that's what the system was for.

S. Plater: We have many analyses, but we don't have that….

B. Lekstrom (Chair): We're going to bring this back into order here. Just one moment.

We've asked the same question a number of times, Ms. MacPhail, about what the system is for. As the Chair of the committee, I'm going to go back to my interpretation of the mandate, and that is the piece of legislation that's before us that we are asked to review. We are not asked to review the administrative practices at this point.

Now, we've talked about the issue. If you feel it's a violation — and I'm not sure under which section or if we're going to have that discussion as a committee — I'm not sure it's appropriate to be questioning the guests in the manner you're doing. I don't think you're going to get answer you want.

J. MacPhail: Mr. Chair, what is making you uncomfortable about me asking witnesses questions in the absence of the minister? What is making you uncomfortable about that?

B. Lekstrom (Chair): Well, Ms. MacPhail, first of all, you aren't making me uncomfortable. I'm trying to keep focused as a committee. I'm sure everybody has a huge workload. We're asked to do a job for the Legislative Assembly. To try and keep that job focused is my job as the Chair, and that's what I'm doing here tonight.

J. MacPhail: And I'm saying this is key to the Freedom of Information and Protection Act, which we are responsible for reviewing. What I'm asking and trying to figure out is…. A system that on the face of it treats applications unequally, the consequences of which are delay, is a major issue that we should be facing. I don't care whether it's been in existence since 1993, 2003 or 1953.

B. Lekstrom (Chair): I agree with you, but I would interpret that as…. I have read this piece of legislation thoroughly a number of times. If there's a section in there that you feel should be amended, that's what we should be discussing as a result of questions and answers and presentations from presenters.

J. MacPhail: I'm actually trying to figure out how this government feels it's in compliance with the legislation, Mr. Chair.

B. Lekstrom (Chair): Probably the same way the previous one felt they were in compliance, I would have to say. Thank you.

J. MacPhail: I'll tell you something, Mr. Chair: I had no idea this system existed.

B. Lekstrom (Chair): Rather than get off track, Ms. MacPhail…. Between you and I we can have this debate, I'm sure, but I would like to certainly utilize the time of our presenters wisely. I'll go back.

J. MacPhail: I expect you feel uncomfortable as you call them "guests," but perhaps if the minister had come, we probably could have had a better discussion.

B. Lekstrom (Chair): I get the feeling that's your biggest annoyance here today.

J. MacPhail: No, it actually isn't, Mr. Chair. It's the fact that there are cuts to freedom of information under this government.

B. Lekstrom (Chair): Okay. Regardless, we're going to call this back to order, and we're going to get back to the mandate of our committee, which is to review this legislation and, if possible, to improve it through recommendations back to the Legislative Assembly. If you have further questions of the presenters, I would certainly entertain them.

J. MacPhail: Perhaps the officials could explain, then. If the reason for setting up the sensitivity system was to ensure compliance, why is it that there are no statistics about compliance which you can give me?

C. Norman: We can provide statistics, and we have provided statistics on the time lines of response.

J. MacPhail: Based on the sensitivity system?

C. Norman: You can take the number of requests received, and you can indicate from those requests how many a particular ministry provided within the appropriate time lines, how many had to take extensions — that kind of thing. We do provide….

J. MacPhail: Based on a sensitivity system.

C. Norman: No.

J. MacPhail: That's what I'm asking.

C. Norman: What I'm trying to clarify here is that designating a request "sensitive" under the request tracking system is not…. It would be a real leap to indicate that that was the reason a request took longer to comply with. It only reflects the designation that a ministry would have to do in managing the request anyway. They would look at the request, and they would say: "This is a request for 50 boxes of records that happen to be resident in three or four different locations, and there are other ministries that have an interest in it."

J. MacPhail: Mr. Norman, I don't make requests like that for FOI.

B. Lekstrom (Chair): Excuse me. I mean, with all due respect, I think if we ask questions, we can listen to

the questions, but we can also listen to the answers if that's acceptable to the committee members.

C. Norman: Whether or not this particular system existed, ministries are going to have to try to indicate. When you get a request of large magnitude or that is very complex or there are sensitive issues involved, the ministry needs to be able to somehow, in its own mind, in managing those requests, say: "This is a big one. We are going to have to manage this request carefully, and we're going to have to be sensitive to the time lines."

[1715]

The system designating…. Using the system as a way of marking the request does not in itself make a request take a longer or shorter time. It's simply a tool that's used to help administer that responsibility. It happens to be an electronic tool they use for that purpose. I think it would be a difficult leap to justify to indicate that by marking it as sensitive on the system, somehow that in itself makes the request overdue.

J. MacPhail: That's what Mr. Roberts' report said. So you're challenging that report.

C. Norman: I don't know that that's what he said, but if he did, I would challenge that assumption.

S. Plater: He uses statistics to generate that in his report. I would suggest that one of the things…. What Chris is saying is perfectly legitimate. There are many reasons that requests go over time, and probably not a whole lot of them have to do with it being a sensitive request. If there are statistics within the system that you would like to see…. If you would like to see a particular set of statistics, if you let our branch know, we will generate those for the committee. Because I'm not a systems analyst, I don't know the capacity of it to develop in every area, but our systems analyst is very good. She will go in. She will generate, usually, what statistics are requested.

J. MacPhail: I'm concerned about the sensitivity ratings, which I think aren't complexity ratings at all. There's a difference between complexity and sensitivity, so I'm using the government's term of sensitivity ratings.

That's why I'm concerned, and that was the reason I raised this issue before. I referred to Alasdair Roberts's report. I referred to the work that was done in other jurisdictions.

M. Hunter (Deputy Chair): The reports in the *Toronto Star*.

J. MacPhail: That's exactly right — on other jurisdictions, after which this system is modelled.

I'm surprised that the ministry doesn't have the statistics here based on the sensitivity rating. I will request…. Mr. Roberts reached the conclusion that the highly sensitive and the medium sensitive requests, marked as such, took twice as long to fulfil.

S. Plater: Can I ask one point of clarification on the statistics you're requesting? There are two sensitivity ratings within the CRTS system. One is applied by ministries; one is applied by the corporate agency.

J. MacPhail: I'd like both, please.

S. Plater: You would like an analysis of both?

J. MacPhail: My apologies that you didn't understand that's why you were here today. That is exactly why I asked the requests before, and I guess that could have been interpreted from *Hansard*.

Yes. I understand that you don't change the ratings, but it would be interesting to see what a changed rating means for fulfilling a request.

S. Plater: So if there's a difference between the rating that a ministry has and the rating the central agency….

J. MacPhail: I'd like it to go back to 1993, please, in terms of every single request, its sensitivity rating and the outcome of it. Please.

S. Plater: Okay.

J. MacPhail: I assume that's what the system does.

S. Plater: It can. I guess why I paused there was because that is a huge number of requests to have written out on paper. It's just a huge volume of paper. The system can do that, if that's….

J. MacPhail: Maybe I'm misunderstanding….

B. Lekstrom (Chair): Just one moment. I do have other speakers on the list. After this one, Ms. MacPhail, I'm going to go to others and then come back to you to allow a free flow of questions.

J. MacPhail: Sure, go ahead.

B. Lekstrom (Chair): All right. I mean, I want to deal with the request that has been put forward. Sharon, you were dealing with that request, saying the amount of work and time frame….

S. Plater: No, it's more the amount of information we would have. We produce two types of reports, and within those there are many varieties. One gives you a listing of: "This is request No. 495 that went to the Ministry of Forests. It was received on this date; it was released on this date. It may have a sensitivity rating; it may not. It was from an individual." Those are the kinds of things we release. If you looked at every one of those for '93 until now, that would be a massive vol-

ume of paper. It would be a lot of work for you to go through and look at.

The other thing we can do is statistical analysis on the system. How many requests were of this nature; how many were of that nature? What was the trend over years? Was there a difference between '92 and '93? We can do that kind of analysis. If that's the sort of thing you're looking for, that's much different. You'll get pie charts; you'll get diagrams, etc. It's much easier to interpret.

So there are two different types of documentation.

[1720]

B. Lekstrom (Chair): I would envision that the statistical evaluation you've just talked about is what would be of benefit to this committee to be able to have a look at.

S. Plater: Okay. Thank you.

B. Lekstrom (Chair): Okay. I'm going to go to Harry Bloy with the next question.

H. Bloy: Thank you for coming. I just wanted to clarify a couple of things, because one of my colleagues doesn't seem to understand. The sensitivity is just a rating system, and that has not changed since 1993, so whatever government she wants to go after, we're talking about the same period of time. So all the sensitivity ratings are exactly the same, basically done by the same person for the last ten years out of this.

Out of the requests that you get, my understanding is that 70 to 80 percent of the requests are completed within the same time frame — or within the 30-day time frame.

S. Plater: Within the 30 days. The majority are, yes.

H. Bloy: Okay. There's no political sensitivity that you put on. You've explained that it's by volume mainly, or many ministries.

C. Norman: If I could just clarify. Some of the sensitivity ratings are done by the individual ministry, so that would be different people over a fairly long period of time. The ratings are high, medium and low. For the ratings that were done within the central agency, the corporate privacy and information access branch, there's been one individual who has either been assisting in doing them or doing them pretty much for that period of time.

H. Bloy: Okay. So the rating system you use for your operation you complete within a timely manner.

C. Norman: It's really an assist for us in cases where we're helping ministries to do a cross-government request. Ministries do come to the central agency as part of the activity Sharon described. Sometimes they'll come and they'll have a complex request, and they'll say: "We want to ask some questions about the interpretation of the legislation as it relates to this."

One point that I would reiterate: the vast percentage of the requests — in fact, half of the requests — are requests for people just asking for their own information. Those are fairly easy to deal with well within the time lines. It's only in ones where it's a very large amount of information. It might be a child-in-care type of request where there might be very sensitive issues in that. There might be third-party information in it, where the ministry would have to go through and carefully consider how it would respond to that kind of thing.

Sometimes even with personal information requests there's a lot of work to respond to that. Sometimes those requests themselves may take longer to respond to, just because they want to be careful that they don't invade someone else's privacy inadvertently or respond inappropriately.

H. Bloy: Okay. Thank you.

B. Lekstrom (Chair): Other questions from members? I see no further questions. We do have a request…. Yes, Ms. MacPhail.

J. MacPhail: Sorry, I thought…. You did interrupt my line of questioning, so I assumed that you were going to come back to me.

B. Lekstrom (Chair): I did, and I have.

J. MacPhail: I actually got a copy of the report. This is why you're here, because of my concerns around the Alasdair Roberts reports, which I've clearly put on record at the last committee hearing. I'm very sorry if you didn't get the information about why you're here.

Here's what the Alasdair Roberts report says: "In general, the CPIAB-sensitive tag did not increase processing time if a ministry had already classified the request as sensitive. On the other hand, it did increase processing time if a ministry had not already classified the request as sensitive."

It isn't just a matter of, as you say, some bureaucrat sitting there checking it de rigueur. There has been a change between when it leaves the ministry and goes to CPIAB. I don't care whether that change occurred in 1995, 1993 or 2003. I say it's inappropriate.

S. Plater: Can I just clarify there? The request never comes to the corporate privacy and information access branch. What happens is that a ministry enters its request on the request tracking system. The individual in our branch monitors that system and will put a checkmark, but CPIAB never sees the request, nor do we have any interaction or any involvement in the processing of that request or when it goes out.

J. MacPhail: So this report is wrong?

C. Norman: I would seriously wonder how Mr. Roberts would have reached the conclusion that by CPIAB putting a designation of sensitivity on it, how that in itself would result in that request taking longer than if a ministry itself put a sensitivity rating on it. I have no knowledge that that would occur, and I'm not sure I can figure out how that would make that occur.

[1725]

J. MacPhail: Well, he's got the statistics. That's why you're here, to counteract his report. That's fair enough. You'll need time to do that.

C. Norman: I would need to look at that to be able to respond.

J. MacPhail: Have you read the report, Mr. Norman?

S. Plater: Actually, it came to our office, and we proofed it before he published it. He asked us to go over it and offer him comments before he published it, so we have read it.

J. MacPhail: Okay. Because what he also says here is: "For example, requests that are tagged highly sensitive by ministry take an average of 81 days to process. Low sensitivity requests take 46 days." Then he also shows how if a CPIAB-sensitive tag is added and changed — there's a different one in the ministry — then the requests take even longer.

It also says he's examined 4,908 cases of sensitivity ratings, so most of these must have come, you know, under the new CRTS system, if you ask me, because you just said that there were only 800 that you could find prior to that system.

S. Plater: Yes, I think his were for…. As I said, I think it was from '97 on, but I'm not sure. He took a subset on which he did his analysis. It could be that when he did his analysis, there's some kind of linkage between the dates and the CPI rating in the analysis, but there's no linkage within the department. CPIAB never, ever sees those requests or has any involvement in their processing, so if there is an artifact, it's not within CPIAB. CPIAB is not orchestrating that.

C. Norman: To support the committee, we would certainly be happy to commit to take the analysis that you've cited, go back and have a look at that, and either return to the committee or provide the committee with information that would help to clarify those statements.

J. MacPhail: My final question is…. Your reports, the CRTS reports — where do they get circulated?

C. Norman: The ministries prepare reports within their own ministry for use by their executive or for planning or budgeting purposes — that kind of thing. Keep in mind that the system was designed very carefully not to invade individuals' privacy, not to disclose third-party information, so there are all kinds of walls in the system, for example, that would prevent CPIAB from being able to identify the name of a requester. All those kinds of safeguards were put into place to ensure that it was within the keeping of the provisions of the legislation.

Now, as far as CPIAB is concerned, as I think we outlined, we provide a variety of annual statistical reports and other kinds of statistical reports for use of various parties. I think we cited a number of them here — media, interest groups, researchers, etc.

J. MacPhail: But your CPIAB report. Sorry. Am I saying that wrong? Does the CRTS inside CPIAB issue reports?

C. Norman: It can generate the kinds of reports we just discussed, such as an annual statistical report and the kinds of reports that Sharon mentioned as far as pie charts. Or if somebody wants to come and say, "How many reports did you get by the media between such-and-such a date and such-and-such a date," we can go into that system and generate that kind of report on request.

J. MacPhail: And have you?

C. Norman: Yes.

J. MacPhail: Do you have a tracking…? Can I have a list of the reports that you've generated and for whom?

C. Norman: I don't know if we have that capacity. Sharon could certainly check.

S. Plater: I will check. Our systems technician usually keeps a record of the reports we've released. Most of them will have gone to media.

J. MacPhail: I'm asking for internal reports as well. If this is just an administrative system, then clearly there have to be reports to see how the administration of it is working. I would assume that there have been reports issued internally to — I don't know — Treasury Board? Cabinet? Premier?

C. Norman: Treasury Board has asked us to generate reports, say, on the number of requests or on the number of requests that…. I believe they may have been ones on requests going over. One of the frustrations of the earlier system was that it was even a pre-Windows system, so it was very cumbersome to try to generate reports. The impetus to generate the new system was that it was better able to respond to ad hoc inquiries.

[1730]

J. MacPhail: Well, Mr. Chair, in order to determine the value of this information and whether it complies with the act, I'd like to see who's using the information

internal to government. I don't care about external to government.

C. Norman: Okay.

J. MacPhail: Internal to government, all the way up right into cabinet or the Premier's office. If it's to cabinet, you may be able to claim that it's cabinet information, but I'd like to know that a report was generated.

C. Norman: Okay.

J. MacPhail: I don't need to know what the details of it are.

Here's the other aspect of this report — the last one: "Sensitive requests are also less likely to result in full disclosure and much more likely to result in a response that records do not exist." He goes on to say: "Again, the reasons for these differences need to be explored more fully." How could you do that?

S. Plater: How could we explore that more fully? I don't know, as a central agency, that we could, because we don't have any involvement in the processing of the actual requests. Again, that would be an artifact of the statistics. We could generate those statistics to replicate what he's got, but in terms of how or what the reasons were for that particular request being over time, you would have to actually go to the ministry to find out. Did it have a huge volume of requests? Did they have to consult with people? You know, what were the different circumstances? We wouldn't know that.

J. MacPhail: Let me just conclude with, perhaps, this piece of advice. If indeed this system is at all useful from an administrative point of view — I think it's in violation of the act — wouldn't it make sense for you to see a statistic and say: "Oh my gosh, our highly sensitive rating is causing delays, or there's a link"? Wouldn't you want to go back in and find out why, if it's a useful tool? Because whether it's an artifact of the statistics or whether it's the truth, either would lead to the conclusion that if you want to administer the act according to the act, in terms of the time lines of the act, you would want to look at why highly…. Maybe the sensitivity rating is wrong. The system is meaningless.

S. Plater: My only thought is that that would mean I'd have to have staff in my branch go to each ministry and ask them all about their requests. I don't know how legitimate that would be.

C. Norman: I guess, too, the other comment that might made would be whether we called it a sensitive request or a complex request or a large request. Again, we're making an assumption that the designation itself is the cause of the delay. I would question that assumption.

J. MacPhail: With the greatest of respect, the statistics are overwhelming. I'm fine to have you tell me that they're wrong and that even though there are overwhelming links, they're wrong links. The statistics are overwhelming that requests that come from certain groups get rated highly sensitive.

C. Norman: Yeah.

J. MacPhail: And highly sensitive ratings lead to delays and often to not full disclosure. That's what his conclusion reaches.

C. Norman: I guess one could say that the requests that come in that get designated sensitive are very large requests, are very complex requests, and those requests take longer to respond to.

J. MacPhail: Mr. Norman, from my own experience, after two and a half years in opposition, which is my only experience with FOI directly, that doesn't hold water in our particular case.

C. MacDonald: In response to what you've requested, I've got notes that there are four things you've asked for as a committee. The first is a statistical analysis with trends over years and information on the sensitivity and the time frames and how those link. You've also asked us to review the Alasdair Roberts report and give back to you the confirmation or comments on the content of that. The safeguards in the system to protect privacy of information are something that you may want some information on. That had to do with the partitioning of data so that people were not able to go in and see data from other ministries. I think that's probably something we should bring back. Then the list of reports generated, the nature of the reports generated and for whom they're generated. I believe those are the four things you've asked for. Is there anything else that you wanted?

B. Lekstrom (Chair): I believe that does cover what I'd heard, and we certainly would look forward to receiving that information as a committee.

I do have a couple of other people wishing to ask questions, if you have just a few more minutes. I will go to Harry Bloy and then to Mike Hunter.

[1735]

H. Bloy: You said it was mainly media that request these reports?

S. Plater: The external requests would mainly be, yes.

H. Bloy: Okay. Do you charge the media for these requests?

S. Plater: No, we don't.

H. Bloy: Is there any point where you charge for information? You know, if they're small, medium and large, is there at some point…?

S. Plater: Most of the statistical requests we've had don't take that long to provide. We provide them routinely, so it's not through the FOI process. They just come and ask us. It's fairly easy for the systems person to pull those off.

H. Bloy: What would be a complex request?

C. Norman: For statistics?

H. Bloy: Yeah.

C. Norman: It would be one where sort of year-over-year trends or for…. We did have one fairly recently from one of the interest groups that required a fair bit of work on our part.

S. Plater: There are fairly standard statistics that you pull off, but sometimes people will come in, and they'll and want a different configuration. Then our systems person will have to go in and see if she can get the system to develop that. That will take a little bit longer.

H. Bloy: Do you charge for that?

S. Plater: We haven't, no.

H. Bloy: Is there no way that the standard information could be put out and they could reconfigure it themselves?

C. Norman: We do have some standard information which we have essentially ready to go. We certainly have considered and, in fact, may have actually put some of that on our website. I think there's more interest in it, so we would certainly do that.

S. Plater: I'm not sure they could reconfigure it on their own, because what happens is that there are so many different fields in this particular system, and she has to call up different items in order to get the statistics to appear. They wouldn't have that capability.

H. Bloy: But would one of your analysts spend three or four weeks trying to put together…?

S. Plater: Oh no. No. A lot of times she will spend a couple of hours putting it together. Sometimes she may spend up to a day over time, but that would be pretty well the maximum.

H. Bloy: Is there a waiting list? Is there a time delay? If a request comes in today, the odds are that she'll get to it this afternoon? Or will it be a week?

S. Plater: It might take us a maximum of, say, two or three days, depending on what her load is. She manages our website. She manages our personal information directory, our CRTS system, and she manages all the troubleshooting that comes in. Ministries will call up and say: "I can't get it to work. I don't know what to do." It just depends on what her workload is.

C. Norman: There isn't a high volume.

H. Bloy: Pardon?

C. Norman: There isn't a high volume of numbers of people asking for these statistics.

H. Bloy: How many are there?

S. Plater: How many are there?

C. Norman: We can find that.

S. Plater: Yeah, we can add that. If I were to say, I would say that we maybe get one or two a month.

H. Bloy: Okay.

B. Lekstrom (Chair): All right. I'll go to Mike Hunter next.

M. Hunter (Deputy Chair): I know we want to move on to Mr. Loukidelis, but I do have to say that I want to strip the politics and all the nonsense out of this. This committee has been told by the member opposite me that the statistics are overwhelming, that there's a causative relationship between the designation of a request and the way in which it's handled. All the other stuff that you've talked about in terms of response to this discussion tonight, as far as I'm concerned, is all about administration. I don't think it's the purview of this committee.

If you could provide us with an analysis which either supports or rebuts this famous report, that would be most helpful. The rest of it, as far as I'm concerned, is the business of administering the act, and I'm not particularly interested. But I do think these allegations of overwhelming statistics and the hypothesis that somehow when you put a red star on a file, it means that it takes 90 days instead of 45 are what we need to know. If that's the real question, then please focus on that, not the rest of it. Thank you.

B. Lekstrom (Chair): Good summation.

I will go to Ms. MacPhail for one final question.

J. MacPhail: If it hadn't been me that brought the report up, we wouldn't even be dealing with this.

B. Lekstrom (Chair): Is that your question?

J. MacPhail: No, it isn't.

B. Lekstrom (Chair): Okay.

J. MacPhail: It's unbelievable how this committee wants to bury its head in the sand over this issue…

B. Lekstrom (Chair): Can we do the job of the committee rather than debate?

J. MacPhail: …which is not partisan.

H. Bloy: Mr. Chair, I object to her talking like this.

B. Lekstrom (Chair): We're going to get focused. I've asked a number of times. If we can't, we'll take a recess. It's pretty straightforward. I don't think anybody wants to waste their time or get into political battering back and forth across the table when we're asked to do the work of the people of British Columbia, not the work of ourselves. So one final question.

J. MacPhail: I expect you're directing that at every member, are you, Mr. Chair?

B. Lekstrom (Chair): I certainly am.

J. MacPhail: Good.
What's the budget of the CPIAB over the course of the three-year service plan? How has it changed, if at all?

C. Norman: Of the upcoming service plan?

J. MacPhail: The three-year service plan.

[1740]

C. Norman: The budget for next year — I'm afraid I'm not in a position to relate that. As I say, last year's budget was, I believe, $700,000.

J. MacPhail: No, I'm asking for changes. The government puts out a three-year service plan with the three-year budgets, '02-03.

M. Hunter (Deputy Chair): Order, Mr. Chair. Isn't that a job for the estimates debates of this ministry?

B. Lekstrom (Chair): Actually, it is. We're somewhat off track. Those three-year fiscal plans have been out and available a number of times.

J. MacPhail: I have it here, Mr. Chair. You can't tell it from the budget.

B. Lekstrom (Chair): Okay.

J. MacPhail: I'm talking about whether there have been cuts or not. Does the member not want to know whether there have been cuts to this budget or not?

B. Lekstrom (Chair): Through the Chair. You said you had a further question. If it's related to the financial situation, please ask the question, and then we'll go.

J. MacPhail: I just did.

C. Norman: I'm not sure I understand the question. If the question is what the budget has been over the last three years, the budget has been in the ballpark of $700,000.

J. MacPhail: There've been no cuts?

C. Norman: There have been no cuts to the budget of the central branch.

J. MacPhail: That answers my question. Thank you.

B. Lekstrom (Chair): With that, Sharon, Cairine and Chris, I want to thank you for taking the time to come out and address the committee and certainly listen to the questions put forward and answer them. Again, I thank you very much.
With that, we will take a ten-minute recess.

The committee recessed from 5:41 p.m. to 5:49 p.m.

[B. Lekstrom in the chair.]

B. Lekstrom (Chair): Good evening. We will reconvene the committee hearing. For our next presenter this evening, we have David Loukidelis with us, who is the information and privacy commissioner of British Columbia. Joining David is Mary Carlson. Good evening and welcome.

[1750]

Witnesses

D. Loukidelis: A couple of preliminary matters, if I may. First, with the committee's permission, I would like to make available to those who are in the audience, if they wish, copies of the written submission, dated February 5, 2004, that I've prepared and delivered to the committee. I believe committee members will have copies in front of them.

B. Lekstrom (Chair): I believe they do, and that would definitely be acceptable.

D. Loukidelis: Before I get into the substance of the submission to you this evening, in light of the discussion that has just concluded and given my understanding of the will of the committee to have further information on the issues raised surrounding the corporate request tracking system, I can tell you that I have made some inquiries of the corporate privacy and information access branch.

They have been very forthcoming with responses to that, but in light of the discussion this evening and the items left with the representatives of that branch by the committee, I will be making further inquiries. Indeed, I have asked for copies of the same information that will be made available to the committee so that I can review that in light of my general responsibility for monitoring the administration of the act and so that I can assist as

appears appropriate with the committee's consideration of those issues as you move forward.

B. Lekstrom (Chair): We can accommodate that. Once we receive the information, we will make it available, certainly, to yourselves and your branch.

D. Loukidelis: Thank you, Mr. Chair.

A well-crafted freedom-of-information law is indispensable to the proper functioning of any democratic government, and balanced but meaningful privacy rights are critically important in protecting individuals from the state's power. The Supreme Court of Canada has on a number of occasions recognized in relation to access-to-information laws that their overarching purpose is to facilitate democracy.

Access-to-information legislation fulfils this objective in two related ways. First, it helps to ensure that citizens have the information they need to participate meaningfully in the democratic process. Second, access-to-information legislation helps to ensure that politicians and bureaucrats remain accountable to the citizenry.

I think it worth pointing out that the U.S. Supreme Court has on many occasions said similar things about freedom-of-information legislation in the United States. In one 1978 ruling in *National Labor Relations Board v. Robbins Tire & Rubber Co.*, the court said that the basic purpose of access to information is "to ensure an informed citizenry vital to the functioning of a democratic society needed to check against corruption and to hold the governors accountable to the governed."

This policy objective, of course, is explicitly acknowledged in section 2(1) of British Columbia's Freedom of Information and Protection of Privacy Act, which expressly provides that one of the goals of the legislation is through a right of access to information — a right that I might add is given to the public at large — to make public bodies more accountable to the public.

Similarly, privacy protection is a fundamental value in modern democratic societies. Privacy is an expression of an individual's unique personality, and it is grounded on physical and moral autonomy — the freedom to engage in one's own thoughts, actions and decisions. British Columbia's Freedom of Information and Protection of Privacy Act deals with information privacy, which, like other concepts of privacy, is based on the idea of the dignity and integrity of the individual.

Simply put, British Columbia's access and privacy legislation has for over a decade now served the vital functions of guaranteeing public access to information and protecting individual privacy. The legislation is a foundation upon which government remains open and accountable to the citizens who are represented by those who govern us. All laws, however, must be periodically reviewed and amended to correct either outright errors or oversights or to keep pace with changing needs, and this is no less true with the act than any other piece of legislation.

Of course, in May of last year the Legislative Assembly resolved, as contemplated by section 80 of the act, to mandate this committee pursuant to terms of reference to undertake a review of the Freedom of Information and Protection of Privacy Act with a view to recommending amendments to that legislation. As you're all aware, this legislation has previously been reviewed through such a process, and the last all-party special committee to review the act in 1999 recommended a number of amendments.

Some of those amendments were realized in 2002 and 2003, while other amendments to the legislation were made in those years as a result of an internal government review of the act. That review was mandated by the Premier in a June 2001 letter to the minister responsible for the act, and like the first Legislative Assembly review, the present review is a review by the legislative branch of government, which is to be contrasted with the review by the executive branch of government pursuant to the Premier's June 2001 direction to the minister.

[1755]

That executive branch review — the review internal to government, of course — resulted in some amendments in 2002-03. The present review by this committee I think offers an excellent opportunity to ensure that the legislation in British Columbia remains meaningful and current in light of changed needs, changed policy demands and development of new technologies and programs across the broad public sector in British Columbia.

I would, therefore, argue that the committee has the best of opportunities in the coming years to ensure that the act's privacy protections remain strong and relevant in the face of advances in information technology and new policy initiatives respecting private sector delivery of public services. To ensure the health of fundamental democratic and human rights, this committee must, I respectfully submit, focus on the larger picture and the longer term. This committee can and should make recommendations that ensure public access to information, and thus, public body accountability is guaranteed, effective and meaningful in the coming years. This committee can and should suggest changes to the act that protect personal privacy in the face of rapid technological change.

As I've already indicated, the February 5, 2004, document you have before you contains the main submissions of my office to this committee. I also, of course, have provided to the committee, in the form of a letter dated January 27, 2004, certain submissions in response to the presentation made on behalf of the B.C. Association of Municipal Chiefs of Police.

Tonight I would like to focus on some of the submissions that are found in the February 5 document, all of which reflect the following considerations: first, the need to ensure that the act remains, as I have said, an effective tool for achieving openness and accountability on the part of public bodies and for protecting citizen's privacy; second, to ensure that the act's administrative

provisions are practical without jeopardizing timely access to information; and third, to ensure that the processes of the office of the information and privacy commissioner remain, at a time of budget cutbacks, simple, flexible, fair and cost-efficient.

In going forward from this point on, Mr. Chair, I propose, as I've already indicated, to focus on some of the submissions found in the document itself that I consider likely to be of most interest to the committee and certainly that I believe merit emphasis. This does not, of course, mean that other of the submissions that I don't address this evening have less weight or less urgency in the eyes of my office.

The first set of submissions on which I'll focus come under the heading of submissions on access rights, and the discussion on the access rights aspects of the legislation begins at page 8 of the February 5 document. The first is an issue that has arisen in the testimony of other witnesses before this committee, and that is the question of routine disclosure of information.

Section 71 of the act allows public bodies to prescribe categories of records that are available on demand without an access request. That section also allows public bodies to charge fees for providing such access. There are indications that in recent years section 71 is being used more by public bodies at the provincial government level. I have to say, however, that apart from initiatives to routinely disclose personal information and some indications of increasing use of this section, that provision has not been used in the past decade anywhere near as much as would be desirable.

A comprehensive program of mandatory, routine, proactive disclosure of information has two advantages over a reactive, request-triggered approach to freedom of information. First, proactive disclosure without request is consistent with the act's goals of openness and accountability. Second, routine access can reduce the costs of freedom of information by avoiding the more expensive process of responding to specific and often-repeated access requests for the same information. I therefore would argue that it is time not only to consider making it mandatory under the legislation to routinely disclose information to the public or make it publicly available but actually to move forward with such a scheme. There are examples of such schemes in both the United Kingdom and in the United States that I believe could serve well here. I will touch briefly just on some aspects of those schemes.

First, under section 19 of the United Kingdom's Freedom of Information Act, it is mandatory for each public authority to adopt and publish and implement a so-called publication scheme. These schemes have to set out details of the classes of information that each authority routinely makes available without access request, how that information can be obtained by the public and what, if any, fees are payable. These publication schemes must be prepared having regard to the public interest in public access to information and the public interest in publication of reasons for decisions made by that authority. They also have to be approved by the information commissioner, who has already published on line a number of model schemes developed in cooperation with various authorities. These model schemes serve, of course, as templates or, indeed, as models for other authorities to use in the preparation of their mandatory schemes.

[1800]

Similarly, any system of proactive routine disclosure has to be designed to work effectively in and take advantage of the electronic information environment in which we increasingly live. In the United States in 1996, Congress enacted amendments to the U.S. federal Freedom of Information Act to promote routine electronic disclosure of information. These are often referred to as the e-FOI amendments made by the Congress to that federal access-to-information legislation.

The U.S. Freedom of Information Act, therefore, now requires each federal agency, in accordance with rules that it must publish, to make available to the public, without access request, copies of all records, regardless of the medium in which they are found, that have been released to any person in response to an access request. It is a more reactive system in that it is triggered by an access-to-information request for a particular set of documents, but once such a request comes in, the agency is under an obligation to determine whether, because of the nature of the subject matter of the records, those records are likely to become the subject of subsequent requests for substantially the same records. Moreover, once that determination is made, in addition to having an obligation to make those records routinely available without that further access request, the agency has to make those records available by computer telecommunications means or other electronic means.

Again, this is a more reactive approach than the United Kingdom system, but it is clear, nonetheless, that the 1996 amendments in the U.S. have resulted in widespread adoption by U.S. federal agencies of electronic reading rooms, which have greatly facilitated public access to information generated by a broad range of U.S. federal agencies. A report by the United States House of Representatives at the time the amendments were made, as quoted on pages 9 and 10 of our submission, gives you further details on the advantages of this system that were expected by the Congress.

I might mention in passing that the Ontario information and privacy commissioner's office has promoted a voluntary program of routine disclosure of information, similar in intent to the United Kingdom approach. Although there has been some uptake at the local public body level in Ontario of that kind of voluntary program, I would argue that the past decade's experience in British Columbia means that a mandatory approach along the lines of what has been undertaken in the United Kingdom, combined with some of the U.S. approaches, should be followed in this province, at least at the provincial government level. Ac-

cordingly, the first recommendation in the brief you have before you is that a mandatory scheme of routine disclosure of information should be adopted pursuant to the British Columbia legislation.

The second recommendation on which I'd like to focus, under the heading, if you will, of access-to-information submissions, has to do with access design principles and access impact assessments. I know that a number of witnesses have appeared before this committee and addressed their remarks to the system of privacy impact assessments in use in British Columbia, particularly under section 69 of our act. I believe the time has come to devise and require the implementation of a workable system of access design principles and access impact assessments.

For some years now, of course, public bodies have used privacy impact assessments, or PIAs. I believe, consistent with the recommendations of my colleague Tom Mitchinson, who's the assistant information and privacy commissioner in Ontario, that the adoption of a system of access design principles will help ensure that as we move increasingly into an electronic world of public information, the right of access to information is enhanced and not diminished.

I would like to leave with you, on that point, an observation that I had occasion to make last year in order 03-16, which was a case in which I was asked to consider a public body's electronic enforcement tracking database. At paragraph 64, I had the following to say about the issue of access to electronic information and some of the difficulties that are presented under the current approach in British Columbia:

> "It is not an option for public bodies to decline to grapple with ensuring that information rights in the act are as meaningful in relation to large-scale electronic information systems as they are in relation to paper-based recordkeeping systems. Access requests like this one test the limits of the usefulness of the act. This is as it should be. Public bodies must ensure that their electronic information systems are designed and operated in a way that enables them to provide access to information under the act. The public has a right to expect that new information technology will enhance, not undermine, information rights under the act and that public bodies are actively and effectively striving to meet this objective."

[1805]

I would argue that this legitimate expectation on the public's part as to enhancement of the public's right of access as electronic information systems develop would best be served by requiring the use of common-sense access design principles and access impact assessments.

Turning to existing provisions of the British Columbia legislation, I would like to touch briefly on the protection for cabinet confidences about which you've also heard from earlier witnesses. Section 12 of the act, of course, protects certain confidences of the provincial cabinet. The importance for our system of government of generally protecting the confidentiality of cabinet proceedings and deliberations is beyond question, and it may be that the Legislature believed this principle was so important that the section 12 exception to the public's right of access should be mandatory. As it stands, in other words, a public body has no choice under section 12(1) but to refuse access to information the disclosure of which would reveal the substance of deliberations of the provincial cabinet.

I would argue that it should be open to the provincial cabinet to waive the protection of section 12(1) and to release information that could otherwise be withheld under that provision. I'm not aware of any constitutional or legal principle or, indeed, convention or practice that stands in the way of such an amendment, and it should in fact be open to one cabinet to waive the protection of section 12(1) and disclose information that could otherwise be protected under it. Such a change would be entirely consistent with the trend toward open government and, I think, would enhance the accountability of provincial governments over the years as issues arise for consideration under access to information. The flexibility or, in other words, the discretion on the part of a cabinet to waive the protection of section 12(1) is consistent with the openness and accountability objectives of the legislation, and this is an amendment I would urge this committee to recommend in its final report.

Similarly on the cabinet confidences protection, it is our view that the 15-year time limit on the protection under section 12(1) is unnecessarily long, and I would argue that it should be reduced from 15 years to ten years — the idea being, of course, that once the ten-year period expires, a public body is not required to withhold information under section 12(1) or could not use its discretion to withhold that information if the first amendment I've suggested is actually made.

I would turn now to an issue that has arisen in previous presentations to this committee. It is one that I regard as being a very grave threat to the interests of openness and accountability under this legislation. I am referring here to the advice or recommendations exception in section 13(1) of the legislation.

One of the most frequently invoked exceptions under the act, at least at the provincial government level, is section 13(1). This is, of course, a discretionary exception that protects advice or recommendations developed by or for a public body or a minister, and it is not necessary for a public body to establish harm that would result from disclosure of the information before it can rely on that exception to the right of access. Section 13, in other words, is a so-called class-based exception, by contrast to some of the other exceptions in the legislation, where you have to show harm that would result — or a reasonable expectation of harm that might result — from disclosure. It is, again, applicable at the discretion of the public body so long as the information qualifies for the class — in this case, advice or recommendations, as I've described.

Now, it is clear that section 13, like much, if not most, of the British Columbia legislation, was modelled on a very similar provision in Ontario's Freedom of

Information and Protection of Privacy Act, which was first enacted in 1987. That act followed, after a few years of delay, the landmark publication of *Public Government for Private People*, the report of the Commission on Freedom of Information and Individual Privacy, also known as the Williams Commission. That report recognized, as have many other commentators and, indeed, the courts, that if a class exception for advice or recommendations is too broadly worded or interpreted, it could swallow the right of access to information entirely.

I believe it is worth quoting here from the Williams Commission:

> "An absolute rule permitting public access to all documents relating to policy formulation and decision-making processes in the various ministries and other institutions of the government would impair the ability of public institutions to discharge the responsibilities in a manner consistent with the public interest. On the other hand, were a freedom-of-information law to exempt from public access all such materials, it is obvious that the basic objectives of the freedom-of-information scheme would remain largely unaccomplished. There are very few records maintained by governmental institutions that cannot be said to pertain in some way to a policy-formulation or decision-making process."

[1810]

Now, in late 2002 what I've just referred to as a grave threat to the interests of openness and accountability that are one of the explicit and fundamental goals of the legislation came in the form of a British Columbia Court of Appeal decision about which you've already heard. That is the court's decision in the College of Physicians and Surgeons of British Columbia v. the Information and Privacy Commissioner of British Columbia. Briefly, in that case the Court of Appeal decided that expert medical reports obtained by the College of Physicians and Surgeons for the purposes of investigating a complaint against a physician were protected in their entirety as advice, under section 13(1).

The opinions concerned whether the physician had improperly performed or attempted to perform hypnosis on the access applicant, who had originally complained to the college about the physician. The college had looked into the matter and obtained these third-party expert medical opinions and decided not to proceed against the physician. Its complaint file had been closed.

To the surprise of all, and with the benefit of only sparse argument, the Court of Appeal pronounced what, with deference, can only be described as a sweepingly broad interpretation of "advice" in section 13(1). The court's interpretation says that advice includes an opinion that involves exercising judgment and skill to weigh the significance of matters of fact, including expert opinions on matter of fact on which a public body must make a decision of some kind, of whatever import or significance, for future action.

I believe that with some justification public bodies have taken this interpretation to mean that factual information presented to provide background explanations or analysis for consideration in making a decision is now protected under section 13(1). To say the least, with all due respect, this interpretation at the very least seriously undermines section 13(2)(a), which explicitly provides that a public body cannot withhold factual material as advice or recommendations. Indeed, the Court of Appeal's interpretation comes perilously close to ignoring the existence of section 13(2)(a) altogether.

The interpretation also means that public bodies can simply rely on the expanse of interpretation of the term "advice" to withhold investigative material relating to law enforcement and need no longer meet the harms-based requirements in the law enforcement exception, which is section 15. The decision also means that individuals can be denied access to their own previously available personal information. Of course, section 2(1) of the legislation acknowledges that one of the underpinning purposes of the law is to provide individuals with the right of access to their own personal information for no other reason than that information was gathered, compiled or presented for the purpose of generating investigative or briefing material for a public body's consideration in making a decision of some kind — again, whether trivial or not.

The decision also has serious ramifications for section 12 of the legislation, the cabinet confidences exception. Indeed, the broad interpretation given by the Court of Appeal to this provision, in the view of some commentators at least, threatens to swallow whole many of the other explicit exceptions to the right of access in the legislation, many of which are harms-based.

Clearly, the College of Physicians decision is binding on public bodies, it is binding on the information and privacy commissioner, and it is binding on the lower courts in this province. It is not, however, binding elsewhere in Canada and has not, as two very recent Ontario court decisions demonstrate, been followed in that province. Indeed, very recently the Ontario Divisional Court has, to give one example in a case known as Ministry of Northern Development and Mines v. Ontario information and privacy commissioner, declined explicitly to follow the College of Physicians and Surgeons decision. In fact, the court there found, in a three-judge panel decision, that it's appropriate for the advice and recommendations exception to be interpreted as the information and privacy commissioner has interpreted it in that province.

That interpretation is, for the most part, consistent with the interpretation here. If anything else, in fact, the interpretation placed on section 13 in our province in my decisions and my predecessor's decisions has been somewhat more conservative than the Ontario interpretation.

In the Ministry of Northern Development and Mines decision, Mr. Justice Dunnet said explicitly the following in relation to the attempt by the ministry there to rely on the College of Physicians decision: "In my view, the ministry seeks to ascribe to the word 'advice' an overly broad meaning, tending to eviscerate

the fundamental purpose of the statute to provide a right of access to information under the control of institutions in accordance with the principles that information should be available to the public and exemptions from the right of access should be limited and specific."

[1815]

Again, an overly broad interpretation of the policy advice or recommendations exception can lead to a situation where "advice" encompasses all information generated by civil servants, and it has the potential to render a legislated right of access to information meaningless. I submit that the College of Physicians' decision — which, among other things, failed to interpret section 13 in light of the explicit accountability objective in section 2(1) of the act — has turned these warnings into reality in British Columbia.

The accountability and openness promised by section 2(1) depend on section 13 being amended at the earliest opportunity to clarify a number of things: (1) that advice and recommendations are similar and often interchangeably used terms, not sweeping separate concepts; (2) that advice or recommendations set out suggested actions for acceptance or rejection during a deliberative process; (3) that the advice or recommendations exception is not available for the facts upon which advised or recommended action is based; and (4) that the advice or recommendations exception is not available for factual, investigative or background material for the assessment or analysis of such material or for professional or technical opinions.

The next exception to the right of access I would like to touch on is the third-party business information exception. Our submissions on that provision are found at pages 20 and following of the February 5, 2004, document. I raise this in part because at least one previous witness has mentioned this to the committee, and I think it is worth putting forward our perspective on the section 21 protection for certain third-party business information.

Section 21 of the act protects some third-party business information that has been supplied in conference to a public body where disclosure of the information could reasonably be expected to cause harm of a kind mentioned in that section. Decisions I have made and also decisions of my predecessor, David Flaherty, have consistently acknowledged that the intent of this provision is to protect certain third-party interests.

Indeed, some provisions very similar to section 21 are found in all Canadian access-to-information statutes, most of which explicitly require information to have been supplied before it qualifies for protection. This requirement of so-called supply has consistently been interpreted in the same manner as in British Columbia, including by the Federal Court of Canada, in Ontario, in Quebec and in Alberta. I would just refer to a full review of decisions from across Canada on this point that you can find in order 03-02, which the committee may wish to examine.

Section 21 of the act, like other similar provisions across Canada, balances the public interest and accountability for the spending of taxpayers' money and the public interest in avoiding harm to private business interests. The case law that has developed across the country consistently affirms the appropriateness and the effectiveness of that balance, and the price of doing business with government is considered to be a degree of scrutiny that is not found in purely private business deals. This has been the case across Canada for many years — at the federal level for almost 20 years and in British Columbia for a decade.

No persuasive case has been made of which I am aware where the balance in the statute, in section 21 itself or in the decisions considering that section, is not correct and appropriate. To the contrary, the present level of scrutiny through section 21 is appropriate and evermore vital as alternative service delivery in public-private partnerships moves ahead at all levels of government in British Columbia. In an era of public-private partnerships and private sector delivery of public services, the case for accountability is, in fact, stronger now than it was a decade or more ago. Long-term contractual commitments on the taxpayers' behalf can have significant financial consequences for taxpayers, and meaningful though not unrestricted scrutiny of such deals must be preserved under the act.

I'll note in closing that the previous special committee to review the act was asked to recommend changes to section 21, including eliminating the supply requirement, but in the end recommended only a minor amendment, which my office supported and which went forward in 2002. I submit to you that no further change to section 21 should be contemplated at this time, because no such change is needed. Any amendments would be a retrograde step and would run counter to the thrust of such provisions in almost all Canadian access laws. Any such change would run against the current of decisions under those laws across the country.

I'd like to turn now to touch on some of the submissions on privacy protection that are found in part C of the written brief. The first submission or recommendation on which I'll touch is that which relates to the need to account for wider privacy considerations in systems design and technological change. This is found on page 26 and following. A number of submissions have already drawn to your attention the desirability of public bodies undertaking privacy impact assessments. I've already mentioned to you this evening how section 69 of the act addresses the PIA approach to designing privacy into various programs, systems and policies.

[1820]

The office of the information and privacy commissioner has always taken the position that a privacy impact assessment must do more than assess technical compliance with the legislation. A PIA must not be limited to assessing whether a proposal technically complies with the act's requirements when it comes to collection, use or disclosure of personal information. A PIA that only assesses technical compliance fails to account for the wider risks that initiatives can raise for

personal privacy of individuals whose lives and personal information are affected.

Arguably, the act fails to address the wider implications of, for example, surveillance technologies and related initiatives, and it should be amended to require public bodies to examine wider privacy issues that are likely to arise out of new activities involving personal information so that PIAs do not just assess technical compliance with part 3 of the act. I have in mind here, if you will, a privacy charter for British Columbians similar to that introduced in the Senate in 2000 as a private member's bill by Sen. Sheila Finestone.

In a speech that she gave on February 19, 2001, Senator Finestone discussed the purpose of her bill, which was called the Privacy Rights Charter. Her comments on that occasion indicated that the Privacy Rights Charter was intended to give effect to a number of principles. I will refer to only some of them: first, that privacy is essential to an individual's dignity, integrity, autonomy and freedom and to the full and meaningful exercise of human rights and freedoms; second, that there is a legal right to privacy; and third, that an infringement of the right to privacy, to be lawful, must be reasonable and justified. Privacy laws such as the act have not been designed, to date, to require consideration of this broader social perspective on a case-by-case or program-by-program basis. It is time that such laws did so and, therefore, time for the act to be amended accordingly.

The next set of comments I will make address the submissions on the scope of the legislation found in part D of our written brief, at page 29 and following. The first focus that I would like to bring to bear this evening was already mentioned earlier in passing. I have more fully discussed, in my January 27, 2004 letter to the committee, my concerns about the submission on the part of the municipal police chiefs suggesting that police activity, certainly, should be exempt from the access and privacy provisions of our legislation.

The primary thrust of the arguments, as I understood it, is that access to information laws interfere with the ability of police forces to conduct their investigations. As I have said already in writing, the claim that access to information laws hinder law enforcement activities is not substantiated in the chiefs' brief. Under section 15 of the act, as I have already argued, records generated by law enforcement agencies enjoy substantial and strong protection from disclosure.

Simply put, accountability for the police, as for other public bodies that serve the public, begins with information. The importance of access to information in promoting accountability on the part of the police, who serve the public, is for this reason broadly recognized in Canadian law. You can take the example of the RCMP, which polices the vast majority of British Columbia's citizens. The RCMP has been subject to federal freedom-of-information-and-protection-of-privacy legislation for some 20 years, and a review of the federal access and privacy regime that was recently completed did not recommend that the RCMP be exempted from access to information and privacy protection legislation.

Section 2(1) of the British Columbia legislation confirms that our act is intended to make municipal police forces that serve British Columbians more accountable to them. That important public policy goal should not be defeated now, ten years into the act's life, by putting our municipal police forces beyond such public scrutiny as the act enables. I would note, in closing, that any such change would create an anomaly. Municipal forces would not be covered by access and privacy legislation, while RCMP detachments serving under contract as municipal forces would continue to be covered by federal access and privacy laws.

The second comment that comes under the heading of submissions on the scope of the act has to do with alternative service delivery and the right of access to information. At a time when the provincial government is outsourcing services and functions to the private sector, the public's right of access and the accountability it secures should not be diminished because records move beyond the control of public bodies and into private sector hands. This risk exists whether or not a public body intends records to leave its control.

There can be confusion in the minds of public bodies and contractors alike as to which party has control of records that contractors create, compile or take custody of in the course of carrying out their contractual duties to provide services to the public. When the issue of control over records is not clear, resources of the public body and of the office of the information and privacy commissioner are needlessly expended trying to resolve the issue.

[1825]

Because it is important that accountability respecting the provision of public services is not eroded through alternative service delivery, I submit that section 3 should be amended to confirm that records created by or in the custody of an external service provider in the course of carrying out contractual duties for a public body are in the public body's control and are therefore subject to the right of access under the legislation. This would streamline and clarify request and review processes under the act while lowering compliance costs and would promote the accountability goals of the legislation, as I've already mentioned.

Next, records available for public purchase. As it stands, section 20 of the legislation authorizes a public body to refuse to disclose information that has been requested under an access request where that information is available for purchase by the public. Without going over the details with you this evening, I would argue that it would be more appropriate and consistent with the scheme of the act for section 3 to be amended to provide that the legislation simply does not apply — the right of access does not apply — to any record that is available for purchase by the public, whether or not a fee is charged for that record.

Any such move brings into play a concern that has existed under the present approach, which has section

20 allowing a public body effectively to deny an access request on the basis that a record is available for purchase. Our office has for some time been concerned that a policy should exist and that it should be explicitly mandated in a new section of the act to facilitate meaningful access by individuals and groups to information that is available for purchase.

Government policy trends across North America have for some years been to commercialize information resources by selling to the public information that has already been generated at taxpayers' expense. It remains a pertinent and pressing issue now, a decade into the life of the act, to ensure that there is meaningful public interest access to information that is available for purchase, and the act should be amended to allow cabinet to prescribe by regulation a governmentwide policy on access to published information by public interest groups.

Turning now to submissions on the administration of the legislation, which are in some senses, of course, near and dear to our hearts because they pertain to the work we do daily, I propose again to focus only on some of those submissions, without in any way intimating that we don't regard other of the submissions as being any less pressing or important for the committee's consideration.

The first of those is the issue of extending the power of the commissioner to grant extensions for response time to public bodies. Section 10 of the legislation authorizes the head of a public body to extend the time for responding to an access request, and it authorizes the commissioner or his or her delegate to further extend the response time in the three situations set out in section 10, specifically sections 10(1)(a), (b) and (c). But a notable number of the public body extension requests that we receive do not qualify under one of the three grounds that are now set out in section 10.

For example, where a public body's operations, as has happened from time to time, have been suspended or curtailed due to events such as strikes or catastrophic events such as forest fires, the OIPC does not now have the ability to recognize the force majeure, if you will, that is applicable and therefore extend the time for response. What this means, of course, is that the public body is technically in default of its obligation to respond, for reasons that would generally be recognized as being beyond its control.

We do get a number of complaints about these technical non-compliance situations that we believe would be more appropriately dealt with at the outset by being in a position to grant an extension to a public body when the problem arises, as opposed to looking at it after the fact when there's a technical non-compliance, because really there's no remedy we can offer. By then the public body will have been responded, and there's no point investigating the matter to say: "Well, look, you're technically late in responding to the request, but there's really nothing we can do about it because there's no point ordering you to respond because you already have." So it sets up a situation where the legislation doesn't recognize some of the realities on the ground, and it also puts us in a position where we're using resources that we believe could be better used elsewhere.

[1830]

The next point I would like to make is really just a general point and, having said that, a very strong point as well. On the question of fees for access to information, I have said on numerous occasions — and I will underscore most emphatically here again this evening — that fees for access to information must not become a barrier to access. The legislation gives to the public, literally and specifically, the right of access to information in order to hold governments and other public bodies accountable for their exercise of power or spending of money in the name of the citizens that they serve. Therefore, the right of access to information is not a service to consumers, and that right is, again, a right of the public that exists for accountability reasons. Although that right is exercised in each instance by a single access applicant, its existence is fundamental to accountability in our democratic system of government. The present approach to fees under the act is already a user-pay approach. Consistent with this, my submission to you is that the legislation appropriately addresses the question of user-payand that there should not be any increase in the cost burden on access applicants.

The next point is a related one, and that has to do with fees. The fee schedule that forms part of the Freedom of Information and Protection of Privacy regulation, which is made under the act, was drawn from fee provisions that were created under the federal Access to Information Act, and it therefore dates back to the early 1980s. In our view, the fee schedule does not reflect the subsequent almost invariably downward changes in computer costs since that time and also does not reflect the introduction of new media, such as CDs and DVDs. I'm asking this committee to recommend that the fee schedule be amended to reflect these cost decreases and the development of new communications means and storage media.

The next submission has to do with updating the Freedom of Information and Protection of Privacy regulation to address questions of who may act for others. Section 3 of the FOI regulation prescribes who may act for minors, for individuals with committees and for deceased individuals, but it does not recognize that individuals may have other types of legitimate representatives, such as those with a power of attorney or representatives under the recently enacted Representation Agreement Act. By contrast, sections 1 through 4 of the Personal Information Protection Act regulation provide a comprehensive guide for determining who the nearest relative is — for example, who may act for minors — and other types of representatives who may act for individuals for the purposes of that legislation. Our submission to you is that section 3 of the FOI regulation should be updated to bring it into line with the Personal Information Protection Act regu-

lation, and we would ask the committee to make such a recommendation.

The last set of comments I have for you this evening relates to the powers and processes of our office. The first point I would like to make, found on page 36, is a point that arises also out of the recent enactment of the Personal Information Protection Act. That is, the office of the information and privacy commissioner should be able to require complainants who come to our office to first try to find other ways to resolve their disputes with public bodies. As a part of dealing with the budget cutbacks that have faced our office, we have in the last year begun referring complainants to public bodies in order to have them attempt to resolve privacy and access complaints with the public body first. If the complainant is unable to resolve the dispute with the public body, they're entitled to come back to our office, which then will consider if the matter warrants further review by our staff. This approach has been working well.

Under the Personal Information Protection Act, which of course came into force on January 1 of this year, the commissioner has the express power to require an applicant to first attempt to resolve the complaint or request for review with an organization. We've structured our policies to reflect this as we move forward with private sector privacy oversight. I would ask the committee to recommend such an amendment to the Freedom of Information and Protection of Privacy Act to give us the explicit black-and-white authority to require would-be complainants similarly to go back to the public bodies involved to attempt to resolve the disputes directly before they come to our office.

The next point of focus has to do with commenting on draft legislation. Section 42 gives the information and privacy commissioner the power to comment on the information or privacy implications of proposed legislative schemes, policies or programs. Some public bodies do take the initiative to submit draft legislation to our office before a bill is tabled in the Legislature so that we can provide meaningful comments to their staff on the information and privacy ramifications that may arise from the proposed legislation.

It is the case, however, that public bodies sometimes introduce legislation without having first submitted it to us for comment. In many of these cases, the first time that our office becomes aware of the new legislation is when it hits the order paper in the House. Such legislation, of course, may have an impact on information and privacy interests, but it may be too late at that point to effect any meaningful changes in the legislation.

In order for our office to effectively and meaningfully exercise our authority to comment on proposed legislation, we submit that it would be appropriate to amend the act to require public bodies to submit draft legislation to our office for review of its information and privacy implications before its introduction in the Legislature.

[1835]

The next submission on which I'll spend a moment or two has to do with the period within which the office of the information and privacy commissioner is required to address requests for review that are made under the Freedom of Information and Protection of Privacy Act. The present wording of the act requires that an inquiry into a matter under review — typically an access to information appeal — must be completed within 90 business days after our office receives the request for review.

Now, we recognize that time limits of this nature can be helpful in encouraging settlement between the parties to a review under the legislation, but given the realities of other work pressures, both under the public sector and private sector legislation and diminished resources, it is frequently not possible for the parties to resolve the issues between them within the 90 working days I've mentioned.

The simple addition of a few days or weeks to the time for mediation has frequently meant a successful settlement of the issues in dispute, but because of the 90-day time limit, my staff spend considerable time and resources negotiating and arranging extensions of the mediation time line simply to deal with that mandated 90-day time limit. It would streamline our processes and facilitate mediation if we could extend the 90-day time limit under the legislation. It would also make the act consistent with the Personal Information Protection Act, which gives the commissioner the power to extend the 90-day time limit for reviews under that legislation.

The next topic I'll address — and it is the next to last, I can assure you — addresses our submission on page 43 of the brief, and that is the submission respecting the role of the information and privacy commissioner in judicial review proceedings. As I'm sure you are aware, it is open to the parties to a matter before the commissioner to seek judicial review in the British Columbia Supreme Court of a decision that has been made under the legislation. The College of Physicians and Surgeons decision, of course, ended up in the Court of Appeal, on appeal from a decision of the B.C. Supreme Court in response to the College's application for judicial review of a decision that I had made.

Most applications to the court for judicial review of a decision are made by the public bodies or third parties, not the access applicants. The Ministry of Attorney General provides lawyers to represent public bodies associated with central government, and other public bodies and third parties will be represented almost invariably by their own lawyers. It is necessary to emphasize that the Ministry of Attorney General does not represent the information and privacy commissioner or defend the commissioner's decisions on a judicial review application. The Ministry of Attorney General is also not in a position to speak to the public interest in the administration of the act that extends beyond the interests of public bodies that it represents.

Now, few access-to-information applicants apply for a judicial review and very often do not participate in judicial review proceedings brought by public bodies or third parties. Those few access applicants that do

participate almost invariably are not represented by a lawyer, perhaps because of the cost of hiring a lawyer.

Although my office usually participates in judicial review proceedings, the legislation is silent about the role of the commissioner in doing so. Yet the commissioner is the only disinterested party who can knowledgably address the disputed records in light of the act's right of access and its exceptions to that right, and the commissioner is also often the only participant who addresses the perspectives of unrepresented parties or the wider public interest in the act's administration. The commissioner is nonetheless repeatedly and consistently called on by other parties to explain and defend the right and scope of his or her participation on judicial review, an exercise that contributes to the complexity, length and expense of judicial reviews of those decisions.

Other jurisdictions are heading in the direction of giving full-party status on judicial review proceedings for the information and privacy commissioner, and I submit that the time has come for the act to expressly confirm the right of the information and privacy commissioner to participate on judicial review as a full-party respondent. I would note in closing that in 2003 a similar provision was added to the Securities Act in this province in response to a decision of the Court of Appeal on the question of the role of the British Columbia Securities Commission on judicial review.

The last submission on which I will focus this evening is related to judicial review and the standard of review applied by the courts in reviewing decisions of the information and privacy commissioner. That's found on page 44 of the written brief.

Section 2 of the act reflects the legislative policy that access and privacy decisions must be reviewed independently of government by an information and privacy commissioner who has an ongoing and specialized mandate to oversee the administration of the act. The commissioner's decisions can, as I have said, be reviewed on a limited basis by the courts, but the courts do not have regular, or indeed, contextual experience with the act's administration, interpretation or application.

[1840]

A major factor in the complexity, length and expense of judicial reviews of the commissioner's decisions is that there is extensive argument in each and every case about the commissioner's expertise relative to the court and whether the court must respect that expertise or can simply substitute judicial opinion for the commissioner's conclusions. This is the debate around the standard of review. Should the court appropriately show some acknowledgement of the expertise developed by an information and privacy commissioner and not intervene and substitute its own opinion for that of the commissioner based on the evidence at hand, or should the court be more proactive and more willing to substitute its view of how this specialized and technical legislation should be administered on a case-by-case basis? I would argue, for the reasons given on page 44, that the mandate of the information and privacy commissioner has what you might call the classic hallmarks of expertise relative to the courts in matters surrounding access to information and protection of privacy.

I note that the Supreme Court of Canada has held that decisions of the similarly situated Quebec access to information commission deserved deference, and I would submit to you that with regard to the commissioner in this province, the hallmarks of expertise are also present and should be affirmed in the act by the adding of what is known as a privative clause such as is found in the Labour Relations Code concerning the finality and exclusivity of the commissioner's authority under the act.

This does not oust a judicial review by the courts. What it does do is send a signal to the courts of legislative intention that the expertise of the office is such that the courts ought, in fact, to show more deference to the decisions reached without completely abandoning their role to ensure that the decisions of the commissioner operate within the rule of law and the confines of administrative fairness.

With that comment I would be happy to take any questions that the committee may have.

B. Lekstrom (Chair): Thank you very much, David, for a very in-depth and well-put-together report. I thank you for taking the time to come and address our committee here this evening. I'm going to begin with Jeff Bray.

J. Bray: Thank you very much. Good bedtime reading to read this in its entirety, Mr. Loukidelis.

One of the themes that has come across, at least in my mind, with the witnesses we've had at this committee has been a very positive response to the PIPA legislation, the private sector legislation just brought into force, and a general comment along the lines that there are areas of FOIPPA that could actually be amended to mirror PIPA because PIPA's provisions are better — in particular, the privacy aspects of PIPA versus the privacy considerations in FOIPPA and the area around informed consent.

Especially with some public bodies, the consent portions of various government forms — income assistance, MSP, Pharmacare — has gotten so legalistic that it has actually gone beyond the point of meeting a reasonable expectation of reasoned consent. No one can understand it, not even the lawyers. Could you just give some comment, because I know you've been following the testimony, as to whether or not you think this committee should be looking to make those kinds of parallel amendments to FOIPPA to meet PIPA, especially around both consent and what constitutes informed consent and around the privacy provisions in PIPA versus what has existed for the last ten years in FOIPPA?

D. Loukidelis: Thank you for the question.

It is true that the Personal Information and Protection Act uses a consent-based model in terms of the collection, use or disclosure of personal information by organizations in the for-profit and not-for-profit sector. The Freedom of Information and Protection of Privacy Act — and this is consistent with similar public sector legislation across the country — also acknowledges the concept of consent and authorizes public bodies to collect, use or disclose personal information if there's consent.

It's also fair to say that the legislation focuses more on collection where the information being collected, used or disclosed is necessary for and directly related to an operating program or activity of the public body, a standard found in section 26 of the act. As such, the legislation de-emphasizes consent as compared to the more recent private sector privacy legislation, of which the Personal Information Protection Act is an example.

I'll leave it for the committee to consider whether the two pieces of legislation and the two approaches I've described are — and I don't mean to be trite here — separate but equal. Of course, in the public sector context, you may well find situations where it is broadly acknowledged, perhaps grudgingly, that governments ought to have the ability to require people to give up information and focus more on the protections around what that information is subsequently used for and how it's guarded and kept secret than going to a consent-based model.

[1845]

For example, I mentioned that people grudgingly accept that information sometimes has to be provided. I don't see how a consent-based system of reporting your income for income tax purposes would work very effectively. If you go down the road of trying to move more toward the consent-based model, you may find yourselves designing legislation that tries to straddle both those needs — compelled disclosure or collection, if you will, and consent-based — running into considerable complexity and difficulty in identifying situations which should fall on either side of the boundary.

Two more points. One, I'd ask you to consider whether the section 26 criterion that you can only collect personal information or use or disclose it as a public body if it's necessary for or directly related to an operating program or activity or if you have specific legislative authority to do so isn't, in fact, an appropriate check and balance and one that achieves much the same end. Under the new private sector privacy legislation an organization can force somebody to consent to giving up information in order to acquire a service or good, so long as the information being given up and the uses proposed are reasonable and appropriate in the circumstances. I would argue that you're maybe getting to the same end but using different approaches.

The second point is perhaps we ought to be focusing on transparency and accountability. As it stands under the Freedom of Information and Protection of Privacy Act, public bodies are required to give notice of the purpose for collection of personal information. I think it's safe to say that that requirement or obligation has, over the past decade, been honoured or observed in the breach more than anything. It may be time to find ways to try to ensure that important transparency aspect of the legislation is actually complied with. It may be time to focus on ways to ensure that once information is collected for a particular purpose, it's not used for other purposes.

J. Bray: Thank you. This is an area I've canvassed with you lots of times, having come from government.

One of the other witnesses talked about the implied versus explicit consent. One of the areas I see when government…. We can talk about any level, but obviously, here, we're focused on the provincial government. When new benefits come on stream or the potential for new benefits comes on stream, there always appears to be a debate around having to invent an entire new system to essentially go back to the same person and go through the same process of collecting their personal information in order to provide them a benefit.

The example I often use is the B.C. family bonus. Here we have people in a data system, our income assistance system, as well as in the Canada child tax benefit system that we want to provide additional financial benefit to. The complexity around how you actually did that without creating a whole new system simply from the aspect of: "Well, you got the information from over here…." Is it reasonable to take it over here to provide them with a month-late supplement to their income?

One of the witnesses talked about the ability to notify somebody when you are contemplating a change that is clearly to the benefit of the individual by simply being able to use that information to provide the new benefit. Do you think FOIPPA is too rigid to allow that, or do you think FOIPPA should be rigid and require governments to go extensively back to the drawing board to make sure we don't get lazy and start to say: "We're sure they wouldn't mind, it's to their benefit, and we're just going to use the information?" Is my question clear enough?

D. Loukidelis: Two parts to the answer to that. The first is that the legislation was amended recently, in the past couple of years, to allow the sharing of personal information between or among public bodies where the information is being shared for the purpose of delivering a common, integrated program or service. You have a multiministry approach — for example, addressing issues around juvenile addiction, perhaps being offered by the Ministry of Children and Family Development and the Ministry of Health Services — that I think addresses some of the issues that surround that.

The second part to the answer is that you've touched on an issue that certainly raises some pretty slippery-slope concerns. I think there is room, certainly,

for a consent-based or a voluntary system under which you would have citizens, to give a simple yet important example, update their address information for a variety of purposes, for example.

[1850]

As you move down the road of complexity and the size of data holdings you're talking about aggregating and holding on people…. I think, then, that you have to be very sure that you have a strong, well-functioning oversight system, a well-functioning and strong enforcement system to ensure that, first, you're not aggregating data that you shouldn't be aggregating and making commonly available to all public bodies or indeed others; and, second, that you continue to use it only for legitimate and narrow purposes, as you say, so that government doesn't get lazy and start making assumptions about what is appropriate or what people might consent to.

It's an idea that's been raised in other jurisdictions — the so-called population registry or client registry. It's one that has not, to date, moved forward particularly broadly at all in North America. Indeed, you don't even find it, although there are some initiatives down this road in the United Kingdom. In some European countries they have a more comprehensive database of that kind. Sweden is one example, but it has not caught on certainly in the Anglo-Canadian tradition.

J. Bray: Just one last question, if I could. Do you have an opinion about possession of a record in an electronic form — say, an extract file — that…? I mean, I may actually physically be holding the CD-ROM, but it may contain 10,000 records. For me to make any reasonable use outside of the scope, I'd have to have a computer and a week's worth of time. I'm going to be using it for data matches for the administration of my program in a way where the matching occurs in cyberspace and the only information I get is pertinent to my act. So fraudulent collection of benefits, dual benefits or the collection of reportable incomes in my program that people should be providing us that information anyway….

Does it, in your opinion, make a difference whether or not I physically have that extract tape in my hand, which I can't really make use of, versus the cyberspace mixing of this data which produces the types of compliance results?

D. Loukidelis: To my mind, it's primarily an issue — almost entirely — of security risk. You say you have the file in your hand. You can't make use of it. As we all know, somebody out there can. If you have multiple copies of this kind of data literally walking around in a CD-ROM with people, you're increasing the chances that it will fall into the wrong hands and that people will find a way to make use of it potentially inappropriately.

I tend to prefer the kind of yes/no on-line data matching that you've referred to, where you have secure servers where the data including the match don't necessarily reside anywhere permanently. If you get a yes hit, then you follow up on that administratively to see whether or not, in fact, there's something worth investigating.

J. MacPhail: Just a brief question, and it was really way back to recommendation 2 about making sure that when you move from a paper-based system to a computer system, the right of access should still prevail.

What is the rule around destroying information? The reason I say this is because I delete my e-mails all the time. What is the rule around that?

D. Loukidelis: This touches on a subject that I know has been raised in other submissions to the committee. It's a subject that I've been, from time to time, speaking about for four and a half years now. It's common to governments across Canada. That is, that as information moves increasingly into electronic forms of creation, delivery and storage, the issues around organization, retrievability, permanence and transience become much more complex. Legislation and government programs and information systems in this country generally have not kept pace with those changes.

The rules, to put it more briefly, around keeping electronic mail — e-mail, for example — are not clear in legislation. There is certainly government policy around that in this province, as in other provinces. But I have in the past said, and it's not a formal recommendation here, that governments should be looking at their information management systems and at the legislation that governs them — Document Disposal Act is the legislation in B.C. — with a view to ensuring that the right of access certainly is not diminished or indeed lost. It has larger questions for governance and corporate memory, for example.

J. MacPhail: I think it's the Public Accounts Committee where the document disposal people have to come to us and get approval. It's Public Accounts — right?

A Voice: Yeah.

J. MacPhail: But we don't do that with…. They're not responsible for electronic information. Or are they?

[1855]

D. Loukidelis: My understanding is that the Document Disposal Act covers a document in an electronic form. But there are issues around transitoriness and permanence and whether or not a record is permanent and therefore a record, if you will, for the purposes of either the Document Disposal Act or this legislation for that matter.

J. MacPhail: So it's that that you're recommending on in recommendation 3. Is that what you mean — permanence of records and access?

D. Loukidelis: The concern is that as you create sophisticated databases that, for example, might be

used to track compliance with a piece of environmental legislation, you should not be creating systems that are programmed literally in a way that doesn't allow, for example, the severing of protected information — which is required by section 4(2) of the act — from information that cannot be withheld. Indeed, that was the situation I addressed in order 03-16, where you had a ministry that had an enforcement-tracking database but said: "Look, we haven't designed this thing in a way that allows us to comply with the FOI legislation." And that is something that should be addressed systematically.

J. MacPhail: Right. Got it. Thank you very much.

M. Hunter (Deputy Chair): David, I want to say thanks for a very thorough, comprehensive briefing tonight. It was very helpful. I did want to follow up on Jeff Bray's point and your comments on PIPA, which I also found helpful. It struck me as a little curious that everybody is singing the praises of PIPA, and you've had…. I don't know how many cases you've had across your desk, but it's only 38 days old. So I'm a little wary of jumping onboard that issue.

My question for you is leading back to page 19 of your brief, recommendation 6 on section 13(1). You're going to have to lead me at least through your recommendation D again, because you say…. As I understand what you say here, the exception is not available for factual, investigative or background material — I understand that — for the assessment or analysis of such material, or for professional or technical opinions.

Can you just lead me through the logic of that again? I thought professional opinions, as opposed to facts, would qualify for exception.

D. Loukidelis: The recommendation that you've highlighted seems almost to have been invited in the Court of Appeal decision in the College of Physicians and Surgeons. I think this is a point that has been made by at least one previous witness. The court indicated at the conclusion of its discussion of this exception that if the Legislature intended to not allow these kinds of opinions to be withheld under the advice or recommendations exception, it could say so in effect.

The difficulty that observers have noted with the Court of Appeal decision is that it interprets advice in a way that, arguably, ignores — frankly, with deference — the existence of section 13(2)(a), which says that factual material cannot be withheld.

The point has been made again by a previous witness that the opinions being sought in that case, for example, were: did this happen or not? Did X occur or not, in your opinion?

But because it's not an objectively verifiable thing — the sun rose this morning — and it involved a matter of expert opinion, if you will, it was difficult to distinguish that kind of analysis from factual material. In other words, "Do you think that hypnosis occurred or not?" is, as one witness pointed out, a question of fact. It's a matter of opinion, but it's a question of fact. It doesn't fall within the sort of policy thrust, if you will, of the advice or recommendations exception, because it does not tend to go towards recommendations for a particular course of action or decision. Did X occur or not? That's the point of 13(2)(a) — to ensure that that's not withheld under 13(1).

M. Hunter (Deputy Chair): Where I'm having a little bit of trouble — and I think I understand the case and what you're trying to say…. When is a professional or technical opinion a matter of intellectual property, for example? Are we running up against that kind of issue?

[1900]

D. Loukidelis: Well, the point you make underscores, I think, an important aspect of this legislation as a whole. I was going to mention it just a moment ago. It may be that there are cases where you have factual material, which section 13(2)(a) says you can't withhold under section 13(1). But that same information, it may be, can be withheld or must be withheld under other provisions of the legislation. So I could see a situation where a professional opinion is intellectual property. It may not be protected under the advice or recommendations exception, but it may be protected under section 21, the third-party business information exception just as material that may be a cabinet confidence and covered by section 12(1) might also be advice or recommendations that are protected as well by section 13(1) or solicitor-client privilege, section 14.

M. Hunter (Deputy Chair): Thank you. That helps.

B. Penner: A question for Mr. Loukidelis. You were talking at the outset of your presentation about the B.C. Court of Appeal's ruling on section 13(1) of the act and talked about how, in Ontario, two other courts there have not chosen to follow the lead of the B.C. Court of Appeal in applying Ontario's legislation.

How similar is their wording in the Ontario statute to our section 13(1)?

D Loukidelis: It's identical in all material respects. It says that advice or recommendations developed for an institution, as they call them there, may be withheld. I don't think that the word "developed" appears in it, but certainly, the core, which is the advice or recommendations wording, is consistent in both Ontario and federally, I might add. The federal Court of Appeal has not gone down, at least as yet, the road taken by our Court of Appeal.

B. Penner: Are you sufficiently familiar with those decisions in Ontario to be able to answer the following question: was the B.C. Court of Appeal case considered by the Ontario courts?

D. Loukidelis: Explicitly so, and the court was very careful on a number of grounds to distinguish the deci-

sion and to decline to follow it. The passage I've quoted for you in the brief and part of which I read to you earlier this evening I think contains the nub of the court's view of the situation.

B. Penner: Prior to your presentation tonight, have you had a chance to review all of the presentations that were made to this committee previously?

D. Loukidelis: I've reviewed the transcripts of *Hansard*, but I haven't seen…. That's not true. I have seen a copy of the submission made by the Freedom of Information and Privacy Association.

B. Penner: All right. I'm just casting my mind back to what I felt was a particularly troubling presentation a husband and wife presented here a few weeks ago. In particular, the wife was remarking how in a custody and access dispute involving their son — who I think had been injured in a motor vehicle accident — their son's estranged spouse, through her lawyer, had tendered some kind of a psychological opinion about the status of the grandmother of the child indicating that she had some kind of a mental disability or disorder.

This, of course, upset the grandmother, who was a witness here before our committee. Much to her chagrin and surprise, she was not able to obtain a copy of that report, because it was prepared, offered as an opinion, to the family court counsellor or some other individual who was tendering this report to the court. It struck me as rather odd that again this legislation wouldn't assist someone getting information about themselves. It wasn't about someone else that she wanted to get information about; it was about a report someone had written about her and her mental status. She wanted to have a chance to look at that report.

M. Carlson: I would actually just like to add that the Court of Appeal decision has the potential to deny people access to reports that they've had for years and years. I can give you a couple of examples. One could be an accident where there are two independent traffic analyst reports about what happened, and then based on those opinions, the adjudicator makes a decision. Well, conceivably, those could be swept out, and now you wouldn't actually know the basis or the information from which the decision was made.

Another one that comes to mind is WCB often gets different opinions on levels of disability, thresholds of pain, and that information goes to an adjudicator to make a decision. They would be professional opinions of whatever health specialist is looking…. At this point, the WCB isn't withholding those, but the potential exists for this information to no longer be available.

D. Loukidelis: If I may just add to that, as I mentioned earlier, one of the act's explicit goals under section 2 is to provide individuals with the right of access to their own personal information. The example just given — and the example that you gave, Mr. Penner — are very good examples of information that is about those individuals. It is their personal information.

[1905]

H. Bloy: Thank you for your presentation and your review of all the presenters that have been coming toward us. That's good.

I wanted to go back to one part. You said it should be no fee or very low fee for public information. I'll accept that, but what happens if this information is to be sold through private purposes and there is a value coming out of it and it takes a long time to get the information — for you to put it together? I don't know if it takes weeks or months. We just talk about the cases, so I don't know what the length of time is that you would work on it or how you would allocate a dollar to that file. If most of the information coming is public, and just an individual wants their own information, and it was explained earlier, but through your office…. If you're going to spend three months in compiling information and making sure it's done and someone's going to use this for their own gain or benefit, should they not be charged? It should be up to the person who receives the information that…. If it's duplicated for commercial purposes, shouldn't they be charged for it?

D. Loukidelis: The act, consistent with what I said earlier about the user-pay approach that already exists under the legislation, already enables a public body that receives a request for access to information to charge full freight if the request is from a commercial applicant.

H. Bloy: What would be a "commercial applicant"?

D. Loukidelis: There's no sort of exhaustive, definitive interpretation that I could offer to you now, but certainly, if somebody is making an application, simply put, for a commercial purpose — to exploit the information they've requested with a view to making a profit from that information — generally speaking, I think a public body would be on reasonable ground to say: "That's a commercial access request. You pay full freight, not just the maximum fees that are now prescribed under the FOI regulation."

H. Bloy: Who would be a commercial body? Who would you think? Who would you charge? Have you ever charged anybody?

D. Loukidelis: We don't respond, of course, to access requests. I mean, we just review the administration of the act by public bodies.

I can give you an example from the federal sphere. It's kind of well known now in access-to-information circles. Yes, such circles do exist. A tax lawyer from Montreal had, over a number of years, successfully used the federal Access to Information Act to get from what is now Canada Customs and Revenue Agency internal documents that the lawyer then annotated, edited,

summarized and published as a newsletter for clients, for taxpayers. He was making upwards of $500,000 a year doing this. That's certainly a commercial use. The only reason those access requests were being made was to turn that information to a personal profit, if you will. I'm not aware of any situation — certainly, none comes to mind — in British Columbia that even approaches that kind of example, but I think it illustrates the point.

H. Bloy: Okay. Thank you.

B. Belsey: David, thank you very much for your presentation. It was very informative. I have two concerns I'd like to share with you. One Barry has touched on is this section 14, the solicitor-client privilege, the doctor-patient privilege, even the law enforcement–informant privilege. I assume it is all under section 14 — is it? — that that privilege is exercised?

D. Loukidelis: Section 14 deals only with solicitor-client privilege. Doctor-patient privilege, obviously, primarily would be protected in the private sector under the new Personal Information Protection Act. In other words, I would not, under that legislation, be able to get at your personal medical information. It would be very, very difficult, if not impossible.

Under the public sector legislation, if there happened to be medical information in the hands of a public body covered by the act — say, one of the hospitals — that was subject to doctor-patient privilege, again, it would be almost impossible to get, because section 22, which protects the patient's privacy in that information, would be triggered. Section 22 explicitly acknowledges that it would be or is presumed to be an unreasonable invasion of personal privacy to disclose an individual's medical information.

Law enforcement privilege, section 15, protects the identity of a confidential source of law enforcement information. That's one of the explicit components of section 15. Also, more generally, section 15(1)(a) says that a public body may refuse to disclose information where the disclosure could harm a law enforcement matter.

B. Belsey: It seems like a very difficult balance, I guess — the freedom of information and the protection of privacy when the potential is there to destroy lives with things that are said yet access to that information can't be achieved.

[1910]

The other point I wanted to bring up was an area that we have heard…. I think we have a submission on it. That is, cases of adoption where a client may want to find the mother or the father or whatever for whatever reasons — certainly, medical or genetic concerns or whatever. You've made reference, I think, that a person should be allowed to get his own personal information. Do you think that kind of a case would fall within that section of your recommendations?

D. Loukidelis: Amendments were made to the Adoption Act in 1996 to, I think it's fair to say, attempt to balance an individual's interest in getting access to his or her own personal information against the right of other parties, primarily biological parents, to their own privacy. The Adoption Act amendments prevail over the freedom-of-information and protection-of-privacy provisions. It's obviously a difficult balance to strike appropriately. I know that at the time those amendments were introduced and enacted, there was some controversy around it. Our office at the time — Mary Carlson can speak to this directly because she was here then, if she has anything to add — fielded a considerable number of inquiries about it and had to deal with the fallout of it for a number of years. Whether that balance is correct or not, I can't say at this time, really.

B. Lekstrom (Chair): I'll have a look to see if there are any further questions from members of the committee here this evening. Seeing none, David and Mary, I would like to thank you very much for being here this evening to present to our committee. It's a very interesting subject and one that — I agree with your earlier words — is of vital importance to the people of British Columbia. We will do our utmost to make sure we do the job we've been asked to do by the Legislative Assembly. I thank you for taking the time.

D. Loukidelis: Thank you, Mr. Chair and members of the committee, for, indeed, your patience and your kind attention. Consistent with what I've said earlier, on past occasions, if there's anything the committee requires, if we can be of any further assistance, you need only ask.

B. Lekstrom (Chair): Thank you very much.

With that, we do have one item of business still to deal with. I would bring it to the committee's attention. We have had a request from Darwin Sorenson. He was with the Injured Workers of British Columbia and presented to us earlier. He has requested a number of things from the committee, one being the amount we have spent to advertise the committee hearings and ask for written submissions. The amount — and I would like to put it on the public record — to date we've spent is a total of $48,594.48 to advertise public hearing notices and calls for written submissions in 139 newspapers provincewide.

As well, he has asked for a complete cost of the committee once it is concluded, which will be known roughly by June of '04.

B. Penner: Will he have to go through freedom of information to get that?

B. Lekstrom (Chair): No. He has put forward a request under his presentation for an FOI, but as has been indicated, this committee is exempt under the FOI. We are unable to process a request like that. I have put together a letter on behalf of the committee, as Chair, that I will respond to them, outlining the actual legislation where it's written. We will be making available to him

all of the written submissions that we have received and accepted as well as the full *Hansard*, should he want to access that. If that's acceptable to the committee, I will do so. All right.

With that having been said, I would look for a motion to adjourn this evening.

The committee adjourned at 7:14 p.m.