COMMISSION OF INQUIRY
RESPECTING THE MUSKRAT FALLS PROJECT

Transcript | Phase 3 Volume 5

Commissioner: Honourable Justice Richard LeBlanc

Monday 22 July 2019

CLERK (Mulrooney): All rise.

This Commission of Inquiry is now open.

The Honourable Justice Richard LeBlanc presiding as Commissioner.

Please be seated.

THE COMMISSIONER: All right.

All right, Ms. Muzychka.

MS. MUZYCHKA: Good morning, Commissioner.

This morning we are going to begin with a presentation by associate co-counsellor – or associate counsel, Gobhina Nagarajah, and she's going to provide a summary of the *Report of the 2014 Statutory Review, Access to Information and Protection of Privacy Act*, Newfoundland and Labrador. And then I understand we're going to break, following that, and have a meeting of counsel. And at 2 pm this afternoon we will have witness, Judge Donovan Molloy, who will appear by Skype.

THE COMMISSIONER: Okay. All right. Good. Thank you.

So, Ms. Nagarajah, I'm not going to obviously have you sworn; you're a solicitor in the Province of Newfoundland and Labrador. So I'll allow you to proceed with your presentation then.

MS. NAGARAJAH: Thanks, Commissioner.

I'd like to begin by entering the following exhibits into evidence: P-04469 to P-04472; P-04474 to P-04476; P-04480; P-04487 to P-04519.

THE COMMISSIONER: All right. Those will be entered as numbered.

And when you're ready Ms. Nagarajah.

MS. NAGARAJAH: Okay.

So just for reference, Exhibit P-04469 is the executive summary to the report of the 2014 Statutory Review Committee of the ATIPPA. And Exhibit 04470 is the full report. And those are at tabs 1 and 2 of the binders.

Today, Commission counsel would like to bring this report to your attention and highlight specific sections. We have been in touch with the 2014 Statutory Review Committee, and they've pointed us to the parts of the report which are most relevant to the Commission.

So as a background, the *Access to Information and Protection of Privacy Act* came into force on January 17, 2005 with the exception of part 4, "Protection of Privacy," which was proclaimed on January 16, 2008.

The act requires appointment of a review committee prior to the expiration of five years from the coming into force of the act, and then every five years thereafter. The first legislative review was in 2010, following which amendments came into force in June 2012, via Bill 29.

So the 2014 Statutory Review Committee conducted the second statutory review, and they looked at the acceptability of the overall statute while examining how Bill 29 altered the way ATIPPA functions and how it should be revised. So their review resulted in a report that was released in 2015 along with a number of recommendations. And the ATIPP Act 2015 came into force on June 1, 2015, replacing the previous act.

Now, pursuant to section 117 of the act, within five years of its coming into force there must be another comprehensive review along with further reviews every five years after that. So there should be another review by the end of 2020.

In doing the report, the 2014 committee held consultations with private citizens and stakeholders and they also considered standards and leading practices in other jurisdictions as part of their review. They also submitted a draft bill with recommended changes to the ATIPPA.

So Exhibit P-04507 is the implementation table, which lists all of the recommendations and their status as of July 2019. And I will note that most of the recommendations appear to have been completed upon Royal Assent or – and there are

very few that are still in progress at this point. I will be pointing to some of the more relevant recommendations and their status during this presentation.

So I'll start off with discussing the purpose of the ATIPPA. So it's set out in section 3 of the act, which is also an exhibit at tab 41. And that's P-04519.

So section 3 states that – and this is the revised 2015 statute, not the 2012 one, but that is also in the exhibits. So the purpose of the ATIPPA "is to facilitate democracy through

"(a) ensuring that citizens have the information required to participate meaningfully in the democratic process;

"(b) increasing transparency in government and public bodies so that elected officials, officers and employees of public bodies remain accountable; and

"(c) protecting the privacy of individuals with respect to personal information about themselves held and used by public bodies."

Madam Clerk, can you go to Exhibit P-04469, page 15, please? And that is at tab 1. You can scroll down a little bit.

So the committee describes the ATIPPA as being "the public's portal to the information held by their government."

The chief purpose of the ATIPPA is "to facilitate democracy …" as it allows individuals to have information that will allow them "to participate meaningfully in the democratic process."

It also, of course, has a privacy component to it – a protection of private – privacy information component to it, but that will not be covered in today's presentation.

The committee describes the challenges of the act and say that through their work one point became clear to them, and I'm just going to read a quote that sums up the committee's thoughts on how some of those challenges can be overcome.

If you can scroll to page 16, Madam Clerk? A little bit further. That's good.

So the committee stated – 2014 committee stated: "Systems for access to information and protection of personal information can only work effectively if political leaders and senior executives are supportive and committed to the purpose of the *Act*.

"Leaders must challenge themselves to lose their fear of giving up control when they release information to the public. At times this will require leaps of faith, and acknowledgement that despite the potential embarrassment about the disclosure of certain records, it is the right thing to do. This kind of attitude among leaden can signal important cultural shifts to others in public bodies. People do lead by example."

Madam Clerk, if you could go to Exhibit 04470, page 24 please?

CLERK: What page?

MS. NAGARAJAH: Twenty-four, please.

So Chapter 1 of the report gives a bit of an analysis as to the nature of the right to access information. Because the right of access conflicts with other rights – such as privacy, Cabinet confidences, solicitor-client privilege, confidential business information – the committee thought it was important to analyze the nature of the right and to determine what its stature and significance should be.

So the fact – some of the factors that the committee looked at were the fact that it's not a constitutional right. They've also looked at decisions of the Supreme Court of Canada, which have nevertheless afforded this right some significance, and some decisions have recognized that it is a quasi-constitutional right. So the Supreme Court of Canada has also recognized that access to information can increase transparency in government, contribute to an informed public and enhance an open and democratic society, but they've also recognized that some of this information is entitled to protection.

They've also said that section 2(b) of the Charter, which guarantees freedom of

expression, does not guarantee access to all documents in government hands, but it is a derivative right which may arise where access to information is a necessary precondition of meaningful expression on the functioning of government. So essentially, if the withholding of documents prevents public debate or a meaningful debate or a discussion on a matter of public interest, then that – those documents should be released.

So in sum, access to information ensures some level of accountability of the government and facilitates democracy, but it comes with limits. The purpose of the ATIPPA is to promote principles of responsible government and democratic accountability. And the committee – the 2014 committee concluded that based on the SCC case Lavigne, as well as their review of the stature of the right to access across Canada and other international jurisdictions, the right to access information is a quasi-constitutional right.

The 2014 committee also pointed Commission counsel to a number of their findings that may be relevant to the Commission. So in relation to transparency, the committee pointed us to discussions of the public interest override. The public interest override is analyzed at pages 79 to 80 of P-04470. (Inaudible.) It's also in the executive summary, but we'll stick to this exhibit here.

So the public interest override is used when information that wouldn't be disclosed in the ordinary course is – there's a public interest in disclosing it anyway. So either to the applicant who is seeking the information, or to the public at large. In 2014, the committee found that the public interest override in the ATIPPA was too narrow. At that time, it applied only to – in urgent circumstances, "to information about a risk of significant harm to the environment or to the health or safety of the public or a group of people … disclosure of which is clearly in the public interest." So the 2014 committee recommended that the public interest override be broadened and be applied to most discretionary exemptions. So discretionary exemptions being types of documents or disclosure that shouldn't be disclosed.

Also – they also recommended that the urgency requirement be removed, so they specifically recommended section 31(1) of the ATIPPA should contain a new section where a public body can refuse to disclose information to an applicant under one of the exceptions listed. The exception would not apply where it is clearly demonstrated that the public interest in disclosure outweighs the reason for the exception. So the discretionary exemptions that fell under this list included section 19, which was local public body confidences; section 20, which is policy advice or recommendations; section 21, legal advice; and also section 24, disclosure harmful to the financial or economic interests of a public body. And there – the other one's listed there as well.

THE COMMISSIONER: So where are you on that – in the report there, on page 80?

MS. NAGARAJAH: That's on – down on page 80, yeah.

Actually can you keep scrolling?

Actually, Madam Clerk, it might be a little bit further down, the recommended – recommendation section.

Keep going.

Okay, so it's right there. So that's page 87.

THE COMMISSIONER: Okay.

If you could just – as you go through, if you could just show us where you're referring to, I'd appreciate it.

MS. NAGARAJAH: Sure.

THE COMMISSIONER: Thank you.

MS. NAGARAJAH: Okay.

So this recommendation was accepted in full and it – as part of the 2015 statute.

So the other section that the 2014 committee pointed us to was the information management and duty to document. So this is at chapter 10 of the full report, which starts at page 309.

Or maybe not.

Can you go up a little bit?

Oh, keep going, sorry. I have the wrong reference there.

It's going to be three – yeah. So 318.

So the committee notes that quality record-keeping leads to successful completion of access requests in this section. They also note that ATIPPA assumes that records have already been created and it doesn't actually address how records should be managed, other than to lay out the duty to protect personal information. So record management is covered in the *Management of Information Act*, which is in exhibits at P-04471. And that's at tab 3.

Section 8 of this act makes it an offence to unlawfully damage, mutilate or destroy a government record with a fine of up to $50,000 and an imprisonment term of three to 18 months on default of payment. Section 4.1 provides for the retention of electronic records, which requires that information not be materially changed. So if you can scroll down.

There you go, 4.1. So this act then is overseen by the Office of the Chief Information Officer, so the OCIO.

Now, page 319 of the full report also refers to a Frequently Asked Questions section on the OCIO website. So – on the second column there, it says that: "A *Frequently Asked Questions* section on the OCIO website explains that instant messages (Pin-to-Pin, Blackberry Messenger, SMS Text Messaging) are to be preserved in this context." So that's under the *Management of Information Act*. And it says: "If you feel that the content...should be retained as a government record, it is your responsibility to transfer it to an appropriate medium." So it places the responsibility on the employee to ensure that they preserve these records. I did try and look for this Frequently Asked Questions section on the website currently, and I wasn't able to find it.

So the *Management of Information Act* also requires that emails, when "… created or received in connection with the transaction of Government business … may not be destroyed without the authorization of the Government Records Committee." So this includes the emails of employees and contractors. The 2014 committee goes on to say that, "Strong information management policies and practices are the foundation for access to information."

So in the 2011 review, so that was a review conducted prior to the 2014 one, John Cummings made recommendations to improve the information management capacity of public bodies. So the 2014 committee asked public bodies … to update their progress in complying with Mr. Cummings' recommendations. And his recommendations are listed there on page 320. So they include: "adopting a retention and disposal schedule for all paper and electronic records; taking steps to ensure policies for the management of records, including emails, are understood …; coordinating the approach to training to make sure access requests and privacy issues are dealt with consistently; using redaction software to sever documents; determining if ATIPP coordinators should be considered an Information Management resource; reviewing organization and reporting structures to make sure access requests are dealt with efficiently and on time; requiring public bodies serviced by the" OCIO "to consult extensively with the office on all recommendations."

So in the 2014 committee, in their review of how these recommendations were implemented, found that there was a demonstrated progress toward addressing the recommendations made in January 2011 by the Cummings report.

And I do believe that GNL may have put some more documents into evidence in relation to this?

MR. RALPH: Yes.

MS. NAGARAJAH: Yes, so we will be seeing some more of that, I believe, later this afternoon.

The 2014 committee found that all managers must complete online information management – so, sorry, some of the things that were implemented as a result of the January 2011 recommendations by the Cummings report were that all managers now must complete online

information management courses, and all employees are required to do an online course in best practices as well.

The committee did find that not all departments served by OCIO have achieved the same level of proficiency in information management as others, so they recommended that resources be allocated to those departments. So, that was recommendation number 81. And the implementation table, which is at – let's see – sorry, (inaudible).

So the implementation table is at P-04507 and that's tab 29. So, if we go to Recommendation number 81 – so "**Recommendation #81**: Adequate resources be provided to public bodies served by the Office of the Chief Information Officer, so that there is consistency in the performance of information management systems."

Implementation status says complete. Commentary there says: "The OCIO has completed its IM Self Assessments … with core departments. All were provided with a review of existing IM resource strengths/weaknesses. OCIO provides IM advisory services with extensive materials and courses as well as in-person training and three government-wide discussion forums to assist public bodies and IM resources in building their IM capacity."

So, the other part of this section was the duty to document. So there is a concern that access legislation creates a chilling effect leading to less documentation. Officials find other ways to communicate and stop creating paper trails. So the recommendation here is that the duty to document should be legislated, and this was also recommended by Canada's Information and Privacy Commissioner and that there should be clear policies and procedures on how to maintain records within government.

The committee states that: Without such a requirement, there is no way to ensure that all information related to decision-making processes is recorded. And the risk is compounded by the availability of other mediums for communication, such as instant messaging and text messaging. So these documents that are to be preserved or reported would relate to any non-trivial decisions relating to the functions, policies, decisions, procedures and transactions relating to the public body.

So that's recommendation number 79. So if we go to recommendation number 79 on the implementation table, that's at page 16. It says implementation – it says in progress, and the commentary says: "Simultaneous implementation of the ATIPP, 2015 recommendations and Duty to Document required the same IM staff/resources. OCIO's initial focus has been on helping departments and agencies build their IM capacity and maturity. In preparation for duty to document, OCIO is working diligently to assist public bodies in building their IM capacity by providing IM supports including; IM policy development and guidance, training sessions including transitory records, IM Self Assessments, and increasing awareness of IM responsibilities. This work is ongoing.

"As well, broad research and consultation is needed prior to implementing and this work is not yet complete."

So the committee also concluded that the duty to document would not belong in the ATIPPA or in any stand-alone act and that it should be included in the *Management of Information Act*. Currently, British Columbia is the only province in Canada to have legislated a duty to document and that's at – their act is at P-04472 which is tab 4 and the section is section 6, which is at page 6.

So that section reads: "The chief records officer may issue directives and guidelines to a government body in relation to a matter under this Act, including, without limitation, the following: … the digitizing and archiving of government information; … the effective management of information by the government body; … the creation of records respecting the government information referred to in section 19(1.1) *[responsibility of head of government body]*, including, without limitation, directives and guidelines respecting the types of records that constitute an adequate record of a government body's decisions."

So there is some criticism of this particular provision as being a little bit empty, so we do have news articles at tab – well, at tab 5 we've

got the government's press release with respect to how this provision would work. And this is from March 8, 2017, and it states that – at that time it was Bill 6 – would "help improve the way the Province manages valuable information on behalf of its citizens;" it reinforced "British Columbia's commitment to open governance; and enhance compliance with best practices in information management."

And then at tab 6 we have an opinion piece which basically states that because this duty to document is discretionary and, basically, just gives the chief records officer the option to create directives and guidelines, it's not really substantive and doesn't really do anything. So, at this point, it's not clear how exactly this duty to document has been implemented.

THE COMMISSIONER: There are other jurisdictions that have mandated duties – duty to document, not in Canada but in other jurisdictions.

MS. NAGARAJAH: In other jurisdictions. Yeah, I believe New Zealand is one of them and those are covered in the full report.

Let's see. Madam Clerk, if we can go to page 318 of Exhibit 04470. You're going to have to scroll a little bit, actually. If you don't mind scrolling down to … keep going.

Okay, it's not – I'll have to refer to it. I'll have to look for that later, Commissioner, but –

THE COMMISSIONER: Okay, that's fine.

MS. NAGARAJAH: – I believe it is mentioned in there. I believe New Zealand and Australia are mentioned in there.

THE COMMISSIONER: Yeah, I think they're mentioned earlier on in the report.

MS. NAGARAJAH: Yeah.

Okay. All right.

So the next section that the 2014 committee referred us to was balancing commercial considerations with public accountability and transparency. So this is just some of their – we'll be talking about this a little bit more later, but this is just some of their recommendations on this subject matter. So the committee discusses certain legislative provisions which prevail over the ATIPPA.

So this is page 158 to 148 of 04470. So, one – so, at 150.

THE COMMISSIONER: 148 to –

MS. NAGARAJAH: Sorry,

THE COMMISSIONER: – 158?

MS. NAGARAJAH: 148 to 158.

THE COMMISSIONER: 148?

MS. NAGARAJAH: So at 148, the committee discusses Nalcor Energy's procedures for ATIPP requests. So essentially, legal counsel filled the role of ATIPP coordinator and they oversee the ATIPP process and timelines. So, previous section 6 of ATIPPA, currently section 7, states that ATIPPA takes priority over any other statute; however, section 5.4 of the *Energy Corporation Act*, which sets out what information will be withheld, applies notwithstanding section 6 of ATIPP. So just – this is already in exhibit as – the *Energy Corporation Act* is already in exhibit as 00431.

So the exceptions stated in section 5.4 of the *Energy Corporation Act* is that – so this is the new version anyway, where the chief executive officer of the corporation or the subsidiary to which the requested information relates, taking into account sound and fair business practices, reasonably believes that the disclosure of the information may harm the competitive position of, interfere with the negotiating position of, or result in financial loss or harm to the corporation, the subsidiary or the third party; or that the information similar to –

THE COMMISSIONER: Five point four.

MS. NAGARAJAH: Oh, sorry.

THE COMMISSIONER: Just one second now, she's just bringing it up. Thank you.

Okay, go ahead.

MS. NAGARAJAH: – that the information similar to the information request be disclosed, is treated consistently and in a confidential manner by the third party, or is customarily not provided to competitors by the corporation, the subsidiary or the third parties in that – in those circumstances, the information can be withheld. So essentially, this section provides a CEO the right to declare a record to be commercially sensitive, to the corporation or a third party. It also entitles the corporation to refuse to disclose a record when ratified by the board of directors.

So the 2014 committee did receive submissions that indicated concern that when applicant requests review of a decision to deny such information, the commissioner must uphold that decision if the CEO of the public body certifies that the information falls within section 5.4 and the certification is confirmed by board of directors. There were some concerns that there was no objective test to this provision.

So the committee's interpretation on that section at the time is a bit different. They thought that these concerns would be addressed by the existence of the process for review by the commissioner in section 5.4(2). So section 5.4(2) says: "Where an applicant is denied access to information under subsection (1) and a request to review that decision is made to the commissioner under section 43 of the *Access to Information and Protection of Privacy Act*, the commissioner shall, where he or she determines that the information is commercially sensitive information,

"(a) on receipt of the chief executive officer's certification that he or she has refused to disclose the information for the reasons set out in subsection (1); and

"(b) confirmation of the" CEO's "decision by the board of directors of the corporation or subsidiary,

"uphold the decision of the" CEO "or head of another public body not to disclose the information."

But at the beginning of that section it says, "Where an applicant is denied access to information under subsection (1) and a request to review that decision" – so the committee read that part of the statute and interpreted it as meaning that the commissioner does have a right to review these – the documents that are in question. And they were also (inaudible) 'cause at that time, Jim Keating, for Nalcor, made submissions and stated that there would be no objections to the commissioner examining documents to ensure that it was of the character it claimed.

And so the committee concluded that normal viewing procedures of the commissioner would apply and believed that that would offer up safeguards to ensure that documents weren't inappropriately being withheld, and they found that that section was satisfactory as is. So the committee did say that it would go a long way in addressing many of the expressed concerns by even adding like moderate limiting objective standard, which is what was done. So –

THE COMMISSIONER: So did they say what would happen if the commissioner was to review the documents and felt that they were not of the character that were being assessed by the CEO and the board? What, then, is the right of the commissioner at that stage, because I – as I read this section, he still – he or she would still be required to basically uphold the exemption.

MS. NAGARAJAH: Yeah.

THE COMMISSIONER: Did they discuss that?

MS. NAGARAJAH: They did not discuss that. They just stated that there was a right for the commissioner to review the documents and that – to ensure that there wouldn't be any inappropriate withholding.

So it is – it does say that the commissioner shall, where he or she determines that the information is commercially sensitive information, on receipt – so, perhaps if the commissioner determined that it wasn't commercially sensitive information, they wouldn't have to follow through with steps A or B. That's a potential interpretation.

UNIDENTIFIED MALE SPEAKER: Thank you.

MS. NAGARAJAH: I'm gonna look for that recommendation now.

Madam Clerk, can you go back to P-04470, please? And if you can just scroll down.

Sorry, just a moment.

Okay, so it's actually recommendation 5.4 of the energy – for – oh, sorry, Recommendation # 44. So we'll go to Exhibit 04507. It's at page 8, Recommendation # 44.

So the recommendation said: "Consider placing a bill before HOA to amend s.5.4(1) of the Energy Corporation Act" – and also another act as well, the *Research and Development Council Act* – "to include the phrase 'taking into account sound and fair business practices' immediately before the words 'reasonably believes' in each of those sections."

And so that was completed. So that section now reads – in full, it reads: "… where the chief executive officer of the corporation or the subsidiary to which the requested information relates, taking into account sound and fair business practices, reasonably believes" – and then it goes on to – with the test for determining whether or not information is commercially sensitive.

So the last question that the committee pointed to – responses in their report to – was to – was we asked how to – how adequately the ATIPPA balances commercial considerations and the need for transparency and public accountability.

So this is at chapter 3 of the full report, so P-04470. At page 29, that deals with business interests of a third party.

Maybe not. Can you keep scrolling?

We're just going to chapter 3, Madam Clerk.

THE COMMISSIONER: Go right to chapter 3.

MS. NAGARAJAH: And try page 131. Okay.

So the question is how far the protection should be extended "to prevent harm to *legitimate* commercial interests?" So prior to Bill 29, which is what implemented the amendments to ATIPPA following the first statutory review, information had to meet a three-part test to be withheld from disclosure as commercially sensitive business interests of a third party and therefore withheld from disclosure.

So, it had to reveal a trade secret or commercial, financial, labour relations, scientific or technical information of a third party. It also had to be information that was supplied, implicitly or explicitly, in confidence. And the disclosure would reasonably be expected to result in any of the following, so one is harm significantly the competitive position or interfere significantly with the negotiating position of a third party; result in similar information no longer being provided to the public body when it was in the public interest to do so; result in undue financial loss or gain to any person or organization; reveal information supplied to a person appointed to resolve or inquire into a labour relations dispute.

So after Bill 29, the 2012 – 2012 legislation, information only had to meet one of the above conditions to be withheld. So, there was some views that this wording worked against the transparency and openness that the ATIPPA is intended to promote. The committee also reviewed the harm test to determine how that's interpreted by Canadian courts as well as the Newfoundland and Labrador courts.

So at page 132, just read a little bit about their – under "**Other relevant law**." Keep going. So it says: "Newfoundland and Labrador public bodies are guided by three sources, the ATIPP Office *Access to Information Policy and Procedures Manual*, the reports of the OIPC, which reflect Canadian practice, and the recent decision of the Supreme Court Trial Division in *Corporate Express Canada, Inc. v The President and Vice-Chancellor of Memorial University of Newfoundland, Gary Kachanoski*.

"*The Access to Information Policy and Procedures Manual* produced by the Office of Public Engagement ATIPP Office stresses that there must be 'a reasonable expectation of probable harm,' but that it is not necessary to 'demonstrate that actual harm will result or that actual harm resulted from a similar disclosure in the past.' The guide defines the various words and terms used in section 27, but it does not shed

much light on how those words and terms are interpreted by access to information practitioners, nor does it rely heavily on Canadian judicial decisions.

"A helpful approach to assessing 'harm' under section 27 is contained in a May 2013 report by the OIPC, its first assessment of the post-Bill 29 version of section 27."

Can you scroll down that, please, Madam Clerk?

Oh, a little bit up – higher. Yeah.

"In Report *A 2013-008*, the Commissioner relied on the definition of harm quoted in Ontario Order P0-2195:

"Under part 3, the Ministry and/or OPG must demonstrate that disclosing the information 'could reasonably be expected to' lead to a specified result. To meet this test, the parties resisting disclosure must provide 'detailed and convincing' evidence to establish a 'reasonable expectation of harm.' Evidence amounting to speculation of possible harm is not sufficient."

So: "This position was reinforced in the September 2014 decision of the Trial Division in *Corporate Express*. In stating that 'the burden of proof of probable harm is on the party resisting disclosure,' Justice Whalen concluded the evidence from Corporate Express was 'vague and speculative and insufficient' to prove that permitting access to the documents in question … brought reasonable expectation of probable harm to the competitive position of Corporate Express, or that there would be significant financial loss resulting in damage to the company's business interests."

So that case did go on to the Court of Appeal and it was upheld by – the Court of Appeal did uphold the Trial Division's decision.

So essentially, a law that's developing is that that harm that could result has to be more than speculative. So in the end, the Committee was satisfied that legitimate interests of businesses are protected through the application of the three-part test that existed in the ATIPPA prior to the Bill 29 amendments. And that test is also used in many of Canada's larger provinces as well.

The committee went on to state that the public has an interest in understanding the interplay between government and the businesses that provide goods and services to public bodies, people have a right to know how tax dollars are being spent. And another view that's – that was also presented to the committee is that disclosure of information when dealing with the public sector is a cost of doing business and businesses doing business with the government, and businesses should expect that transactions with government bodies will be made public.

So the committee also concluded that a third party should only be notified that a request has been made in relation to its business information when the public body has formed an intention to actually release that information as opposed to the stage when it's considering whether or not it should be releasing the information. Otherwise, there could be possible interference with the public body's ability to arrive at an independent decision.

So this provision did revert back to the pre-Bill 29 wording in the 2015 statute, that there is a three-part test.

So that concludes my presentation, Commissioner, subject to any comments that other counsel may have.

THE COMMISSIONER: Right.

Okay, thank you.

My purpose in having this presentation this morning, just for clarification, is to provide a bit of a backdrop for this week and also to give us an update on the ATIPPA situation in the province. So if counsel – if any counsel would like to ask or make a comment or ask a question of Ms. Nagarajah, this is the time to do so.

There will be other witnesses called this week, including the former commissioner for ATIPPA this afternoon, who will be likely able to speak to this. So do I need to go through the list or does anybody like to make any comment at this stage of the game or ask any question?

All right.

MR. FITZGERALD: Commissioner, I have a comment to make. It might be clarification for a question that you asked the witness.

THE COMMISSIONER: Okay.

MR. FITZGERALD: It might be easier if I just take you through the statute as opposed to ask the questions to the witness.

THE COMMISSIONER: Okay.

Come right up.

MR. FITZGERALD: Thank you.

I think the question you asked the witness with respect to section 5.4 of the *Energy Corporation Act* is what happens after the commission – it goes to – the documents go to the commissioner. And if you look at section 5.4(3) –

THE COMMISSIONER: Three, yeah.

MR. FITZGERALD: – of the *Energy Corporation Act*, it goes to the commissioner, then the ATIPPA is engaged.

THE COMMISSIONER: Let's just bring that up.

MR. FITZGERALD: Okay, sorry.

THE COMMISSIONER: So let's bring up the act then, please, which is 00431, Exhibit 00431.

MR. FITZGERALD: That's 00431, that's – and I'm going to jump back and forth just briefly between that and the ATIPPA.

00431 if we –

THE COMMISSIONER: So just one second. Can we go to 00431, please?

CLERK: Which section?

MR. FITZGERALD: 5.4(3).

THE COMMISSIONER: Okay, right.

Right there.

MR. FITZGERALD: What ends up happening is that once the documents go to the commissioner, the commissioner makes a recommendation; the commissioner doesn't have order power. So then, under the ATIPPA under section 49, the commissioner will issue a report.

If the access to information applicant or a third party is upset with that, there's appeal provisions in the ATIPPA. And section 5.4(3) tie in those appeal provisions. Section 52 actually allows a direct appeal – bypassing the commissioner – from the decision of the public body. Section 53 allows a direct appeal by a third party to the Supreme Court.

Section 54 is the answer in terms of what happens with respect to the commissioner's recommendation of report. Because the report is issued under section 49 and if the public body decides not to follow the commissioner's recommendation within 10 days, section 54 kicks in and that person can go to the Supreme Court.

And if you go down further, 59(3)(a) – sorry – is important – no, sorry, section 5.4(3) near the bottom of it – right here, sorry – keep going up, sorry – right here, right here. Five – sorry, yes.

It says 59(3)(a) and section 60 of the ATIPPA apply. That's important because 59(3)(a) is the provision in the ATIPPA that allows the justice to receive submissions in private. That's very rarely, it hardly ever happens, but it does allow records to be filed under seal only to be reviewed by the trial justice.

So if there is an issue on the commercial sensitivity of the documents, the justice will have the opportunity to review those in private without revealing any of the information. And, ultimately, then section 60 is engaged and that says what a justice may do following his or her review or hearing the appeal, which includes making an order that documents be released.

So the two statutes do operate hand in hand, and that's what would happen following a commissioner's report or review. I don't know if I went through that too fast –

THE COMMISSIONER: No, no.

MR. FITZGERALD: – but I'm trying to be helpful.

THE COMMISSIONER: That's good.

I guess my point – you know, I think the reason I asked the question is that it's not an automatic. Based upon what was written in the report of the review committee –

MR. FITZGERALD: That's right.

THE COMMISSIONER: – it's not an automatic that – or there's not a lot the commissioner can do, other than to make a recommendation**.**

MR. FITZGERALD: That's right.

THE COMMISSIONER: It would then be up to the person who is seeking access to the document to follow through on the appeal process.

MR. FITZGERALD: Absolutely.

THE COMMISSIONER: Right?

MR. FITZGERALD: Yeah, it's not a commissioner-driven process at that point in time.

THE COMMISSIONER: Right.

MR. FITZGERALD: It has to do with the applicant.

THE COMMISSIONER: Correct.

Thank you, Mr. Fitzgerald.

Mr. Ralph.

MR. RALPH: Yes, thank you, Commissioner.

Good morning.

You spoke about instant messaging and I can't find it right now, but there is a – I think it's a frequently asked question.

MS. NAGARAJAH: Yeah.

MR. RALPH: Have you seen that?

MS. NAGARAJAH: I was looking for it, but I wasn't – I (inaudible) that one.

MR. RALPH: Okay, that's – I found it somewhere else. I couldn't find it in the exhibit, but OCIO has indicated that for the most part instant messages tend to be transitory records. Are you familiar with that?

MS. NAGARAJAH: There have been mentions of transitory records in the statutory review, yes.

MR. RALPH: Yes.

MS. NAGARAJAH: Yeah.

MR. RALPH: So that's how – generally speaking, that's how OCIO approaches that record.

MS. NAGARAJAH: Okay, so is that a change from what was in the previously frequently asked questions from the statutory – from the committee?

MR. RALPH: I don't think so. I don't think so. I think that would've been the same. I'm not certain about that but, currently, that's the situation. I think would've been the situation for quite some time.

MS. NAGARAJAH: I'm just going to (inaudible).

MR. RALPH: And, actually, you know, I will find the reference in the exhibit. I've got the reference in the document that's been made an exhibit, but not in the exhibit itself. But I'll find that for you.

THE COMMISSIONER: Okay.

Well, just – so these – so when we talk about these sort of records, are we just talking about texts or are we talking about emails? How far does it go?

MR. RALPH: I don't think that instant messaging would cover emails.

THE COMMISSIONER: Okay.

MR. RALPH: My guess would be texts and BBMs and that type of thing.

MS. NAGARAJAH: So –

THE COMMISSIONER: Okay, go ahead, sorry.

MS. NAGARAJAH: So I'm just – I just want to go back to Exhibit 04471 at page 319 – 04470 at page 319.

CLERK: Page?

MS. NAGARAJAH: 319, please.

So – okay, so it says here from – this is from the statutory review: "The information management system is overseen by the Office of the Chief Information Office (OCIO), under the legal framework of the *MOI*." – that's the *Management Of Information Act* – "Accordingly, the OCIO policy framework applies to all records 'regardless of physical format or characteristics.' A *Frequently Asked Questions* section on the OCIO website explains that instant messages … are to be preserved in this context:

"If you feel that the content…should be retained as a government record, it is your responsibility to transfer it to an appropriate medium."

So are you saying that this (inaudible) –

MR. RALPH: That's the same right now. So, basically, each individual employee, if you've got a text message or a BBM and you think that that is a government record, then you have to preserve it.

MS. NAGARAJAH: Right, but that would not be –

MR. RALPH: But, generally speaking –

MS. NAGARAJAH: – a transitory record.

MR. RALPH: – OCIO would suggest that most of these records are transitory.

MS. NAGARAJAH: Right.

MR. RALPH: So it may, in fact, be rare that you would save something like that.

MS. NAGARAJAH: Right. So – but –

MR. RALPH: So that's the guidance that OCIO is giving civil servants right now.

MS. NAGARAJAH: Right, but under certain circumstances they should be preserved.

MR. RALPH: Absolutely.

MS. NAGARAJAH: Yeah.

MR. RALPH: If it's a record of a government decision – and thereby a government record – then you have to preserve it.

MS. NAGARAJAH: Okay.

MR. RALPH: Now, the Wells report was interesting because – I'll call it the Wells report, but the – it provided a draft bill.

MS. NAGARAJAH: Yes.

MR. RALPH: And I understand that that draft bill basically became legislation with very few substantive changes. Is that right?

MS. NAGARAJAH: That's correct, yeah.

MR. RALPH: And I understand as well that the report itself is dated March 2015. And if we can go to Exhibit 04517 and this is a government news release.

MS. NAGARAJAH: Okay.

MR. RALPH: And it's dated the 3rd of March and it indicates that the government has accepted the recommendations. And I don't know what – at exactly which date they got the report, but clearly they only had it for a very short period of time it would seem. A very lengthy report with – a very complex report I'd suggest, and within a very short period of time they decided to adopt all the recommendations.

To your knowledge – I mean, the report comes in March of 2015 which is at the end of that fiscal year. The fiscal year for the government begins in April and ends in March. Is that your understanding?

MS. NAGARAJAH: I don't know that.

MR. RALPH: That's fine.

MS. NAGARAJAH: Okay.

MR. RALPH: And as I understand it, when this was done – when the act was passed, all the recommendations were adopted – there was actually no new spending for the 2016 – or 2015-2016 year. Is that your understanding?

MS. NAGARAJAH: I wouldn't know.

MR. RALPH: You wouldn't know?

MS. NAGARAJAH: No.

MR. RALPH: Okay.

Now, if we could go to – 04470, is that the report?

MS. NAGARAJAH: That's the – that's the full report. Yeah.

MR. RALPH: And if we go to page 347 – need to go down.

MS. NAGARAJAH: It might not be exhibit – page 347.

MR. RALPH: Okay, just a second. Sorry.

MS. NAGARAJAH: Madam Clerk, do you want to go to page 347 of the document itself, rather than … Yeah.

MR. RALPH: It's 339 of the document.

MS. NAGARAJAH: 339, okay.

MR. RALPH: So, in this second column here and this is – this addresses the recommended statutory changes. And it says: "The Committee recognizes that it has made recommendations involving a wide variety of changes to statutory provisions and to the existing approach to providing access to publicly held information and protection of personal information held by public bodies. Implementing those changes will likely result in substantial adjustment to existing practices and procedures of public bodies and the Office of the Information and Privacy Commissioner, and may well involve some increase in cost to government.

"The committee was sensitive to those possibilities when it was considering the information before and the recommendations it would make. However, the Committee's mandate included making recommendations that would produce a user-friendly statute which, when measured against international standards, will rank among the best. This" – was – "we have endeavoured to do." If you can go down a bit further.

And it says, "And it may be necessary to implement the" – development – "to implement the recommendations in stages, in order to allow time for development of new or significantly adjusted practices and procedures, or the making of budgetary decisions for any increased costs. That is a policy decision for Government and not a matter on which the Committee should make further comment."

So it's kind of interesting isn't it? I mean, they're suggesting don't do this all at once, make sure the budgetary resources are in place, but that's not what happens. Is that your understanding? Basically, they adopt the recommendations very quickly, within weeks it's in the House and through the House.

MS. NAGARAJAH: Yeah, my understanding was it was passed in June 2015 or the Royal – received the Royal Assent in June 2015, so.

MR. RALPH: And I'm gonna bring this up now also with Justice Molloy. But if we go now to a statement that he gave – and I'm just curious, did you speak to the committee about that? Did they raise that with you that they weren't expecting –?

MS. NAGARAJAH: No.

MR. RALPH: You never spoke to them about that?

MS. NAGARAJAH: No.

MR. RALPH: If we can go to Exhibit 04497. So I mean, I understand 2015 was an election year. That a few months later, the Liberal party won, Premier Ball became the premier, and the Tories lost. So the – this is done quite quickly. It seems to me that there was very little, sort of, consideration in terms of cost and what's going

to be required for the public service. And then if we go to this article (inaudible) Justice Molloy then, in 2017, sees fit to do an interview. And if we can keep scrolling down here, it's (inaudible) where – no, just back up to the top here. Okay, so here it is.

And he says, "…government staff are being pushed to their limits with increased workloads processing access to information (ATIPP) requests."

If we keep going down. The bottom, "Donovan Molloy says stress is affecting their mental health and family… 'If you look over the past three years, we've gone from about 757 requests two years ago to just over 1,400 last year ... to almost 2,100 this year'… 'That's about 140 per cent increase in workload.'"

And I'll pursue this more with Justice Molloy, but in addition, because I think when you – when the Liberal government comes into power, in their first budget of 2016, what they do is they reduce the amount of resources. There's a fiscal crunch, and in fact, the number of resources in information management goes down. Are you aware of that?

MS. NAGARAJAH: No.

MR. RALPH: No. That's fine, thank you.

MS. NAGARAJAH: Okay.

THE COMMISSIONER: Anyone else? Mr. Coffey?

MR. COFFEY: Good morning.

MS. NAGARAJAH: Good morning.

MR. COFFEY: I just have – to ask you about the duty to document. In the Wells report, they do canvass that.

MS. NAGARAJAH: They do, yes.

MR. COFFEY: They canvass that. And they also point out that they kind of – as was their – they were requested to, they look internationally – as to what practices are, what they found to be.

And if you could go to – in 04470, page 318. Bottom of the page, please.

There on the bottom right hand side, "The 'duty to document' issue was also addressed in the UK Justice Committee's review of the *Freedom of Information Act 2000*." And "The discussion arose in the context of claims that there was a" – quote – chilling effect – end quote, "around the giving and receiving of advice among senior civil servants" – continue down – "and ministers in the UK government. Lord O'Donnell, who had been Cabinet secretary during the last two years of Tony Blair's prime ministership, testified before the committee that the impact of chilling went far beyond editing and" – bowdlerisation – or bowdlerising, I'm sorry – of records. "He said it could come to mean that there would be no record at all" – quote – "'because ministers may avoid holding formal meetings entirely,'" end quote.

And he goes on to – I believe that what is below there is probably Mr. O'Donnell's actual comment, to that committee. And I stand to be corrected, but I believe that's the only outside reference here.

MS. NAGARAJAH: I think there was another reference in another section of the – of this statutory review, but I'd have to go back and look.

MR. COFFEY: Okay and –

MS. NAGARAJAH: Yeah.

MR. COFFEY: – but in any case, it wasn't like there were references from a whole bunch of other countries.

MS. NAGARAJAH: No, they really only looked at Commonwealth countries like the UK, Australia –

MR. COFFEY: Yeah.

MS. NAGARAJAH: – and New Zealand.

MR. COFFEY: But even in that context, there are a lot of Commonwealth countries. There's not a lot of – in the report – about other jurisdictions apparently addressing duty to

document, in the same way that the UK did in 2000.

MS. NAGARAJAH: Not in this section, no –

MR. COFFEY: Not in this section –

MS. NAGARAJAH: – from what –

MR. COFFEY: – no.

MS. NAGARAJAH: – I can recall, yeah.

MR. COFFEY: Now, you told the Commissioner several minutes ago that in your review, British Columbia is the only province that has a –

MS. NAGARAJAH: In my review –

MR. COFFEY: – legislation –

MS. NAGARAJAH: – yes.

MR. COFFEY: – duty to document, and in relation to that, of course 2017, I understand, that the Liberals were in power, or the Liberal Party was in power in British Columbia, and they enacted that legislation you referred the Commissioner to, and since then there's an NDP government, I believe.

You're aware of that?

MS. NAGARAJAH: Yes.

MR. COFFEY: Okay, and they were in Opposition at the time, 2017, and the public record will show they criticized the legislation that the Liberals enacted in 2017 for the reason you pointed out, in fact; that it's left to directives.

Now were you aware that the press, in the spring of this year, 2019, carried stories in relation to people who are not politicians, apparently, criticizing the NDP government for not doing what it had criticized the Liberal government for doing.

MS. NAGARAJAH: No.

MR. COFFEY: You're not aware of that.

MS. NAGARAJAH: No.

MR. COFFEY: Okay, (inaudible).

Can you offer any explanation, other than perhaps that quoted by the UK committee in 2000 –can you offer any explanation as to why, over the past 20 years, governments apparently have chosen not to actually implement, in a legislative way, duty to document, other –

MS. NAGARAJAH: (Inaudible.)

MR. COFFEY: – than the chilling effect which is referred to in the UK.

MS. NAGARAJAH: I wouldn't know why governments –

MR. COFFEY: You wouldn't –

MS. NAGARAJAH: – and it's not something that's really been addressed in this statutory review as to why it hasn't been.

MR. COFFEY: And people talk about it –

MS. NAGARAJAH: People talk about it a lot, yes.

MR. COFFEY: – and so on, but it is, at least in your review, you – the only sole Canadian example you found is British Columbia –

MS. NAGARAJAH: Yes.

MR. COFFEY: – it occurred in 2017, and you –

MS. NAGARAJAH: Yes.

MR. COFFEY: – haven't actually, your review, it hasn't called upon you to actually look at what has happened since 2017 in BC.

MS. NAGARAJAH: From what I've seen so far, it hasn't been implemented –

MR. COFFEY: Yeah, yeah.

MS. NAGARAJAH: – yeah.

MR. COFFEY: Yeah, in terms of the actual directives.

MS. NAGARAJAH: It's –

MR. COFFEY: You haven't –

MS. NAGARAJAH: In terms of (inaudible) –

MR. COFFEY: – found such records.

MS. NAGARAJAH: No.

MR. COFFEY: Thank you.

Thank you, Commissioner.

THE COMMISSIONER: (Inaudible) that's interesting because, you know, some of the evidence that I've heard talked about, you know, possibility that people were being told, you know, don't document or don't keep records or whatever the scenario is, which is the very reason why some people argue against the duty to document. Well, to me, the duty to document might be one of the ways to address the issue of the chilling effect.

In any event, there's a chilling effect – it sounds – it seems to me and I just – anybody who'd like to comment on this – it seems to me there's a chilling effect created by the ATIPPA legislation we presently have, whether it has a duty to document or not. And I think it's – we may see more of that – more evidence of that this week.

Mr. Ralph.

MR. RALPH: Yes, Commissioner.

The quote from Lord O'Donnell that former Justice Wells – retired Justice Wells talks about – it seems to me that it's not – what Lord O'Donnell is saying is that we have to be careful here. And I went and looked at more of the reports that he's quoted in and they – in those reports – and I – perhaps I can just read you a couple of paragraphs, if that's okay.

THE COMMISSIONER: Sure, go ahead.

MR. RALPH: And so this (inaudible) there's – the quote in – of Lord O'Donnell is in the eight or 10 paragraphs before – but then it says:

"It is evident that numerous decisions of the Commissioner and the Tribunal" – so this is the report, the Justice report of the UK Parliament – "and the Tribunal have recognised the need for a 'safe space'. However, equally evident is the fact that in some cases their decision that information should be disclosed has challenged the extent of that safe space. We accept that for the 'chilling effect' of FOI to be a reality, the mere risk that information might be disclosed could be enough to create unwelcome behavioural change by policy makers. We accept that case law is not sufficiently developed for policy makers to be sure of what space is safe and what is not." And that's paragraph 166.

Paragraph 155, earlier, it says: "Fear of the chilling effect has led to calls for a 'safe space' to be delineated in which policy can be formulated without fear that the discussions, papers or minutes involved will be made public in the short to medium term. The Act already describes a safe space, through its provisions for exemptions and the ministerial veto. The question is whether that safe space is adequate."

So – and my reading of that report was arguing against perhaps, you know, that there should be, like I said, against – more transparency and perhaps against a duty to document. And a belief that there has to be a safe space, (inaudible) a place in which civil servants have to be able to give very frank and open opinion with the belief that not everything they say will be released to the public.

Now, that's a difficult line to draw, but I don't think that – or that stands to the proposition that the former Justice Wells is using it for.

THE COMMISSIONER: Okay, that's fine.

Thank you.

All right, any other comments before I allow Ms. Nagarajah to step down?

All right, thank you very much. I appreciate that.

MS. NAGARAJAH: Thank you, Commissioner.

THE COMMISSIONER: All right.

So we're on again this afternoon at 2 o'clock with Justice Molloy. He will be skyped in from

up north and – so we'll proceed with him at 2 o'clock.

In the mean time, I've – at the request of counsel, we are going to have a meeting this morning to deal with the issue of submissions, off the record. So we'll go off the record now and – that's fine – and in five minutes or so, we'll take a break and then in five minutes or so we'll come back down and we'll have a chat about the submissions.

CLERK: All rise.

Recess

CLERK (Mulrooney): All rise.

This Commission of Inquiry is now in session.

Please be seated.

MR. RALPH: Commissioner, if I could? There was – we followed up on the evidence this morning and there – I think there's the Public Records Act of New Zealand is now an exhibit? Section 17, I guess would have – what they would call the due – the document. But again, it's not – it's similar to the same in BC.

THE COMMISSIONER: I've actually already reviewed their legislation as well as Australia's. So, yeah. I do have that and I understand it's been made an exhibit as well. Thank you.

All right. This afternoon, Ms. Muzychka.

MS. MUZYCHKA: Good afternoon, Commissioner.

This afternoon we have Judge Donovan Molloy, who will be appearing from the Northwest Territories via Skype. I believe that that connection is –

THE COMMISSIONER: Right.

MS. MUZYCHKA: – has been made. Oh. There he is.

Good afternoon, Judge Molloy. Do you – can you hear me?

JUDGE MOLLOY: I can.

MS. MUZYCHKA: Okay. I guess there's a little bit of a delay so it might – it might make it for a little bumpy until we get used to it. But, all right. So we're ready to proceed. Judge Molloy, I gather, does not require to sworn or affirmed. But if you prefer, Judge Molloy, we can do either?

JUDGE MOLLOY: I'm okay with – to be sworn.

MS. MUZYCHKA: Okay.

CLERK: Do you swear that the evidence that you shall give to this Inquiry shall be the truth, the whole truth and nothing but the truth, so help you God?

JUDGE MOLLOY: I do.

CLERK: Please state your name?

JUDGE MOLLOY: Donovan Molloy.

CLERK: Thank you.

MS. MUZYCHKA: Yeah. Judge Molloy, you were a Judge of the Territorial Court of the Northwest Territories since your appointment, February 2019?

JUDGE MOLLOY: That's correct.

MS. MUZYCHKA: And prior to that, I understand you were a civil servant with the Government of Newfoundland and Labrador.

JUDGE MOLLOY: Yes. I returned to the civil service in 2007 with the St. John's Office of Public Prosecutions. In 2010 I became Assistant Director of Public Prosecutions. And in 2012, I became Director of Public Prosecutions. Which – I held that position until July of 2016 when I was appointed as the Information and Privacy Commissioner.

MS. MUZYCHKA: And you remained in that position until your appointment to the Territorial Court in February of 2019?

JUDGE MOLLOY: Yes.

MS. MUZYCHKA: Okay.

So today, if you can simply outline for the Commissioner the – what you understand or what you will be presenting as the scope of your testimony?

JUDGE MOLLOY: So, my understanding today is I will be speaking to my experiences as a civil servant. But that would be mostly confined to the time from February 2012 onwards when I became assistant deputy minister, Criminal Operations and the director of Public Prosecutions.

MS. MUZYCHKA: Okay.

JUDGE MOLLOY: And then to talk about some of my experiences as Privacy Commissioner, with respect to record keeping and the duty to document.

MS. MUZYCHKA: Right.

Now, I understand that you have had the opportunity to follow some of the evidence in this Commission of Inquiry. Is that correct?

JUDGE MOLLOY: I have. I have to say that I wasn't watching it obsessively, but there were occasions when I did tune in to the testimony of various people that have appeared before the Inquiry.

MS. MUZYCHKA: Right; and that includes some of the members of the civil service? 'Cause we've had evidence from Julia Mullaley, Charles Bown, Donna Brewer, Paul Myrden, Paul Morris and a few others.

JUDGE MOLLOY: Yeah. I mean, I saw bits and pieces of many of them, but I think it would've been Mr. Bown that I saw more of than the others and parts of Ms. Mullaley's, but, you know – bits here and there as I had the opportunity to view it.

MS. MUZYCHKA: Okay.

And as a former member of the civil service, what observations, if any, did you make as a result of your observations of some of the testimony, cross-examination?

JUDGE MOLLOY: I guess I was struck – particularly, I think it was Mr. Bown, with some suggestions: Well, you know, what contrary role did you play, either sort of in offering your own opinions, or reviewing the materials? And some of the other civil servants as well in terms of – I felt that it didn't necessarily accurately portray the ability of senior civil servants to speak truth to power.

MS. MUZYCHKA: Okay, and what do you mean by that when you say truth to power?

JUDGE MOLLOY: Well, there's an apprehensiveness in the civil service, generally, including at the senior levels, that if you know what the desired result is, in terms of the ministerial view, that – to express strong opinions contrary to that view may not be in your personal best interest in terms of your – either you employing – continuing (inaudible) employment or your promotion.

MS. MUZYCHKA: Okay, so are you suggesting then that there's a chilling effect in terms of having civil servants advising ministers, as an example, to be less than candid in terms of their advice or how would you describe it?

JUDGE MOLLOY: Well, it's the general atmosphere that you may prejudice yourself significantly by offering a contrarian view, and in an economy like Newfoundland where, you know, civil service jobs they pay reasonably well, especially at the senior levels, people are – would legitimately be concerned about, you know, about the prospects of their employment, especially civil servants serving at pleasure.

MS. MUZYCHKA: Okay.

Have you – are you aware of any departures of individuals, senior civil servants as an example, who may have found difficulties working in that environment?

JUDGE MOLLOY: You know, I mean it's just a matter of discussions amongst ourselves, the feelings generally when talking to other members of the executive, I felt the – not just myself but a number of people, there was a – I don't want to call it a purge, it's too strong a word, but there was a number of people who left in senior positions in early, I think, 2016 that were viewed as very strong performers and people who perhaps tended to speak their mind.

And certainly that gave rise to some discussions amongst ourselves as to whether they were moved on because of the fact that they were independent minded and because, you know, they were otherwise viewed as very strong performers.

MS. MUZYCHKA: Okay.

Do you have any specific experiences in your role as the director of Public Prosecutions with respect to independence of the civil service?

JUDGE MOLLOY: I have to qualify it by saying the director of Public Prosecutions is in a more advantageous position than most other civil servants just because of the independence of the Attorney General and the requirement that there be no political interference with respect to the conduct of prosecutions. However, in terms of the operation of the department, certainly, you know, when you – when I was (inaudible) in terms of specific examples, I can recall that despite being asked to prepare memos for the minister, they couldn't go directly to the minister even if they were sent simultaneously to the minister and the deputy or others.

Sometimes that would result in discussions before it went on to the minister about certain aspects of a memo, which sometimes, you know, you're dealing with the law, interpretation of the law that it's absolutely correct and fine, but if you're talking about sort of things that aren't within the confines, strictly, of prosecutions, then you question sort of whether or not you're able to fully express your advice.

There was one occasion where I was told that – I prepared a memo for the minister, it was not solicited, but it was a matter – regarding a matter of significant importance to Public Prosecutions and I was told that that memo specifically was not going to be given to the minister because it would make the minister angry and could result in prejudice to Public Prosecutions as a whole, not to me personally.

MS. MUZYCHKA: Okay.

And so is it the case that memos that you would write for a minister would not go directly to a minister, but rather would be filtered through an ADM? Is that what you're indicating?

JUDGE MOLLOY: Mostly filtered through the deputy.

MS. MUZYCHKA: The deputy. Right, not – sorry – the ADM, the DM. Okay.

What about any other occasions? Did you ever have a sense that there was any concerns in terms of ministerial comments as to the independence of the AG and your role in the DPP?

JUDGE MOLLOY: You know, sometimes after meetings where I expressed a difference of opinion, you would either be summons to the minister's office or the minister would drop by your office unannounced, and it always felt to me like it was a consequence of having given advice that perhaps was not the desired advice and explaining sort of the perspective …

I don't know. I often wondered if it was an attempt to get me to modify my advice and, frankly, they were the type of discussions that should've took place in the group meeting when the contrarian view was being expressed.

MS. MUZYCHKA: Okay, and in terms of the exchange of advice and information, what can you say about the documentation and the recording of information that arise – arose or would arise out of these meetings?

JUDGE MOLLOY: There was never really any clear direction as to what was required to be documented or not. We had just come out of – Public Prosecutions had come out of the Lamer Inquiry, which stressed, among other things, the importance of accountability and transparency.

So I was accustomed to a culture in which everything was recorded, written down and so I continued that practice. But it – after some, not too long a period of time, I would often be sort of subject of jibes or other comments about: Oh, well, you know, we don't have to worry because I'm sure Donovan will do a memo or, you know, or when can we expect your memo and – it was always like a subtle kind of dig at my practice of memorializing advice and, you know, I think somebody who, with less independence and more worried, sort of, about their tenure, it's the type of thing that, I believe, would discourage you from continuing to document your advice.

MS. MUZYCHKA: Okay.

Are you aware – I mean we've heard some evidence in this Inquiry that the practice of providing ministers with detailed briefings and advice in terms of – to assist them in decision-making has changed over the years and that very little, or less – much less information is put in writing to ministers, due to concerns of ATIPP requests. Are you aware –

JUDGE MOLLOY: Yeah, that –

MS. MUZYCHKA: – of that at all?

JUDGE MOLLOY: Yes, and, in fact, I think some departments, ministers refuse to take briefing notes whatsoever, everything's been reduced to oral briefings and, frankly, not only does that undermine the accountability and transparency, but it sends a very important message in terms of culture.

Culture in an organization flows downwards, and by engaging in those practices, basically, either intentionally or not, you're communicating to people below you that keeping records is bad. So, you know, you can have whatever you like in terms of legislation, but if the person who's running the show is engaging in practices that actively discourage documentation, well, everybody below that is going to see that as sort of their direction, regardless of whether or not it's stated expressly.

MS. MUZYCHKA: And how do you see that affecting the government operations, in terms of continuity or transparency of decision-making? Do you see that affects it in any way?

JUDGE MOLLOY: Yeah. I mean, it plays a significant role in terms of undermining accountability and transparency, but it also really undermines good governance, either in terms of corporate memory, historical memory. Somebody takes over from somebody who's retired and they say, well, you know, what do I have to consider to make a particular decision? Someone else goes: Oh, well, you know, Bill or Sue always took care of that; they didn't write anything down; I don't know what to tell you.

Or in the instance of, say, government being sued, you know, how do you defend a decision, discretionary decision, if there's no record of how that decision was made?

So it's really – it's important in the ATIPP sense, but it's also critical in good governance.

MS. MUZYCHKA: Okay.

Are you aware of any policies or directives in government that cover, for instance, the communications through instant messaging or other forms of social media messaging, text messaging?

JUDGE MOLLOY: Yes, there was a revision in 2018, if I recall correctly, that largely resulted from – we had a complaint in regards to I think it was Peter Cowan – and I don't mind naming him because he reported on it publicly, that it was his request seeking instant messages from the Premier's office, if I recall correctly.

As part of the investigation, we looked at OCIO's then policy, which in our view was very inadequate because it seemed to suggest categories of information could automatically be assumed as transitory. In fact, it's the content of the message, of a communication, that determines whether or not it's transitory, not the format. And I have to say that in our discussions with OCIO, both in conjunction with that investigation and outside of it, OCIO very promptly amended the policy (inaudible) recognizing that it could lead to people assuming that all instant messages were transitory, and they modified the policy.

The – we did consult with them or, I guess, you know, provided comments on a draft, but that's the genesis of that policy. And I also have to say that with respect to that matter and other matters, OCIO was always extremely positive in dealing with the OIPC – OPIC on matters of policy where we identify possible gaps, and it was probably one of the most positive relationships that the OIPC had, in terms of a government department, was the relationship that existed with the OCIO.

MS. MUZYCHKA: Now the OI – OP – OIPC is the Office of the –

JUDGE MOLLOY: Information and Privacy Commissioner.

MS. MUZYCHKA: Right, okay.

I don't know if you have this in front of you, Judge, but at tab 32 of the binder, and it is Exhibit P-05 – sorry, P-04510, and this would be the directive regarding instant messaging.

JUDGE MOLLOY: Yeah, if you could just bear with me for a second. Sorry, the number again?

MS. MUZYCHKA: 04510.

JUDGE MOLLOY: Just for the benefit of the audience, we're having some Internet connectivity issues, so if – I have to try and bring these up – documents up individually as they're being referred to –

MS. MUZYCHKA: Okay.

JUDGE MOLLOY: – and also, Justice LeBlanc, I forgot to note in the beginning that I chose not to wear a suit jacket because it's 29 degrees here today and the –

THE COMMISSIONER: (Inaudible.)

JUDGE MOLLOY: – AC is not operating properly, so I apologize and hope that that doesn't cause offence.

THE COMMISSIONER: We could only wish for that, Mister – Judge Molloy.

JUDGE MOLLOY: Yes, who knew moving to Yellowknife was necessary to achieve a real summer?

MS. MUZYCHKA: Okay, so with respect, do you have that document brought up now?

JUDGE MOLLOY: I do.

MS. MUZYCHKA: Okay. Is that the directive that you were just referring to? With respect to the –

JUDGE MOLLOY: It is.

MS. MUZYCHKA: Okay. And so if we look at page 3 of that exhibit, and –

JUDGE MOLLOY: Yes.

MS. MUZYCHKA: – it talks about the purpose being to: "provide individuals … OR information owners with information management requirements for the use of instant messaging technologies." And under section 4.0, just a little farther down. It says that: "Instant messages must be treated like any other information resource and managed according to the *Management of Information Act*." So I guess –

JUDGE MOLLOY: Yes.

MS. MUZYCHKA: – that – incorporates that. Now, was that one of the changes? Because you mentioned that prior to the amendment or prior to 2012, the philosophy with respect to instant messaging was a little different? BBMs, texts –

JUDGE MOLLOY: Yeah.

MS. MUZYCHKA: – et cetera.

JUDGE MOLLOY: Well, you know, there was always the culture of when you're discussing with other civil servants whether something should go in an email or in an instant message or some form of – not sure – social media. These are usually types of communication that are quite varied, like BBMs and IMs that are (inaudible) – are generally part of the government record and are easily disposable.

It was often felt that sometimes, you know, we were – there was indirect pressure to put things in instant messaging or similar formats. In fact, on one occasion, as DPP, I was directed to put communications on a particular matter in a – to stop putting them in an email, put them in an IM. And I simply said yes but didn't change anything. I kept doing what I was doing all along.

MS. MUZYCHKA: So was it because it was the matter was sensitive or what was the –?

JUDGE MOLLOY: I think the more that (inaudible) – it was sensitive politically or especially if it was related to a known individual who, you know, may have issues with government and might have a history of ATIPP – ATIPPing information. There was indirect pressure that it be put in a format that was much harder to locate.

MS. MUZYCHKA: Okay.

What about your experiences in your role as Privacy Commissioner? Can you tell us some examples or when you were involved in reviewing specific requests for disclosure in which denials were made, how you approached –

JUDGE MOLLOY: Well –

MS. MUZYCHKA: – the review?

JUDGE MOLLOY: – you know, we would always ask – the first step would be to ask the public body for the responsive records. We would review them and decide, sort of on an interim basis, whether we thought certain exemptions were claimed appropriately or not. It involved going back and forth with the ATIPP coordinator in the department to see, you know, if there was any flexibility in their interpretation of certain – relying on certain exemptions.

In fact, for the most part, the overwhelming number of complaints that we received were resolved informally by – between the department and the complainant, we would successfully narrow it down to sort of exactly what it was the complainant wanted and what the department was prepared to give and, you know, informal resolution was our mainstay.

MS. MUZYCHKA: Sorry, I missed the last part. You –

JUDGE MOLLOY: (Inaudible) informal resolution was really our mainstay because, you know, if we had to write reports on all the complaints I think we would've been – we possibly would've been swamped as well.

MS. MUZYCHKA: So I guess that may have arisen by the requests being too broad and then in communication with the requester and the requestee, the parameters could be narrowed by agreement.

JUDGE MOLLOY: Well, different issues, you know, whether something was actually (inaudible) or not, whether something is personal information or not, whether, you know, in the case of somebody seeks third party information, what exactly it was they were looking for. So, you know, there was a willingness (inaudible) both sides to work with the OIPC as the sort of intermediary to achieve a satisfactory result.

MS. MUZYCHKA: Okay.

Can you share some examples with us of reviews that you've done in which you noticed, for instance, a paucity of records, where you thought there may be more when there wasn't? I think, if I can direct you to tab 15, which is P-04493, and that's a report of – it's P-2017-003, August 16, 2017.

UNIDENTIFIED MALE SPEAKER: Sorry, what tab is that?

JUDGE MOLLOY: Yeah, I apologize –

MS. MUZYCHKA: Tab 15.

JUDGE MOLLOY: – what's the exhibit number again?

MS. MUZYCHKA: Sorry, do you have that Judge?

JUDGE MOLLOY: Yeah, what's the exhibit number again, please?

MS. MUZYCHKA: 04493.

JUDGE MOLLOY: Yes, I have it.

MS. MUZYCHKA: Okay.

So perhaps you can take us through that. This was a decision arising out of requests to publicly disclose salary information.

JUDGE MOLLOY: Yes.

So the first iteration of, sort of, salary disclosure resulted from an access request filed under ATIPPA. But this – subsequent to that the government commendably enacted the *Public Sector Compensation Transparency Act*, basically provided for yearly disclosure of salaries that exceed $100,000.

Unfortunately, in the first iteration of that publication, it led to numerous privacy breeches of people whose salaries and names weren't

supposed to be incorporated on the list either because of their occupational position – for example, at that time employees of the House of Assembly are not supposed to be included. And then the RNC, in particular, had granted – a number of their members had been granted an exemption because of safety and security reasons, if I recall correctly.

When it was – when the release was first put up, all that information was accessible to the journalists who access it. And so it was unfortunate because government was attempting to be proactive in terms of disclosure. But when we went through it, it was clear – I mean, it was a bit of a crisis, I think, from government's point of view. Any number of meetings involving several people, you know, dozen – or a dozen or more people, lawyers, people from HRS, people from Justice. And in the hundreds of pages of disclosure, number one, there was only two pages of written notes –

UNIDENTIFIED MALE SPEAKER: (Inaudible.)

MS. MUZYCHKA: Okay.

JUDGE MOLLOY: – (inaudible) notes. And I can tell you –

MS. MUZYCHKA: Can you pause that for a moment, Judge? We didn't get the – how many pages of notes. You cut out a little bit when you said that.

JUDGE MOLLOY: Oh, sorry. I think it was hundreds.

MS. MUZYCHKA: Hundreds?

JUDGE MOLLOY: Yeah.

MS. MUZYCHKA: Okay. Continue.

JUDGE MOLLOY: Between 200 and 300.

MS. MUZYCHKA: Okay.

JUDGE MOLLOY: But, you know, in terms of handwritten notes, I mean, based upon my own experience, not only working in the Department of Justice but also as a lawyer in general, to think that that many lawyers could be involved in a meeting and not a single note, it – frankly, I was very skeptical. And then when you looked at the emails, they're basically rife with a message simply saying: Call me or come see me. Which, again, speaks to, what I believe, is a culture of not wanting to create a record. It's a movement towards oral government.

And, you know, these (inaudible) unique to that report because we're seeing it in other instances of investigations as well where, you know, I think a reasonable person, who is fully informed, would expect records to exist and they did not exist.

MS. MUZYCHKA: Okay.

So I guess through your role of reviewing records, in terms of assessing the ATIPP requests, you would observe the presence or the absence of records where you would expect to find them. Is that what you're saying to us?

JUDGE MOLLOY: That's my position. You know, not necessarily I personally would expect records to exist. I believe any reasonable person, fully informed, would expect records to exist.

MS. MUZYCHKA: Okay.

The next document I'm going to bring to your attention is P-00431, and that's going to come up on your screen and this is –

JUDGE MOLLOY: Okay.

MS. MUZYCHKA: – we'll go to Section 5.4. This would be the *Energy Corporation Act*.

And before we go any further, I just realized, Commissioner, that I neglected to add two new exhibits. So we probably should do that so that we have them entered for when we refer to them.

So they are P-04520 and P-04521.

THE COMMISSIONER: All right, they will be entered as numbered.

MS. MUZYCHKA: Thank you.

All right, Judge, back to the *Energy Corporation Act*. So we're looking at Section 5.4.

JUDGE MOLLOY: And it's 5.2 on the screen.

MS. MUZYCHKA: Oh, yes. No, we're down to 5.4. So, you've got that now?

JUDGE MOLLOY: I can see it on the screen, yes.

MS. MUZYCHKA: Okay, good. So, we know that there – the section has implications for Nalcor. So perhaps you can just take us through that from your perspective of the Privacy Commissioner.

JUDGE MOLLOY: Well, you know, Nalcor was the subject of – perhaps still is the subject of a very high number of access to information requests. Some of those resulted in complaints to the OIPC while I was Commissioner. The view that – prevailing view that – was that because of section 5.4, Nalcor is basically able to unilaterally decide what information it was going to disclose whether or not, in response to an ATIPP request, while the OIPC had a limited role in, I suppose, in assessing whether the records in question were commercially sensitive.

The definition of a commercially sensitive record in the *Energy Corporation Act* is so broad that that's basically a rubber-stamp exercise, and once the CEO and the board signed off on it, because of the – I'm not sure if it's schedule A or B of the ATIPPA. That section prevails over the ATIPPA so, you know – and Nalcor was in a position unlike every other public body of being able to decide for itself, and, you know, every other public body, despite doing millions of dollars of business, were all required to justify redactions of third party information based on section 39 of the ATIPPA.

MS. MUZYCHKA: And can you tell us the difference between two tests if it had been under – subject to the ATIPPA versus subject to the Energy Act?

JUDGE MOLLOY: Yeah, so basically section 39 – I don't have it in front of me, but it's a three-part test: you know, information that is supplied in confidence, that could harm the competitive position and other interests, technical, scientific information that the – of the third party. The third party objects to disclosure, and if we get a complaint assuming that the public body had already decided that – if I could step back for a second, in the context of third party complaints under the ATIPPA, generally it involved a situation where a public body had already decided that certain information did not meet the three-part test and could be disclosed.

MS. MUZYCHKA: And that's under the ATIPPA.

JUDGE MOLLOY: But a court – that's under the ATIPPA.

MS. MUZYCHKA: Okay, and just before you continue, we do have the ATIPPA in our binder. It's at tab 41 and it's Exhibit 04519, and we're at page 29. So that will get brought up on the screen, if you need to refer to it.

JUDGE MOLLOY: Okay.

MS. MUZYCHKA: Continue.

JUDGE MOLLOY: So after a public body had decided that it didn't meet the test and should be disclosed, they have to notify the third party, and of course the third parties had a right to either appeal or ask the OIPC to review that decision or go direct to court.

So when the – when they asked us to review, we would apply section 39 and – to determine whether or not the information should be withheld despite the fact that the public body had identified it as not satisfying the test. And so every public body that's defined in ATIPPA was – and third parties dealing with them were subject to this procedure, this test, whereas Nalcor simply, on declaring something to be commercially sensitive, could unilaterally decide whether or not the third party information would be disclosed, and the OIPC really had no ability to look behind that.

MS. MUZYCHKA: Okay.

We can turn to tab 16, and it's Exhibit P-04494. And that is a report of – dated December 5, 2017, involving Nalcor Energy. And perhaps you can take us through that as it relates to the sections that we were just talking about.

JUDGE MOLLOY: Yeah, so that was a circumstance – if you could just scroll down a

little bit please? No, too far, just back to the summary, please.

Yeah, that was a situation where an employee was seeking access to information of a third party. The section – the – my recollection is that we certainly had considered disclosing that information at some point if we're applying the test under section 39. But because of section 5.4 or because of the decision of the CEO and board, we had no choice but to uphold the decision to refuse disclosure of the requested information.

MS. MUZYCHKA: Sorry?

JUDGE MOLLOY: But there may be some comment in there (inaudible). There's two reports that come to mind. But, you know, in my view – our view, when that provision was enacted it recognized, at the outset, Nalcor might be dealing with, you know, some multinational conglomerates that might sort of hamper the initial business, you know, in terms of those parties maybe being reluctant to deal with Nalcor.

But it came to be applied basically for every request involving third party information, including employees who were – as is well-known, many of the employees at Nalcor set themselves up as corporations, independent contractors. On the one hand, because of the *Public Sector Compensation Transparency Act* disclosure, we had the salaries of many people at Nalcor who were traditional employees, while their co-workers, because they had availed of a corporate identity, were basically – it wasn't subject to disclosure.

So it was an inherent contradiction. And to the credit of government at the time, it did subsequently (inaudible) to put in the qualification for independent contractors. But even after that event, on the very first request for the disclosure, the (inaudible) arrangement, a number of senior members of Nalcor's executive went to court to try and give it – disclosure of that information. If I recall, some – at least one of those tried to (inaudible) –

MS. MUZYCHKA: I think we're frozen here now.

JUDGE MOLLOY: – there was information before (inaudible) –

MS. MUZYCHKA: Can you just – sorry.

THE COMMISSIONER: Just for a second, Judge Molloy. I think what we're going to do is – we're losing you now more than we were initially, and it's getting more difficult to hear you. So if you can just hold tight for a minute, I think we're going to take a minute. I'm just going to go in and talk to the technical people to see if there's any way we could get this improved. So if you can just hold tight, I think we'll just take a couple of minutes break here now.

JUDGE MOLLOY: Yeah, Justice, there was some incident of vandalism with the communications network last week and I don't know if that (inaudible) or any of the difficulty.

THE COMMISSIONER: Well, it might have something to do with the bandwidth but we'll just check on it and we'll get right back to you in a minute; just hold tight there.

JUDGE MOLLOY: Thank you.

THE COMMISSIONER: So we'll just adjourn for a minute.

CLERK: All rise.

Recess

CLERK: Please be seated.

THE COMMISSIONER: Okay, we've reconnected with Judge Molloy. If this doesn't work, the only other option that we have is to actually just go audio, which will give us a stronger, more stable voice. We won't be able to see Judge Molloy but that may be the route we take, but let's just see how it goes now.

So, Judge Molloy, are you there now?

JUDGE MOLLOY: I am.

THE COMMISSIONER: Okay. Let's continue on, then.

MS. MUZYCHKA: Okay.

So we should probably just briefly go back over what you were saying before we broke because you were cutting in and out a little bit. And you were talking about the impact of the disclosure of public civil servant salaries and Nalcor salaries and the implications it had for those who were contractual employees. So, I think we pretty much got to your evidence to that point.

So, this particular issue came up and it also came before you as a privacy commissioner. Correct?

JUDGE MOLLOY: Yes.

MS. MUZYCHKA: Okay.

And we do have a number of reports relating to Nalcor Energy that are in the evidence documents. The first one is tab 16 and it's 04494.

Oh, we've been to that one already. Yes, okay. That was where we were.

And then the other one is P-04520, and I believe that's at tab –

THE COMMISSIONER: Tab 42.

MS. MUZYCHKA: – forty-two. It's one of the new additions.

UNIDENTIFIED MALE SPEAKER: I believe we've lost (inaudible).

MS. MUZYCHKA: Oh, he's frozen again.

THE COMMISSIONER: Okay.

So I think what we're going to do is we're gonna disconnect from Judge Molloy. We're just going to go audio with him now, which means we got to get him back on the phone. So we'll just take another minute or so and then we'll get him back and we'll just use audio this afternoon.

CLERK: All rise.

Recess

CLERK: Please be seated.

THE COMMISSIONER: So, just for the members of the public who may be watching, this is not the first attempt that we've made to contact Judge Molloy, or others, when we've done Skype. We usually do test runs and they usually work well and we usually get good results.

The problem that we've had with this one in particular, aside from the issue of bandwidth, is apparently there was some vandalism since we tested last week in the Northwest Territories resulting in, basically, theft of copper that, of course, you need to assist with your transmission. The result of which is we lost some of the capability that we apparently had last week.

So, the result is that what we're gonna do now is go to Judge Molloy by telephone only, and I believe we will have a much stronger signal here now and he'll be more easily heard.

So go ahead, Ms. Muzychka:

MS. MUZYCHKA: Okay.

THE COMMISSIONER: You're there Mr. – Judge Molloy?

JUDGE MOLLOY: I am.

THE COMMISSIONER: Okay, thank you.

MS. MUZYCHKA: Okay.

So, I just wanna touch briefly on some of the decisions that we have included in our documents that refer to the decisions of the Office of the Information and Privacy Commissioner. And if you can just briefly highlight, then, the results of the Nalcor Energy one that we had just started to deal with, and that was P-04520.

JUDGE MOLLOY: You know, in essence, what I was trying to say is because of the industrial reports, I think they highlight, because of the breadth of the definition of commercially sensitive information in the *Energy Corporation Act*, that Nalcor, amongst all public bodies in Newfoundland and Labrador, is able to unilaterally decide, when it comes to that type of

information, as to what it will disclose in response to an access request and what it won't.

Whereas, every other public body, and the third party dealing with it, are subject to the section 39 of the ATIPPA in a three-part test, and what results is a situation where, or sometimes, were Nalcor subject to the same test as everybody else, it's a lot of potential for some of the information to be required to be disclosed, the Commissioner lacked (inaudible) ability to order disclosure or recommend disclosure of it because section 5.4 of the *Energy Corporation Act* prevails over the ATIPPA.

MS. MUZYCHKA: Okay.

And, so, in those circumstances, then, Nalcor would be subject to a different test. And, then, in terms of the review of the documentation, how do you determine whether or not the denial is, in fact, valid?

We know under the energy act that you would receive a certification from the CEO, but you would also get certification from the chair of the board of directors as to that decision.

So, are you actually provided with the documentation to review yourself, independently?

JUDGE MOLLOY: Yeah, basically, the only, I guess, review capacity that you have is to determine whether or not we agree that it's commercially sensitive information, and because of the breadth of the unfair conditions in the *Energy Corporation Act*, it's frankly the most (inaudible) to the rubber-stamping exercise.

MS. MUZYCHKA: Okay.

Have you ever had a situation where your review of the information –?

THE COMMISSIONER: Can we just go back just for a second because I didn't quite get that.

So, the question, Judge Molloy, is that: If you did get a request, do you have access to the documents? Notwithstanding the fact that the CEO and the board, basically, are indicating that they're – that the document contain commercially sensitive information.

JUDGE MOLLOY: We did, Justice LeBlanc, but our review was basically confined to whether or not the information was commercially sensitive, as defined in the *Energy Corporation Act*. And, so, as I said, because of (inaudible) the definition is was really a fait accompli.

MS. MUZYCHKA: Judge Molloy, can I ask you if you are on a speaker phone?

JUDGE MOLLOY: I am.

MS. MUZYCHKA: Okay, it might be better, from an audio perspective, if you were to pick up the receiver, as we're not getting the clarity that we need.

JUDGE MOLLOY: How is that?

MS. MUZYCHKA: So are you –?

THE COMMISSIONER: Go ahead.

JUDGE MOLLOY: Is that better?

MS. MUZYCHKA: Yes, okay. Let's proceed, thank you.

So, I was going to ask you if you had ever a situation where you did conduct a review of the information from Nalcor and found that it didn't meet the test of commercial sensitivity. Have you ever had that situation?

JUDGE MOLLOY: Not during my term as the Privacy Commissioner, and I don't believe during – I don't believe at any point –

MS. MUZYCHKA: Not hearing you very well. Could you try to speak a little louder, please?

JUDGE MOLLOY: Not during my term and I – to the best of my knowledge, that never occurred.

MS. MUZYCHKA: Okay.

Now, I want to talk about the duty to document and – because I noticed in some of the decisions that you had written that are provided in the exhibits, you know, there would be – and not just your decisions, there's a decision by Ed Ring, and this is at tab 14 for reference, P-

04492. And this – without going through all the details of it, under the recommendations at page 8, there was a recommendation to "the Premier's Office to implement a duty to document as recommended by the ATIPPA Review Committee." And then that comes up again in other decisions with respect to, again, questioning or requesting that a duty to document be implemented.

And I guess from your perspective as – in your role as the Privacy Commissioner in reviewing requests for access, you're subject to having to review documentation and finding the absence of it.

Can you share with us your thoughts in terms of the – an enforceable duty to document?

JUDGE MOLLOY: Well, the duty to document has been a subject of many discussions in Canadian jurisdiction and in other countries. The question, sort of, in terms of – has two components. It's basically accountability and transparency, certainly in that context, the Privacy Commissioners of Canada issued a joint resolution in 2013 recommending, amongst other things, that government enact an enforceable duty to document.

That was picked up on, amongst other things, by the statutory review committee, which I believe in – if I recall correctly – chapter 10 of the full report recommended that government, as part of its recommendations, enact an enforceable duty to document. To my knowledge, the only province in Canada that has a duty to document is the Province of British Columbia, but there's been recently significant news coverage about that piece of legislation and about its effectiveness because, you know, I think the – Michael McEvoy, the Privacy Commissioner of BC, issued a release saying that the person who is alleged to have not followed appropriate documenting practices is the person responsible for enforcing the act.

And so I think it – his gist of his commentary is that, you know, despite the fact that people complain to his office, they could not do anything because there was no independent oversight of that act. So it has two components: Number one, requiring decisions regarding, you know, functions, policies of government, its operations, procedures and transactions – all those things be documented; but also to provide somebody outside government with the ability to review allegations of failure to document where the legislation requires it.

MS. MUZYCHKA: And that, I understand, is not present in the BC legislation. Is that correct?

JUDGE MOLLOY: No, that is absent from the BC legislation which, I think, is the point of – I mean Michael McEvoy issued – or his office issued a press release because they – I think, it was known that complaints had been made to his office. And, you know, I haven't spoken with him, but reading between the lines it seems the statement was to the effect to tell people that – about the complaints, his office has no ability, no jurisdiction, to look into it.

MS. MUZYCHKA: Okay. I want to ask you – I'm going to direct your attention to Exhibit P-04503 and –

JUDGE MOLLOY: 04503?

MS. MUZYCHKA: Yes.

JUDGE MOLLOY: Okay.

MS. MUZYCHKA: That's at tab 25.

JUDGE MOLLOY: Yes, I have it.

MS. MUZYCHKA: Okay. I don't know if you're familiar with this document. It's an Information Note, Office of the Chief Information Officer regarding the "Legislating a Duty to Document."

JUDGE MOLLOY: I had not seen it before, no.

MS. MUZYCHKA: Okay.

So this was dated September 28, 2017, so it would have been, you know, during your current – in your role as the Privacy Commissioner, correct?

JUDGE MOLLOY: Yes.

MS. MUZYCHKA: Okay.

I just want to direct your attention to the bullet in the middle of the page. It's entitled: The *Management of Information Act*. Do you see that?

JUDGE MOLLOY: Yes.

MS. MUZYCHKA: Okay.

And it says that: "The *Management of Information Act* already establishes a requirement to create records: '*A permanent head of a public body shall develop, implement and maintain a record management system for the creation, classification, retention, storage, maintenance, retrieval, preservation, protection, disposal and transfer of government records*.'"

And I'm just wondering if that is sufficient for a duty to document, as you see it, from your perspective as the former Privacy Commissioner.

JUDGE MOLLOY: Yeah, you know, I view that statement as inaccurate. The *Management of Information Act* basically dictates the establishment of mechanisms, information management systems to deal with records that you have. But I think it's a stretch to say that, you know, so it creates a legally enforceable duty to create a record of the decisions of government or other records. So I – you know, I disagree with that statement.

MS. MUZYCHKA: Okay.

Would you say then, that there would have to be specific language in order to require documentation to be kept –?

JUDGE MOLLOY: Yes, there'd have to be language similar to what – as an example – and, you know, there's no magic in their choice, but something similar to section 19 of BC's current *Information Management Act* which sets out the duty to document.

MS. MUZYCHKA: Okay. So that's – it's a different thing from the duty to create and maintain documents.

JUDGE MOLLOY: Sorry, could you repeat that?

MS. MUZYCHKA: I said it would be – it's distinct from a duty to create and maintain documents.

JUDGE MOLLOY: Yeah, they're different, you know. They're different animals, different things. One decides basically how you retain or dispose of records that you created, but that doesn't speak to a requirement to create a record in the first place.

So if you created a record, yeah, the *Management of Information Act* is (inaudible), says what you shall do with it or what's supposed to happen to it, but nowhere in there does it say that you have to document certain types of decisions.

MS. MUZYCHKA: Okay.

Some would say that the requirement to document would have a chilling effect on members of the civil service for fear of having to disclose. What do you say to that?

JUDGE MOLLOY: In my view, there's more of a chilling effect now in terms of fear of documenting something that's perceived or have been told that, you know, shouldn't be documented. So, you know, civil servants are stressed by creating records, not because it's sort of, you know – you know, not as an administrative burden, but as the potential, sort of, what happens if I create the records, it sort of leads to a scandal or some other issue for government.

The duty to document will frankly free them from that because then it's not a matter of individual choice or discretion, it dictates that records of certain decisions, transactions be kept. And so, you know, to my point of view, I think it would be much harder for government to take issue with somebody for complying with what is in fact a legal duty pursuant to a piece of provincial legislation.

MS. MUZYCHKA: Okay.

So, I guess, is it fair then to say that it's – the chilling effect, if any, arises out of the obligation to produce, or to disclose under the ATIPPA as opposed to under a duty to document?

JUDGE MOLLOY: Yeah, no, I don't think the duty to document would add any more of a significant burden than what already exists. And part of – you know, when we talk about burden, part of the issue in Newfoundland and Labrador is the fact that while we have one of – while Newfoundland and Labrador had perhaps the best piece of Access to Information legislation in Canada, it's a victim of its own success in the sense that I think over the last three or four years, since the new act came into place, I think that overall it's a 300 per cent increase in the number of requests that public bodies are receiving.

And not only in, sort of numbers, but I think the complexity of some of those requests has also increased as people become more adept at formatting their requests. But, you know, despite that increase, there's been little or no, sort of, additional resources put into the system, and as I commented publicly and (inaudible) in one of my reports, you know, in talking to some coordinators – you're talking about people who are suffering severely, both sort of emotionally, people are having difficulties with the – at home because of the amount of work that they had to do, they're in on the weekends, they're in after hours. I mean, my comments were made – I think some people interpreted them as me advocating for more resources for the OIPC, which was never the case.

I was advocating for additional resources in the system, and frankly also that the coordinators be put in a position that the statutory review committee, if you look – I can't remember the chapter, but basically said these people need actual real authority to do their job, and what we do (inaudible) that committee in terms of the importance of the role, the authority of the coordinators to sort of have a real voice, resembles nothing what it looks like, because it's basically still the same in my view as it was – their roles, their abilities, and their pressures – the same as was it before the (inaudible) committee recommendations.

MS. MUZYCHKA: Okay. So you are referring then to the increased workload that was brought about by the enactment of the ATIPPA, correct?

JUDGE MOLLOY: Yeah, so the – you know, after the government commendably accepted the majority – not all of the committee's recommendations, as I said we were going to put a very good piece of legislation, but you know, it's success led to – well, I'm not sure if it entirely led to, but it was a significant contributing factor in the 300 per cent increase in the number of requests that public bodies were receiving.

MS. MUZYCHKA: So, would legislating a duty to document affect that, in your view? Would it add to the expense?

JUDGE MOLLOY: The record – the – right now people are – the massive quantities of records that people are sort of (inaudible) responsive – we go through them. Frankly, many times they – they have nothing of consequence in them. People want to know why particular decisions were taken, what particular actions, what – you know, with respect to government grants, government work. All these various things and if you actually have a document which – which contains recorded reasons why these actions were taken, in my experience dealing with (inaudible) most applicants would be delighted to have that. Because they're not combing through hundreds of pages of stuff trying to find the little nugget that might enable them to surmise why a particular decision was taken.

MS. MUZYCHKA: So what I'm hearing – and I'm having some difficulty hearing you clearly – but if I got what you said correctly, is that by having more documentation say of decisions and other significant matters, it could streamline processes so that people who are tasked with having to obtain the relevant documents for an ATIPP review would have more streamlined process because they'd be able to zone in on the relevant information if – if – is that what you were saying?

JUDGE MOLLOY: Well, people want to know why decisions actually were taken whether it's, you know, awarding business or whether it's a policy change.

MS. MUZYCHKA: Rather than –

JUDGE MOLLOY: (Inaudible) combing through hundreds of pages of documents. I mean, most people just want the record of why

the decision was taken. That's why, you know, (inaudible) resolution is successful because if you could say to somebody, look, this is the document that has the answer, do you really need the other 400 pages that are just dribs and drabs and sort of – (inaudible). I think most applicants would say, yeah, I just want to see the paper, the document, the record that says why a particular decision was taken.

MS. MUZYCHKA: Okay. I don't –

JUDGE MOLLOY: You know, government had (inaudible) other things either in terms of – Section 1 – I think it's 1.11 or 1.12 of the ATIPPA requires the government to – each department to basically have a list of that information that's available (inaudible). You know, I particularly, personally – that was an important issue to me, I wrote the department repeatedly and asked for updates and we're (inaudible) five years out, coming up on the next review.

And to my knowledge that still hasn't happened despite the fact that the LTC was supposed to initiate that work, and again provide – with its obligation within six months of the (inaudible) claims and still waiting on government and (inaudible) getting put off every time you make inquiries of them.

MS. MUZYCHKA: Okay.

Thank you, Judge. I don't have any further questions for you but perhaps there will be questions by other counsel.

THE COMMISSIONER: All right, the Province of Newfoundland and Labrador.

MR. RALPH: Good afternoon, Judge Molloy. Peter Ralph for the Province –

JUDGE MOLLOY: Good afternoon –

MR. RALPH: – of Newfoundland –

JUDGE MOLLOY: – afternoon –

MR. RALPH: – and Labrador.

JUDGE MOLLOY: – Mr. Ralph.

MR. RALPH: It's nice to speak to you again.

JUDGE MOLLOY: Yes.

MR. RALPH: Judge Molloy, I guess you'd agree that, I guess, the management of information and the storage of information costs money.

Would you agree –

JUDGE MOLLOY: I'm –

MR. RALPH: – with that –

JUDGE MOLLOY: – sorry –

MR. RALPH: – statement?

JUDGE MOLLOY: – could you repeat that?

MR. RALPH: Would you agree that –

JUDGE MOLLOY: (Inaudible.)

MR. RALPH: – the document management and storage of information and documents costs money?

JUDGE MOLLOY: Costs money?

MR. RALPH: Yes.

JUDGE MOLLOY: Sure, inevitably costs money.

MR. RALPH: So, any dollars spent, for example, on document management means it's a dollar that can't be spent on hospital beds, schools or roads.

Would you agree with that?

JUDGE MOLLOY: No.

You know, that –

MR. RALPH: Is there some sort of multiplier effect? I'm not sure –

JUDGE MOLLOY: A minister says to me, well, you know, if you continue to complain about resources I'll just tell people well, it means, you know, we have to take ambulances

off the road. Frankly, government enacted ATIPPA, it's the law of the land, and for to use that example as to tell people that they have to choose between accountability and transparency, and health care is in my view, a resort to hyperbole and it's an inappropriate example.

MR. RALPH: I asked – I didn't ask you that actually but if you want to keep pontificating that's your choice, but I asked you if –

THE COMMISSIONER: Take it easy now Mr. Ralph. He's not pontificating. What do you mean he's pontificating?

MR. RALPH: Commissioner, I asked him –

THE COMMISSIONER: No –

MR. RALPH: I asked him –

THE COMMISSIONER: – well he –

MR. RALPH: – a very –

THE COMMISSIONER: – just gave –

MR. RALPH: – simple question. I asked –

THE COMMISSIONER: You know –

MR. RALPH: – him a very –

THE COMMISSIONER: – and he just gave –

MR. RALPH: – simple question –

THE COMMISSIONER: – and he just –

MR. RALPH: – then he went off.

THE COMMISSIONER: – and he just gave you an answer. It's not pontificating. He gave you an answer.

MR. RALPH: That's fine, if you're gonna let the witness ramble as he pleases, that's fine.

JUDGE MOLLOY: Throughout –

THE COMMISSIONER: It depends what –

JUDGE MOLLOY: – the –

THE COMMISSIONER: – you mean – just a minute now.

I'm a little surprised by this. I've asked this witness to testify at this Commission of Inquiry; he gave answers to questions; you're now asking him questions, for some reason you seem to be a little upset with him.

Like, just cool it and ask your questions and he'll answer the questions and we'll move on from then. It's no – there's no –

MR. RALPH: That's fine.

THE COMMISSIONER: – no issue.

MR. RALPH: That's fine.

THE COMMISSIONER: Okay.

MR. RALPH: So, I mean, obviously you would agree, Judge Molloy, that you don't want to spend money on documents that you don't need to keep.

JUDGE MOLLOY: Sorry?

MR. RALPH: You don't want to spend money on documents that you don't want to keep – that you don't need to keep.

JUDGE MOLLOY: No. And that's the beauty of an appropriate information management system is that it enables you to discard according to the system's retention schedule, of documents that have no value, that don't need to be kept.

MR. RALPH: And that's the purpose of creating a management system, is to do just that. And my point being, that costs money and the money you spend on that means you can't spend it on other things.

JUDGE MOLLOY: We, you know – budgetary exercise, from my experience, Mr. Ralph, is always an exercise of balancing and deciding in a – you know, where you're going to put resources and where you can't, I mean. But my point is that, you know, government chose to enact the ATIPPA, it imposes legal obligations, you know, it's like saying, oh, I'm gonna drive around on bald tires because I can't afford new tires, but – you know, government decided to

put this legislation in place, it – nobody can disobey the law, disregard the law simply because, you know, we say it's too difficult or too expensive.

MR. RALPH: I'll ask it differently. If I spend $10 on document management, can I then spend – that same $10 somewhere else?

JUDGE MOLLOY: Obviously not, Mr. Ralph.

MR. RALPH: That was my question. Thank you.

Now, access to information also costs money. That type of regime costs money. Is that right?

JUDGE MOLLOY: Undoubtedly.

MR. RALPH: And your office when you were Privacy Commissioner, the last year that you were there, can you recall what that budget would've been?

JUDGE MOLLOY: $1,200,000, $1,300,000 – in that range.

MR. RALPH: $1.3 million?

JUDGE MOLLOY: In that range, yeah.

MR. RALPH: Okay.

JUDGE MOLLOY: You probably have the actual figure.

MR. RALPH: Now, Judge Molloy, if we could, I'm gonna take you to an exhibit, it's Exhibit 04499.

JUDGE MOLLOY: Just bear with me for one second, Commissioner. 04499?

THE COMMISSIONER: Tab 21.

JUDGE MOLLOY: Appears to be an excerpt from Hansard?

MR. RALPH: Yes, and go to page 26.

JUDGE MOLLOY: Sorry, just bear with me.

Page 26 of 60?

MR. RALPH: That's right, I believe.

JUDGE MOLLOY: Yes, I'm there.

MR. RALPH: I'm trying to find the quote.

I'll read the quote for you. It's here in this – in here, but the quote is from Steve Kent who was the minister which introduced the legislation in April of 2015, the new legislation, the ATIPPA Act – ATIPPA legislation.

And he said in the House of Assembly: "Mr. Speaker, the decision to accept all recommendations in the report and to move quickly on bringing this legislation forward is more evidence of this government's commitment to increasing transparency and accountability. It is also consistent with government's broader commitment to open government. The act is not intended to simply address amendments that we made in 2012; rather, it is a new approach to access to information and protection of privacy now only in Canada, but internationally."

Now, would you agree with that statement, that it's a new approach to protection of privacy?

JUDGE MOLLOY: Really – obviously, it was a new approach and it's – in my view, as I started earlier, I think it resulted in Newfoundland and Labrador having, perhaps, the best piece of access to information legislation in Canada and, perhaps, the world, you know. The – we – I've regarded it as – my dealings with other jurisdictions – you know, we got consulted a lot because, frankly, there were jurisdictions that – I use "envious" advisedly but, sort of, to – would like to have some of the aspects of the current ATIPPA regime.

MR. RALPH: Now, the act itself arose out of the report that was done by former Justice Clyde Wells. Is that right?

JUDGE MOLLOY: Yes, with – if I recall correctly – Graham Letto and Jennifer Stoddart.

MR. RALPH: And, I understand that that report was given to government in March of 2015?

JUDGE MOLLOY: Yes. Well, I think about that time, it was set very quickly and it did came into force in June of July of that year.

MR. RALPH: The – there isn't exact date in the report, it says March 2015, I believe.

JUDGE MOLLOY: All right, yeah. That sort of trend turn – you know, I – I'm familiar with it but not to that degree.

MR. RALPH: Now, if we could go to Exhibit 04517.

JUDGE MOLLOY: All right, yeah. Just bare with me for a second.

THE COMMISSIONER: Tab 39.

JUDGE MOLLOY: 04517?

MR. RALPH: Yes.

JUDGE MOLLOY: The document entitled Improving Access to Information?

MR. RALPH: Yes.

JUDGE MOLLOY: Okay.

MR. RALPH: (Inaudible) scroll down. So the date here – it's from the Executive Council – go back to the top again just for a moment, sorry. It says: Executive Council March 3, 2015. Improving Access to Information. And if we go down, it's – "The Provincial Government will implement the recommendations contained within the… Review Committee's Independent Statutory Review…."

So it's a bit surprising to – you've got a document – actually, there was two, I believe, sections to the report and I think one of them certainly was close to around 400 pages. And it appears as though within a very brief period of time, the government at that time accepts all the recommendations without question, in that report. Is that your understanding?

JUDGE MOLLOY: Yeah, I mean it to – it was an extremely positive development in my view and in the view of many other stakeholders in Newfoundland and Labrador.

MR. RALPH: Now it may be, I suggest, a good idea to accept this act, but I would have thought that as a government, your responsibilities certainly would be, perhaps, give it deep consideration, and I'm not sure if that could happen in a couple of days. Would you agree with that?

JUDGE MOLLOY: You think government didn't have adequate time to review it?

MR. RALPH: It certainly raises a question here, I would suggest. You advise the public on the 3rd of March that you're accepting everything in this report, all the recommendations, and the report is dated March. So, there's no reason to believe they – that they've had it for more than a couple of days.

JUDGE MOLLOY: Well, you know, I – there are – in some discussion of it in the Hansard excerpts and – frankly, I think it was an incredibly strong report, it was a very credible report, and because it had laid out, basically, a draft bill, you know, there's not a lot of discussion in Hansard or elsewhere about it because it was unlike, sort of, other reviews. It did produce a product that was capable of being put in place almost immediately and explained the rationale. So our view was that government, obviously, accepted the rationale, which was quite detailed in the report.

MR. RALPH: So, in your estimation, this is an example of good public policymaking. Is that right?

JUDGE MOLLOY: Mr. Ralph, I stand – the report, to my view, was a very good report. And, you know, I don't know if it's a good public policy. I can't speak to Mr. Kent's mindset. I can't speak to anybody's mindset, but I believe it was a unique situation where the review committee actually offered a suggested bill, with detailed rationale, and the government, because of that, accepted it entirely.

MR. RALPH: So then what the government at the time did was, it introduced legislation, I think it was April 22.

JUDGE MOLLOY: So I was in the government at the time. I believe everybody endorsed with the – every member of the House

of Assembly endorsed the proclamation of the act as set out by the committee.

MR. RALPH: That's fine. But I'm talking about the responsibility of the government now; I'm not talking about the responsibility of the opposition parties.

So the report comes in March of 2015, which is the final month of the budget year 2014-2015. Is that right?

JUDGE MOLLOY: Normally, yeah.

MR. RALPH: And then, it's introduced into the House in April of 2015, which would be the first month of the fiscal year 2015-2016.

JUDGE MOLLOY: Okay.

MR. RALPH: To your knowledge, do you know if that government committed any money – any new resources toward the introduction of this new bill in the budget for 2015-2016, which would've been – come in the spring of 2015?

JUDGE MOLLOY: I have no idea, Mr. Ralph. I – there was only – to be honest, my interest in the act and workings of it out really came into focus on my appointment in July of 2016.

MR. RALPH: Now perhaps we can go – the actual – the bill, I think, became law on – or assented to on June the 1st, 2016.

And now perhaps we can go to Exhibit 04470.

THE COMMISSIONER: 04470.

JUDGE MOLLOY: 04470?

THE COMMISSIONER: Tab 2.

JUDGE MOLLOY: That appears to be Volume 2 of the statutory review committee's report?

MR. RALPH: Yes, that's right.

JUDGE MOLLOY: Yeah, because of our connectivity issue, it must be a sizeable document; it's taking an excessive amount of time. It's very slow to download.

MR. RALPH: And I'm not quite sure of the page in the exhibit, but the page in the report that I'm looking for is page 339.

JUDGE MOLLOY: The end of Chapter 10, I believe?

MR. RALPH: Yes, that's right. Or, actually, no. It's – I'm sorry – it's after 11 and it's called "Recommended Statutory Changes." If you can keep doing down –

JUDGE MOLLOY: (Inaudible.)

MR. RALPH: Oh, hold on. I'll get – you're just – 339. So keep going.

JUDGE MOLLOY: Sorry, I'm having trouble hearing you, Mr. Ralph. I apologize.

MR. RALPH: I'm sorry. I'm pulling away from the microphone. Is that better?

JUDGE MOLLOY: Yes, it is.

MR. RALPH: So we can go down to 339.

JUDGE MOLLOY: Page 339?

MR. RALPH: Yeah – in the document. There we go. Okay, great. Thanks – go to the top here.

So now the –

THE COMMISSIONER: So that'll be page 348 in the exhibit –

MR. RALPH: Sorry.

THE COMMISSIONER: – so I'm not sure if he has the document or the exhibit.

MR. RALPH: Fair enough, yes.

JUDGE MOLLOY: I'm referring –

MR. RALPH: Is it –

JUDGE MOLLOY: – I opened up the exhibit. So on the exhibit it's page 248?

MR. RALPH: 348.

JUDGE MOLLOY: Oh, 348.

MR. RALPH: Yes.

JUDGE MOLLOY: Ah, yes. I'm on that page.

MR. RALPH: And it's a chapter entitled "Recommended Statutory Changes."

So what the committee did was it prepared a draft bill, and I understand that bill was accepted without any substantive changes to it and it passed in the House. Is that your understanding?

JUDGE MOLLOY: I agree.

MR. RALPH: And on the right-hand column here – we'll start at the top – it says: "The Committee recognizes that it … made recommendations involving a wide variety of changes" in "statutory provisions and to the existing approach to providing access to publicly held information and protection of personal information held by public bodies. Implementing those changes will likely result in substantial adjustment to existing practices and procedures of public bodies and the Office of the Information and Privacy Commissioner, and may well involve some increase in cost to Government."

Keep going down. Scrolling down. Sorry. Back up. Sorry. Sorry. Right here. Great.

JUDGE MOLLOY: So what paragraph are you on in that –

MR. RALPH: See where it says now, "The Committee was sensitive"? "The Committee was sensitive to those possibilities"?

JUDGE MOLLOY: On page 339 of the report?

MR. RALPH: Of the report. Yeah.

THE COMMISSIONER: So the second full paragraph in the right hand column.

JUDGE MOLLOY: Okay.

MR. RALPH: And it says: "The Committee was sensitive to those" –

JUDGE MOLLOY: (Inaudible.)

MR. RALPH: – can you see it?

JUDGE MOLLOY: Yup.

MR. RALPH: "The Committee was sensitive to those possibilities when it was considering the information before it and the recommendations it would make. However, the Committee's mandate included making recommendations that would produce a user-friendly statute which, when measured against international standards, will rank among the best."

Again, you would agree with that statement?

JUDGE MOLLOY: (Inaudible.)

MR. RALPH: That the bill – the act ranks among the best in the world?

JUDGE MOLLOY: In my opinion, yes.

MR. RALPH: "This we have endeavoured to do."

Keep doing down a bit.

So: "It may be necessary to implement the recommendations in stages, in order to allow time for development of new or significantly adjusted practices and procedures, or … making of budgetary decisions for any increased costs. That is a policy decision for Government and not a matter on which the Committee should make further comment."

Now, is that your understanding of what happened? That this was adopted in stages? Or was it just adopted?

JUDGE MOLLOY: It was – my recollection is it was the legislation itself was adopted, you know, fairly quickly. I think any adjustments that government made in terms of, you know, resourcing and putting in place systems, getting the ATIPP office set up, getting, you know, manual – I think those things took place in stages.

MR. RALPH: So when did the legislation become – I understand it was June 5 – 1, 2015. Is that your understanding?

JUDGE MOLLOY: Yes.

MR. RALPH: And to your knowledge had sufficient resources been put at the disposal of other people that were doing the document management and the access to information?

JUDGE MOLLOY: I think in – I would answer that I think it was unclear at the time but in retrospect, given the increase of, you know, 300 per cent in the requests that obviously the answer is no.

MR. RALPH: Now, if we could go to Exhibit 04497

THE COMMISSIONER: Tab 19.

JUDGE MOLLOY: Yes, it's a – appears to be an article referencing my comments about the workload of the ATIPP staff.

MR. RALPH: So then in October 2017 now – so this is quite some time after this act is adopted – we're still in a situation where there's insufficient resources for the work that has to be done under the act. Is that correct?

JUDGE MOLLOY: Yeah, in light of the – at that time it was the – the increase had only been, it appears from the article, about 140 per cent. There was nowhere near any corresponding increase in resources.

MR. RALPH: Now, Judge Malloy, as you know, the duty to document was one of the recommendations in the Statutory Review Committee. Is that correct?

JUDGE MOLLOY: Yes, in chapter 10.

MR. RALPH: And that recommendation was accepted by the Government of Newfoundland and Labrador.

JUDGE MOLLOY: Yes.

MR. RALPH: And to your knowledge, has any subsequent governments disavowed that acceptance of that recommendation?

JUDGE MOLLOY: No I mean, my understanding from, again, my dealings with OCIO, that it's certainly in contemplation and they've been studying it. I think they may have, in fact, had some various meetings with their, you know, various information managers and others in executive of various departments, and it's something I believe is in consideration. In terms of its stage of development, that's something that I'm not aware of.

MR. RALPH: Now, you were – I believe you would've been director of Public Prosecutions when that legislation came into effect.

JUDGE MOLLOY: I was.

MR. RALPH: 2015? And did that have –

JUDGE MOLLOY: I was.

MR. RALPH: – any bearing on your functioning or that department's functioning, that section's functioning?

JUDGE MOLLOY: (Inaudible.)

MR. RALPH: The new act?

JUDGE MOLLOY: I guess, you know, I was pretty – in terms of the Public Prosecutions, because of the, sort of, the sections that address what – I'm not sure now if it's section 5 or section 9; I don't have it in front of me – but there was much about Public Prosecutions's work that wasn't subject to ATIPPA and/or (inaudible). So it did not impact my division as much as some others, which I know, for example, Public Safety is one example, I think.

It got a lot – you know, it impacted a lot more because of the decrease in requests concerning aspects of their business, in which one example, I think, would be, if I recall, the penitentiary as a focal point of many requests.

MR. RALPH: And can you describe, for the Commissioner, why the impact was so dramatic on, I guess, departments and employees of the government?

JUDGE MOLLOY: I think – I mean, the simple answer, I think, is simply because, you know, if you look at the years since the act first came into play, there was – the workload was fairly standard.

I believe the news coverage of the committee's work and high profile that it got, frankly, tuned a

lot of people into access to information in general. And, you know, that combination of, sort of, public knowledge, together with a very good act, perhaps, it should have been anticipated that the number of requests would go up substantially. But, you know, over 300 per cent there – I'm not sure what the exact – but it's, you know, high 200, 300. I don't know if anybody reasonably could or should have anticipated that.

MR. RALPH: So if we could, we can go – if we – Madam Clerk, if we go to Exhibit 04504.

JUDGE MOLLOY: (Inaudible.)

THE COMMISSIONER: Tab 26.

JUDGE MOLLOY: Yes.

It looks like a note to Bernard Coffey?

MR. RALPH: That's correct, yes.

This is – you haven't seen this document before, have you?

JUDGE MOLLOY: No.

MR. RALPH: And so it's a document entitled regarding Duty to Document.

JUDGE MOLLOY: Yes.

MR. RALPH: And it states: "The OCIO advised that a presentation was provided to Ministers Bennett and Coady …." And what's OCIO, Judge Molloy?

JUDGE MOLLOY: Office of the Chief Information Officer.

MR. RALPH: And so it says that there was a presentation provided by an information officer to Ministers Bennett and Coady in August and September of 2016 time frame.

JUDGE MOLLOY: (Inaudible.)

MR. RALPH: And so this is – and this is written by Nina, and I believe that's Nina Goudie, who would've been the information manager in Cabinet Secretariat.

JUDGE MOLLOY: Yes, I'm familiar with Ms. Goudie.

MR. RALPH: And perhaps we can go to tab 6 – or, sorry, page 6 of that document.

JUDGE MOLLOY: Okay.

MR. RALPH: And this is – top of the page says: "Proposed Legislative Language to accommodate Duty to Document – *Management of Information Act*." And it created a section 4, which is duty to document. And "4(1) Every public body shall create such government records as are reasonably necessary to document the conduct of its affairs; 4(2) Implementation and operation of Section 4(1) is subject to monitoring or audit and report to the House of Assembly by the Office of the Information and Privacy Commissioner."

And 8(1) creates an offence: "A person who wilfully fails or refuses to create a record as required under this Act may be subject to discipline as directed by the head."

JUDGE MOLLOY: Yes, I'm reading that.

Okay.

MR. RALPH: Were you familiar with that language before that proposal?

JUDGE MOLLOY: I have no recollection (inaudible) seeing that word in (inaudible) –

MR. RALPH: Is that the type of language that you're advocating for in terms of a duty to document?

JUDGE MOLLOY: I think it's – that's the (inaudible) I would prefer, I think – I would advise, I guess, something closer to the wording of Section 19 of BC's Information Management Act which, you know, refers to, if I recall correctly, you know, the – I can't remember now. It referred (inaudible) the decision that impacts, you know, say, a person or the operations of a public body, decisions about changes in policy procedures. I think it would be best to enumerate, as much as possible, what they could be in terms of an inclusive definition, but – providing more guidance than what is in that document that I'm looking at there now.

MR. RALPH: I had difficulty hearing you on that.

JUDGE MOLLOY: I guess, I don't – you know, it would be better than the current situation, Mr. Ralph, but I think it's a little vague and I think they should have specific examples of the types of things that have to be documented as is set out in Section 19 of BC's act.

MR. RALPH: Okay.

Now, if we can go to Exhibit 04505.

THE COMMISSIONER: Tab 27.

JUDGE MOLLOY: It's the document dated June 28, 2017?

MR. RALPH: That's correct, yes.

And on page 2 there's a document – I'm not quite sure – it's entitled a memo and it's from Ellen MacDonald who –

JUDGE MOLLOY: Mm-hmm.

MR. RALPH: – I guess was the chief information officer at that time. Were you familiar with Ms. MacDonald?

JUDGE MOLLOY: Yes.

MR. RALPH: And it's written to Elizabeth Day. At the time she was the acting clerk and now she is the clerk of the Executive Council.

JUDGE MOLLOY: Yes.

MR. RALPH: And it's discussing, again, the duty to document.

JUDGE MOLLOY: (Inaudible.)

MR. RALPH: And the chief – and the sort of third paragraph up from the bottom, starts off: The Office.

JUDGE MOLLOY: Yes.

MR. RALPH: "The Office of the Chief Information Officer (OCIO) appreciates the importance of this recommendation," and that's the recommendation in the Statutory Review Committee regarding the duty to document, "and is continuing its work to implement this duty, which includes research, consultation, as well as understanding the cost and required resources to implement this across in excess of 150 departments, agencies, boards and commissions.

"*In Newfoundland and Labrador, the Management of Information Act* (MOIA) already had an existing requirement for the head of a public body to develop, implement and maintain a record management system for the creation, classification, and retention ... of government records. (Section 6(1))

"Work completed to date includes a jurisdictional review of provinces, the federal government and some international jurisdictions to see what's in place and how it is implemented; drafted policy instruments in support of possible legislative change; consultations with IM Directors on a possible approach; proceeding with improving IM practices in Government and will focus on the legislative change some time in the future."

So this is the – the chief information officer is telling the clerk that we're working towards this but there's some things that we have to do first, and one of those things says "improving IM practices in Government." So IM would be information management. Is that correct?

JUDGE MOLLOY: That's my understanding, yes.

MR. RALPH: And on the top here we've got a handwritten note on the first page. Do you see that? Well, it's actually page 2.

JUDGE MOLLOY: Yeah, it appears –

MR. RALPH: It says Nina.

JUDGE MOLLOY: – (inaudible) question to Nina.

MR. RALPH: Is minister –

JUDGE MOLLOY: (Inaudible.)

MR. RALPH: – and minister, that's M-I-N but I'm assuming that is: Is Minister Bennett aware?

"Is this approach satisfactory, from her perspective?" Should an info note be substituted [sp. submitted] to PO? Now, the PO, would that be the Prime Minister's Office – I'm sorry, the Premier's office?

JUDGE MOLLOY: My understanding of this sort of acronym is that this is the Premier's office.

MR. RALPH: And perhaps we can go to page 5 of this document?

JUDGE MOLLOY: Okay.

MR. RALPH: And there's – it looks like a sticky note is on that page, and I believe (inaudible) May 11, 2017, and it says "on hold per Minister."

JUDGE MOLLOY: Okay.

MR. RALPH: Moving forward "on improving practices, forms, etc. Ellen had discussion" with "W/PC." Any idea who PC might be?

JUDGE MOLLOY: It could be me.

MR. RALPH: So if we go to –

JUDGE MOLLOY: (Inaudible.)

MR. RALPH: – 04503 –

JUDGE MOLLOY: As I already said though, Mr. Ralph, you know, I already acknowledged discussions with OCIO and the work that I was told by them that was being done and – it was simply a matter of there was no definitive timeline and – or understanding as to when it might be done. But I acknowledge and have acknowledged that work was being done with a view to identifying what was necessary to implement the recommendation in terms of a duty to document.

MR. RALPH: If we could go to Exhibit 04503.

THE COMMISSIONER: Tab 25.

MR. RALPH: And so this – have you – do you have that, Judge Molloy?

JUDGE MOLLOY: Okay, sorry, my – the – whatever it is – the kiteworks timed out on me.

Apologies, Mr. Ralph. The number again, please?

MR. RALPH: 04503.

JUDGE MOLLOY: Entitled CIMFP Exhibit P-04503, page 1?

MR. RALPH: Yes, that's right.

JUDGE MOLLOY: Yeah.

MR. RALPH: So this appears to be, I guess, a note. Betty Day had suggested to Ellen MacDonald that a note be drafted for the prime minister's office. And it appears to be this is – this – where this information note is going. And you can see, actually, the distribution list up on the right-hand page here.

JUDGE MOLLOY: Yes.

MR. RALPH: And so you've got Premier, Greg Mercer and some other officials.

JUDGE MOLLOY: (Inaudible.)

MR. RALPH: So it appears as though this is just the prime minister's – Premier's office, sorry – and not Cabinet.

And again –

JUDGE MOLLOY: (Inaudible.)

MR. RALPH: – this is a discussion about what's happened with the duty. And just going to go to the page 2.

JUDGE MOLLOY: Okay.

MR. RALPH: And at the bottom there it says Action Being Taken: "The OCIO has begun a series of activities to improve awareness and IM practices in Government including the following:

"IM Evaluation – a formal process which builds on a prior assessment that evaluates IM program growth in all departments, specific feedback on

strengths and weaknesses and plans to improve IM are provided;

"Awareness – a formal notification to all public bodies of their requirements under the *Management of Information Act* and to notify them of available tools to build their IM programs; and,

"Enhancing Tools – updating and providing training on practices and guidance surrounding the requirement to create records.

"Once these core elements have been put in place, a line of business review will likely be required by all public bodies to allow them to clearly define and understand their records and establish practices around documentation.

"Subsequently, the legislation would be drafted and training and awareness activities would be implemented."

So, again, I know you're acknowledging that the government is committed to doing this, but what I'm doing, I guess, Judge Molloy, is pointing out what has been done in that regard by the government. And, again, we got a situation that is –

JUDGE MOLLOY: Which I've already acknowledged. I mean, not sure what the issue is. I'm acknowledging that the – that work is being done, but my understanding is that it's, in terms of timelines, like, there are no set timelines and that it's – you know, while work has been done, it's one of those things that often takes a back seat to other operational priorities. So, you know, it's one thing to be doing work, but the proof of the pudding is in the eating, and there's no indication as to when it might actually happen because they're not even yet satisfied with their information management systems, which also adds to the work of coordinators and, you know, you have issues with your IM program.

MR. RALPH: Thank you.

So, up in the top there it says Analysis. Do you see that? Top of page 2.

JUDGE MOLLOY: Yes.

MR. RALPH: And it talks about challenges that were identified. So one was: "Little precedent – there are few cases of implementation of this as a legislated duty, therefore rollout to the affected Public Bodies would take time …." And so that was 2017, and I think at that point there would've been no precedents of this.

JUDGE MOLLOY: No Canadian precedents. I'm not sure of (inaudible).

MR. RALPH: Are you aware of international precedent?

JUDGE MOLLOY: Not off the top of my head, no.

MR. RALPH: So it might be an accurate comment that there's no precedents for legislative duty?

JUDGE MOLLOY: I'll say, from my knowledge, there's no Canadian precedent.

MR. RALPH: But you're not aware of an international one?

JUDGE MOLLOY: I'm not aware of any international –

MR. RALPH: And the last bullet in that section is: "Cost – the OCIO estimates the cost of implementation to be approximately $4.3 million, including an initial set-up" cost "of $2.4 million, and on-going incremental operating costs of $2 million."

JUDGE MOLLOY: Yes.

MR. RALPH: So were you aware that the cost of implementing that duty, the duty to document, was costed at $4.3 million? Had you heard that figure before?

JUDGE MOLLOY: No.

MR. RALPH: Now, Judge Molloy, so 2015 the act comes in and then, I guess later that fall or the beginning of winter in 2015, there's a change of government, and the Liberal Party assumes power and Premier Ball becomes the Premier. You aware of that?

JUDGE MOLLOY: Sorry?

MR. RALPH: In 2015 –

JUDGE MOLLOY: Can you step closer to your microphone, please? I'm having trouble hearing you.

MR. RALPH: Okay. I apologize, Judge Molloy.

In 2015, the Liberals assume power in Newfoundland and Premier Ball became the Premier.

JUDGE MOLLOY: I thought it was early 2016, but I think the election was in November 2015.

MR. RALPH: That's close. The exact time doesn't really matter.

And I understand, shortly after getting into power, they announced that there were certain financial challenges with regard to the budgetary issues facing the province. Were you aware of that?

JUDGE MOLLOY: I think everybody in Newfoundland was aware of it. And to say challenges is a bit of an understatement –

MR. RALPH: So you –

JUDGE MOLLOY: – according to my recollection.

MR. RALPH: – you are aware of that then, were you?

JUDGE MOLLOY: Yes.

MR. RALPH: And so I understand in the Budget 2016, in fact, there were cuts to the civil service. Is that right?

JUDGE MOLLOY: Yes. As my recollection is there were cuts, including cuts to Public Prosecutions.

MR. RALPH: I'm sorry?

JUDGE MOLLOY: So are you talking about 2017?

MR. RALPH: 2016.

JUDGE MOLLOY: 2016. Yeah, there were cuts – I'm not sure if there were cuts to most of the – I don't recall significant cuts that were, you know – because I think the – if I recall correctly, it was one of the commitments to process of attrition and not replacing people that were leaving as opposed to just cutting people en masse, but I could be wrong.

MR. RALPH: Right. And that's what – I think you might be correct. I think basically what they did, they didn't fill vacant positions. In fact, they may have eliminated vacant positions, but they didn't let people go. Is that your recollection?

JUDGE MOLLOY: It is.

MR. RALPH: And if we can go now to 04488?

THE COMMISSIONER: 04488. Tab 9.

MR. RALPH: And this is a document created recently by the current OCIO chief –

JUDGE MOLLOY: Okay.

MR. RALPH: – Dave Heffernan. Do you know Mr. Heffernan?

JUDGE MOLLOY: No. I never had the pleasure of meeting him. His appointment was – I don't think it was much in advance of my departure for the Northwest Territories.

MR. RALPH: So the – if we go to page 2 on the duty of document.

JUDGE MOLLOY: Yes.

MR. RALPH: And that the – the last bullet on the page, it says: "The OCIO completed an analysis and based on the following findings recommended delaying implementation until a future date:

"ATIPPA, 2015 Implementation – departments, and subsequently the Office of the Information and Privacy … identified difficulty in meeting the requirements of the new legislation, it was felt that a delay in implanting the DTD would allow more time for adjustment to the new Act and it was clearly noted that good IM practice leads to better ATIPPA outcomes;

"Resources – departments were struggling with sufficient staff to manage the ATIPPA implementation, many of the same staff support the IM program in public bodies – implementing both the ATIPPA and DTD at the same time was felt to be an unsuccessful approach."

So I guess that's the, I guess, the latest statement we have from government regarding the approach to the duty to document. And I guess to your point earlier, there's no indication of when they intend to do it, but the commitment still remains to do the duty to document. That's pretty clear. Would you agree with that, Judge Molloy?

JUDGE MOLLOY: Whatever it says is what it says. I'm still reading through it, but that's what it appears to say, I agree.

MR. RALPH: And if we look down to the middle of page 3, it states: "Financial – an assessment identified that to ensure a sufficient line of business review of records, the cost would be over $4 million."

And it says, "Penalties – the OCIO identified that significant review of the impacts of non-compliance would need to be discussed with human resource, policing (if criminal) and potential union representatives …."

So I guess there's a discussion there that, if what you're going to do in your – with your duty to document, if it had penalties for violations, then that's going to be a consideration with regard to policing, prosecutions and other things. Is that a fair statement?

JUDGE MOLLOY: Yes, I would compare it to the consequences in ATIPPA for violating privacy. The same sort of process.

MR. RALPH: Now, if we could go to 04512.

THE COMMISSIONER: Tab 34.

JUDGE MOLLOY: "Duty to Document Program Costs Estimates"?

MR. RALPH: That's correct, yes.

So this is a document that, again, was prepared by OCIO and it's a spreadsheet providing an estimate of the cost of duty to document. And perhaps we can go to page 3.

JUDGE MOLLOY: Okay.

MR. RALPH: And there's a table there and it says the estimated cost is $4,294,100; $4.3 million.

JUDGE MOLLOY: Yes.

MR. RALPH: Now, so, Judge Molloy, again, so we've got a cost estimate of $4.3 million and, you know, again, the government is committed to doing it, but I guess you're still faced with a situation that that money has to come from somewhere. And if you spend $4.3 million there, then it means you can't spend $4.3 million somewhere else.

Would you agree with that?

JUDGE MOLLOY: Yes, it's pretty obvious. But the government chose to accept the recommendation, so the difficult reality, then, is it has to deal with it. I mean, this wasn't imposed on government; they chose to accept it.

MR. RALPH: Yes, I understand that, and they're still accepting it.

If we go to – let me see, I may have this wrong, 04512? I think we've already been over that document.

THE COMMISSIONER: Tab 34, yes.

MR. RALPH: Yes, that's where we are right now, okay.

THE COMMISSIONER: Yeah.

JUDGE MOLLOY: 04512?

MR. RALPH: No, that's fine. I've already gone through that document. We're fine with that.

JUDGE MOLLOY: Oh, okay.

MR. RALPH: Now, Judge Molloy, so you've been paying some attention to what's happening in the Inquiry and, I guess, did you conclude that there were examples of information management problems by what you saw?

JUDGE MOLLOY: I mean, the perpetual references – the continual references to lack of documentation, lack of notes, I interpreted it as indicative of a recordkeeping issues of information management issues. In some cases, you know, there were simple examples where no records were kept, but I understand, either as the results of them, a number of examples where documents have been referenced, but have the inability to locate them.

MR. RALPH: And those conclusions, were they based upon your watching of the proceedings?

JUDGE MOLLOY: In part, but confirmation of many of the things I've viewed in doing investigations as Privacy Commissioner, I mean, it's part of the same thread.

MR. RALPH: No, but I'm asking you specifically now about the issues that have arisen within – in the course of the development and sanction, financing and oversight of Muskrat Falls that's come to light in this Inquiry.

JUDGE MOLLOY: Yes, I think the lack of records and being able to find records has significantly prejudiced the ability of the Muskrat Falls Inquiry and Justice LeBlanc to get at the truth of what occurred in regards to this project.

MR. RALPH: Okay. So your observations are with regard to the Inquiry itself and not necessarily the adoption of the Muskrat Falls Project as policy of the Government of Newfoundland and Labrador?

JUDGE MOLLOY: I don't know what policy of the Government of Newfoundland and Labrador – which one you're referring to, but it's hard to divorce my experience as Privacy Commissioner from my opinions regarding the document issues at the Inquiry because in – to a large extent, my opinions are informed by that experience. I, you know, I find it hard to keep them entirely separate.

MR. RALPH: Fair enough, but I guess, I mean, you're testifying at an Inquiry with respect to the Muskrat Falls Project. I mean you're not here testifying about –

THE COMMISSIONER: Actually –

MR. RALPH: – you know, access to information in general.

THE COMMISSIONER: Actually, he's testifying in Phase 3, looking to the future about recommendations that I may or may not make. It may relate to some of the evidence that was there. I don't think this witness is being asked questions specifically about the Muskrat Falls Project.

I think, you know, he – this was more general information related to recording of information, management of information, that sort of thing and what if anything – for me, what I'm looking at in Phase 3 is what if anything, perhaps, needs to change to improve the recordkeeping; the management of information, that sort of thing.

MR. RALPH: Quite divorced from the project itself?

THE COMMISSIONER: Correct. That's what Phase 3 –

MR. RALPH: I'm not sure – I don't understand how that would be –

THE COMMISSIONER: That's what Phase 3 –

MR. RALPH: – part of the terms of reference.

THE COMMISSIONER: That's what Phase 3 is about.

MR. RALPH: Yes, I know, but it still has to be about the project; it still has to be about the terms of reference. It can't be just – you can't decide –

THE COMMISSIONER: Correct.

MR. RALPH: – to look at things that are not part of the terms of reference.

THE COMMISSIONER: Correct. But this witness was not called as a fact witness with regards to the Muskrat Falls Project. I don't believe he's given any evidence that would indicate knowledge of what went on during the Muskrat Falls Project.

He's given evidence based upon – you've asked him if he's listened to some of the testimony, as did Ms. Muzychka, and he did and he's saying that's informing him of his opinion now, or whatever he's stating now, but I thought I just heard him say that it leads into what he experienced as well as an information – as the information officer, as the –

MR. RALPH: Yes. 'Cause I understood what he said was basically, what he heard arise in the Inquiry gave him concerns in terms of, you know, documentation that couldn't be found or records that couldn't be found –

THE COMMISSIONER: Correct.

MR. RALPH: – gave him concerns about your ability to do your job.

THE COMMISSIONER: Correct.

MR. RALPH: Right?

THE COMMISSIONER: Mm-hmm.

MR. RALPH: So that's the purpose of his – in part, of his testimony is that he is –?

THE COMMISSIONER: I'll tell you the truth: I didn't know he was going to say that. But, yes, it – you know, he said that. Now, whether or not I say the same thing is a different story, but I'm not exactly sure what it is that you're trying to do here, but, anyway, just ask your question because we got a lot of other counsel to come after you and –

MR. RALPH: I understand that.

THE COMMISSIONER: – once this witness is (inaudible) –

MR. RALPH: I understand that. I mean, this is a very important issue to the – to my client, Commissioner.

THE COMMISSIONER: Well, it's very important to me as well.

MR. RALPH: And, you know, we – I have not been told, actually, before today – or, actually, I was given a brief email on Sunday, I believe, with seven points in it regarding what Judge Molloy was going to testify about.

THE COMMISSIONER: Mm-hmm.

MR. RALPH: And, you know, so we have no objection to that. We're going to do our best to go through this 'cause we all want to finish week.

THE COMMISSIONER: Okay. So ask your –

MR. RALPH: But I – you know, again, I'm trying to find out –

THE COMMISSIONER: So you made your point, now ask your question so I can get to other counsel because we have to finish this witness today.

MR. RALPH: So, Judge Molloy, so how did it come to pass that you are – that you testified here at the Inquiry?

JUDGE MOLLOY: Before I was appointed as a judge, I reached out to the Inquiry simply to point out the observations that – in my view, I thought that there was a lack of perspective in terms of, you know, criticism – sometimes strenuous examination of some of the civil servants' failure to make records, failure to express contrarian views and issues with government record-keeping.

After I was appointed, Justice LeBlanc and the Commission staff asked me would I be willing to testify about it and frankly, at the end of the day, it was a decision, you know, that was informed by Newfoundland and Labrador is home. My family is there. I'm very – still vested in what happens there. And perhaps I'm in a unique position, although I don't know, in terms of being able to give a frank account of what I saw, without having to worry about any repercussions. And I can't be sort of any more direct than that, Mr. Ralph.

MR. RALPH: Now, one of the issues that's come up at the Inquiry is notebooks of civil servants. Are you aware of that issue?

JUDGE MOLLOY: Yes, I heard reference in testimony and in media coverage.

MR. RALPH: And I guess, in particular, we're dealing with three civil servants, each of whom indicated that they had taken notes, I guess, during important parts of the sanction and financing of Muskrat Falls. Were you aware of that?

JUDGE MOLLOY: Yes.

MR. RALPH: And I guess when it came time for them to testify they looked, or had the government look for their notebooks and we – and they couldn't be found.

JUDGE MOLLOY: That is my recollection, yes.

MR. RALPH: And I understand that the – some of the notes would've been taken in relation to cost estimates provided by Nalcor. Are you aware of that?

JUDGE MOLLOY: That's what's been reported.

MR. RALPH: I'm sorry?

JUDGE MOLLOY: That's – in the little bit that I've heard and also the media reports, yes, that's what I understand.

MR. RALPH: And we've heard evidence that the estimates were, I guess, being discussed in the context of decisions that were also being made by Executive Council in deciding whether the Government of Newfoundland and Labrador should enter in a completion agreement and an equity support agreement or guarantee. Were you aware of that?

JUDGE MOLLOY: In my – you know, my understanding relates to pre- and post-sanction and who knew what and at what time they knew it, or if they ever knew it at all. I mean, that's my general understanding of what some of the issues had been with respect to recent records.

MR. RALPH: If we can go to Exhibit 03940.

JUDGE MOLLOY: I don't have that but –

MR. RALPH: Oh, okay.

THE COMMISSIONER: He only has access to (inaudible).

JUDGE MOLLOY: But I mean (inaudible) going on.

MR. RALPH: I'll describe it. It's an Information Note which ultimately led to a minute-in-council. And it, in part, authorized the Finance minister to enter into an equity support guarantee, I believe, and also to enter in a completion agreement.

JUDGE MOLLOY: Okay.

MR. RALPH: And I think the evidence – and, again, I stand to be corrected, of course, by the Commission and others, but I suggest the evidence of the conversations that civil servants had was surrounding cost estimates, in part related to the ultimate decision made to enter into these agreements by the Executive Council. And I guess you would have no knowledge of that?

JUDGE MOLLOY: No, I mean –

MR. RALPH: But I'd ask you to accept that as, I guess, as I guess an assumption, for the purpose of my remaining questions.

JUDGE MOLLOY: I had – as Director of Public Prosecutions, there was no reason – with the limited exception, maybe issues surrounding the protests – I had no reason to have anything to do with or have any knowledge of the particulars of Muskrat Falls whatsoever.

MR. RALPH: Now, again, as sort of context for the couple questions that I'll have about this and some of the senior government officials said they could not recall if they were given a number, but if they were given a number, which was basically $6.5 billion, they perhaps would have written that down in notes in a notebook?

JUDGE MOLLOY: Sure, that's what they said.

MR. RALPH: You heard that?

JUDGE MOLLOY: Yeah.

MR. RALPH: And that these notes likely would've been taken during the course of

meetings with Nalcor officials and Cabinet ministers and perhaps the Premier?

JUDGE MOLLOY: One could hope, that they were taken.

MR. RALPH: Now if we could look at Exhibit P-04488.

THE COMMISSIONER: Tab 9.

JUDGE MOLLOY: It's in the process of downloading.

MR. RALPH: And page 277.

THE COMMISSIONER: You must have the wrong exhibit number.

JUDGE MOLLOY: 04488, yes I have it.

MR. RALPH: I'm sorry?

THE COMMISSIONER: 04488, did you say page what?

MR. RALPH: Two-hundred seventy-seven.

THE COMMISSIONER: You have the wrong exhibit. This one's – only has three pages.

MR. RALPH: Oh 04489, I'm sorry.

THE COMMISSIONER: Tab 10.

MR. RALPH: Two seventy-seven.

JUDGE MOLLOY: It's still downloading.

MR. RALPH: So, these are a policy or guidelines about what to do with officials who are – who, I guess, leave a position or retire. And we can concern ourself basically with 4.7.1, it says: Employee Initiated Termination.

JUDGE MOLLOY: (Inaudible.)

MR. RALPH: And I think if you go through this, it's clear that this section applied to all – to both – to all three of these – the people in question, would it be Charles Bown, Donna Brewer and Julia Mullaley?

JUDGE MOLLOY: Yeah, just bear with me, Mr. Ralph because this document has just downloaded; on what page?

MR. RALPH: Two seventy-seven.

JUDGE MOLLOY: Yes, I have it.

MR. RALPH: So actually we can stop at – start at the top there and it says, Transfer (New Position Outside the Department). See that?

JUDGE MOLLOY: Yes.

MR. RALPH: And – so this would apply to Charles Bown, who went from Natural Resources to Cabinet Secretariat.

JUDGE MOLLOY: Yes.

MR. RALPH: And – but it says refer to, "Section 4.7 Termination of Employment."

So basically what this section –

JUDGE MOLLOY: Mmm.

MR. RALPH: – is saying is when a person leaves the department, goes to another department, then you use the same procedure as you would with someone who's terminating employment with the government.

JUDGE MOLLOY: Yes, I've seen this document before.

MR. RALPH: And if we could – so go down to 4.7.1, Employee Initiated Termination.

JUDGE MOLLOY: Okay.

MR. RALPH: And so a: "Termination of employment occurs for many reasons. When an employee leaves government it is critical that the department retains its information so that it may be managed as required by the *Management of Information Act*."

Now, I won't go through all the requirements here. Perhaps we can go to the next page, 278?

And it says –

JUDGE MOLLOY: Okay.

MR. RALPH: – "Meet with the employee prior to departure to review the information that is in their possession to identify required activities including: Secure disposal of transitory records. Transfer and … disposal of government records as per departmental Records Retention and Disposal Schedules."

So it appears to me that what's supposed to happen is that an information manager in a department is supposed to meet with that employee who is being terminated or who's leaving and secure the disposal of transitory records.

Now in this instance, Charles Bown testified that he lent – left Natural Resources and went to Cabinet Secretariat and he left his notebooks at Natural Resources. And when – in anticipation of testifying, he asked the – for his notebooks and they couldn't be found.

Donna Brewer said that she had testified – or she retired on October 31, 2017. She testified that when she retired, she identified information that was transitory in her notes to an IM manager, expecting the notes would be destroyed as transitory. In her – in anticipation of her testimony, she asked for her notebooks, but they could not be found.

Julia Mullaley left Cabinet Secretariat in September 2016 and when she did, she passed her notebooks to an IM director in Cabinet Secretariat and told her that some of the notes may be transitory.

So it seems to me, in this situation, the proper procedure is basically followed in the case of Donna Brewer, but not in the case of Charles Bown or Julia Mullaley. Would you agree with that?

JUDGE MOLLOY: I mean, in part, that's what's supposed to happen. And I think it speaks to the weakness of government information management systems in general.

MR. RALPH: So what's supposed to happen: Someone from information management is supposed to meet with the employee and say, okay, we got to figure out now which records are transitory and which are government records. And I guess the thing is, the information manager would not be able to necessarily identify which records are transitory. Would you agree with that?

JUDGE MOLLOY: It would be difficult to without the input of the person who made the records.

MR. RALPH: Right.

So it is the responsibility of every employee of the civil service, whether you're working there or leaving, to identify transitory records and make – and secure disposal of them. Do you agree with that?

JUDGE MOLLOY: Yes.

MR. RALPH: So the only – the proper procedure was followed in relation to Donna Brewer. She identified the notes as transitory and they were – they apparently were destroyed. Now, I guess it's possible – we don't know what happened –

JUDGE MOLLOY: That assume that she's correct that they were all transitory.

MR. RALPH: I'm sorry?

JUDGE MOLLOY: You're assuming that she was correct in her assessment of them as transitory.

MR. RALPH: How would you determine otherwise if they were correctly determined to be transitory?

JUDGE MOLLOY: Well, the process speaks to review with the information manager or any person that's understanding of the concept of transitory, which I would expect an information manager to be well versed in and to understand as opposed to civil servants who might not understand the difference between a transitory and a non-transitory record.

And I go back to the earlier iteration of the OCIO policy, which, you know, (inaudible) – was unsatisfactory from our point of view. And for somebody without a knowledge or training in information management, it's difficult to apply. That's the whole point of reviewing the

documents as opposed to somebody simply saying, oh, this entire notebook is transitory.

MR. RALPH: So it's a – Donna Brewer testified that she identified the records as transitory. We don't know if she correctly applied the right definition of transitory, but that was her testimony.

JUDGE MOLLOY: Sure, I accept that. But I'm – you asked me, was it done correctly? And I simply added assuming that the analysis – her analysis was correct, which in my view ought to have been informed by discussions with the information manager.

MR. RALPH: Now, we're not sure what happened with the Bown and the Mullaley notes, and clearly that shouldn't happen. But certainly there's a possibility that someone identified them as transitory and destroyed them. And I think it's common within government to approach these types of notes as transitory. Would you agree with that?

JUDGE MOLLOY: Yeah, on a perhaps not adequately informed understanding of what a transitory record is.

MR. RALPH: Right.

So it's interesting here because we were dealing with the deputy minister and the clerk of Executive Council and to – both of whom apparently didn't follow the procedure that was outlined by OCIO. Would you agree with that?

MR. FITZGERALD: Commissioner, I don't know if that's a fair question to this witness with respect to all the evidence – he hasn't heard the evidence, and now Mr. Ralph is getting up, putting these suppositions to Judge Molloy. I mean, you know.

THE COMMISSIONER: I have no idea what we're talking about to tell you the truth.

MR. FITZGERALD: I don't either. This is Phase 3.

THE COMMISSIONER: But anyway, the thing is that, you know, I just want Mr. Ralph to finish so go ahead and ask your question.

MR. RALPH: Well, Commissioner, I mean, I was standing here and you were suggesting not very long ago that perhaps officials in government got rid of them once we caught wind of the Inquiry being called – with Donna Brewer's notebooks.

THE COMMISSIONER: That was in Phase 2 of the Inquiry; we're in Phase 3, looking forward. So you're going back to Phase 2. I'm trying to give you latitude. Ask your questions, and if the witness can answer the questions, he'll answer them.

MR. RALPH: Well, I would assume that looking forward, you look at what's in place now and I'm showing you what's in place now. I don't think – Inquiry counsel didn't come ask about our information management.

THE COMMISSIONER: Just ask your questions, Mr. Ralph.

JUDGE MOLLOY: I guess, Mr. Ralph – you know, I can't speak to Mr. Bown or Ms. Brewer or Ms. Mullaley. All I can say is a system of checks and balances – an appropriate system of checks and balances – you know, in the absence of, you know, a sudden termination for cause, which – or a sudden resignation, which would be the exception as opposed to the rule, appropriate systems assumes that the information manager, whose job it is, is proactively addressing these things and not leaving it to the employee in question because, frankly, even though their employees are supposed to be aware of all these policies, you know, if you do a poll, I suspect that a large number of people outside of information managers and ATIPP coordinators and similarly placed professionals would be unaware of these things.

I'm not saying that either of those three people were unaware; I'm just talking about, you know, my experience, if policy comes up after something has – something goes wrong or something goes missing, it's one thing to have a policy; it's another thing to support it and be proactive with this.

MR. RALPH: Now, Judge Molloy, the notes that were contained in these notebooks is – ultimately the information in those notebooks, those notes, were contained in presentations to

Cabinet. Would those notes then be considered transitory?

JUDGE MOLLOY: It's possible depending upon the degree of correspondence, but if the substance of the – of a record, an informal record, is contained in a more formal record that it retained, then that is a circumstance where content may be regarded as transitory.

MR. RALPH: Now, if we go to Exhibit 04489 – we're there, are we? Page 329. If we can scroll down a bit. Okay, just up a little bit here.

So, now this is not perhaps completely on point; it talks about a note to file.

JUDGE MOLLOY: Mm-hmm.

MR. RALPH: And I looked through and this is the closest, sort of, policy that I could find with regard to notes in a notebook, and if we could go to page 331.

JUDGE MOLLOY: 331?

MR. RALPH: Yes.

JUDGE MOLLOY: Okay.

MR. RALPH: Okay, just back up a little bit here. Okay, back down. Keep going. I'll see if this might be it right here.

So, it says, "Disposal" – it says – can you see that at the bottom?

JUDGE MOLLOY: Disposal, yes.

MR. RALPH: "… of a note to file is permitted when the public body has fulfilled its legal retention requirements:

"Disposal must comply with the Management of Information Act ….

"Disposal means either secure destruction, transfer to The Rooms Provincial Archives or in rare cases permanent retention by" the "department."

So, certainly, with regard to notes in a file, it would be rare that you'd retain those notes, according – this is the policy of information manager – management. And, well, what's your opinion about that statement?

JUDGE MOLLOY: It's (inaudible) I'm not sure we're on the same page. Which specific subheading or point – bullet point are you referring to?

MR. RALPH: Can you see at the bottom there it says disposal?

JUDGE MOLLOY: Disposal, yes.

MR. RALPH: And then "Disposal of a note to file is permitted …."

And then the second, sort of, bullet there says, "in rare cases permanent retention by" the "department."

So it's suggesting that notes would be rarely kept within government, because they would be considered – generally speaking, they'd be considered transitory.

JUDGE MOLLOY: I mean I don't know (inaudible) it talks about disposal of a note to a file.

MR. RALPH: No, fair enough. And, again, I recognize that it's not an exact, you know, guideline that applies, but it's the one that was most similar to the situation that we have before ourselves. And it did seem to be somewhat applicable, but that – I appreciate your point.

JUDGE MOLLOY: Yeah, it is but, you know, there's other policies that refer to what is transitory and what isn't. So I would caution anybody sort of – (inaudible) it comes back to the issue we had with the initial instant messaging policy. It's not – the format of a record is generally irrelevant; it's the content. And so, if you identify a format as transitory, it's very likely – it certainly increases the prospects of getting rid of records that are, in fact, not transitory, because it's the content, not the format.

MR. RALPH: Now, so these notes would've been created in November 2013, in that period. And as indicated before, they were likely taken in the midst of discussions with ministers and the premier, perhaps, regarding a decision that

was ultimately made in Cabinet and resulted in an MC. And what would be the status of that in terms of an exemption, if someone sought those notes though ATIPPA?

JUDGE MOLLOY: It potentially could – you know, a number of – a couple, at least, exceptions, exemptions in the ATIPPA that speak to Cabinet confidences or information that was used by Cabinet in coming to a decision.

MR. RALPH: So these – if these documents existed, existed now, through ATIPPA, you likely still couldn't get access to them.

JUDGE MOLLOY: (Inaudible), you know, again, each set of records is unique and has to be assessed on its own merits, but I think there would be a high potential for valid arguments that such records are for – if not entirely, then in part – would be that the public body would be entitled to withhold them from an access to information applicant.

MR. RALPH: So, would you agree that – so in this instance, in terms of the duties to document, that wouldn't have helped the Commission because that – those documents, whether you have a duty to document or not, they could've been destroyed because they're transitory.

JUDGE MOLLOY: Sorry, the question is?

MR. RALPH: So –

JUDGE MOLLOY: Can you step back to your microphone? I'm really struggling to hear you, Mr. Ralph.

MR. RALPH: Okay, fine. I'm moving around a bit.

So, with regard to these documents, if the duty to document had existed, that statutory duty on civil servants to create records, even if that duty existed, under the current rules a civil servant would have the authority to destroy those records as transitory.

JUDGE MOLLOY: No, not unless they were recorded in some other format.

MR. RALPH: That's correct. If that information is recorded in a Cabinet document, then it can be considered transitory and it can be destroyed.

JUDGE MOLLOY: Potentially, yes, I agree.

You just can't make broad, sweeping statements, because they all have to be analyzed on their own specifics.

MR. RALPH: So I guess really –

MR. LEARMONTH: (Inaudible) get some clarification here. I'm a little bit mixed up with this.

The – you're talking about these records. I mean, there's a whole bunch of notes that went missing, and in terms of what Ms. Mullaley said, was that these records, with respect to any conversations she had about the $300,000 – or $300-million increase, never went to Cabinet.

MR. RALPH: No, I understand that.

MR. LEARMONTH: So, it's not something – it has nothing to do with Cabinet confidentiality –

MR. RALPH: No, no, no.

MR. LEARMONTH: – whatsoever.

MR. RALPH: I mean, you don't have to go and check to see every piece of information is in the Cabinet document. If you're satisfied the information's gone up to Cabinet –

MR. LEARMONTH: No, but she –

MR. RALPH: – you can get –

MR. LEARMONTH: – wasn't satisfied.

MR. RALPH: – you don't have to like –

MR. LEARMONTH: No, no, she –

MR. RALPH: I'm –

MR. LEARMONTH: – wasn't –

MR. RALPH: – not –

MR. LEARMONTH: – satisfied.

MR. RALPH: – suggesting that if I'm looking at my notes, that I have to go through all my notes and make sure that every bit of information is in a Cabinet presentation.

MR. LEARMONTH: Yeah.

MR. RALPH: Because I don't think that that's the –

MR. LEARMONTH: Well, okay, in terms of – I don't want to delay this, either – but in terms of Ms. Mullaley, she wanted to check her records. And one of the reasons she wanted was because she had no recollection of this going to Cabinet at all, this $300 million. She wanted to check her notes to see whether she had any information relating to it. She – and her search of records confirmed to her that it never did go to Cabinet. So it hasn't – her notes, in –

MR. RALPH: (Inaudible.)

MR. LEARMONTH: – terms of that series of notetaking, has nothing to do whatsoever –

MR. RALPH: Well, I think you're wrong about the –

MR. LEARMONTH: – (inaudible) Cabinet.

MR. RALPH: – your idea of a transitory record is incorrect. That she's entitled – if that information – if she understands that that subject matter has gone to Cabinet, she doesn't have to go and check to make sure every bit of information is gone.

MR. LEARMONTH: But it didn't go to Cabinet.

MR. RALPH: So the –

MR. LEARMONTH: It didn't.

MR. RALPH: – the equity support agreement did, the equity support guarantee did –

MR. LEARMONTH: But you're talking –

MR. RALPH: – the completion agreement did.

MR. LEARMONTH: But you –

MR. RALPH: And this –

MR. LEARMONTH: – talked about November 2013, Mr. Ralph, and that had nothing to do with the equity support agreement. You referred to November 2013.

MR. RALPH: There was a lot of discussions happening in November 2013. Some of – a lot of which had to do with the contingent equity situation and with COREA, and this was all relevant –

MR. LEARMONTH: (Inaudible.)

MR. RALPH: – the amount of cost (inaudible) was relevant to those issues. And those issues ultimately went to Cabinet.

MR. LEARMONTH: Not in November 2013.

MR. RALPH: There's an information note from Mr. Stanley.

MR. LEARMONTH: No, but the ones we're talking about in November – relating to the $300 million, the evidence before us is that that information never went to Cabinet.

Anyway, I am prolonging this. I said I didn't want to. I just wanted to make that point. If you don't agree with it, then I'll leave it to the Commissioner.

THE COMMISSIONER: So, Mr. Ralph, five more minutes.

MR. RALPH: So, Judge Molloy, I mean, you were – I'd suggest – an outspoken person within the Department of Justice. Would you agree with that description?

JUDGE MOLLOY: I was the person, I believe, who was known to be frank and direct in speaking to my colleagues and the executive, yes.

MR. RALPH: And I guess you – fair to say that you didn't mind speaking truth to power?

JUDGE MOLLOY: I didn't. But, you know, I wasn't worried about my employment because I was fairly confident, I had a good reputation as a lawyer and if I parted company with the

department – I never expected I would be employed for any long period of time.

MR. RALPH: And do you think that your approach, in terms of being a civil servant, would it have, I guess, any sort of negative impact on your career in civil service?

JUDGE MOLLOY: I'm fairly confident that my frankness was not universally appreciated. It certainly didn't help me in some circumstances.

MR. RALPH: And what circumstances would that be?

JUDGE MOLLOY: Mr. Ralph, you know, I'm not – as I said when I was talking to Inquiry staff, I have no intentions of making this political. It's not political. What I'm talking about is stuff I observed over two administrations and it's not – I didn't come here today to name names and get into specifics. How –

MR. RALPH: Do you believe that you were passed over for appointments to positions by virtue of your approach to being a civil servant?

JUDGE MOLLOY: Mr. Ralph, as I said, it did not advantage me, and I believe that in some circumstances it was a disadvantage. Whether anybody acted on it or not, I have no idea. I have only my own thoughts. I can't speak speculative to the thoughts of others.

MR. RALPH: Now, Judge Molloy, I understand that you were DPP. You were never a deputy minister or in any of the major departments like Finance or Health. So I take it that you wouldn't be sitting around tables where major policy decisions or major policy directions of government were being made. Is that fair to say?

JUDGE MOLLOY: Nothing outside of Justice. I mean, we had (inaudible) every month. We had other dealings where people would be seeking information about the criminal law. We were generally the sort of office that had – the only office in the Confederation Building that had any expertise. So there was a lot of intermingling, a lot of other discussions and chances to talk about things with the executives of other departments.

MR. RALPH: So, I mean, would you observed or been privy to the relationships, sort of, for example, of the deputy minister of Finance to the minister and to Cabinet?

JUDGE MOLLOY: No, I wasn't there.

MR. RALPH: Or deputy minister of Natural Resources and the minister and Cabinet?

JUDGE MOLLOY: No, I can't speak to the relationships between those – any particular individual. As I said at the outset, I'm giving my general perception as to some of the challenges, whether it be – you know, sometimes it's a personality challenge, and other times, you know, different dynamics. I mean, if I wasn't in the room, I can't speak about these dynamics between any particular group of people or at any given time.

MR. RALPH: What I'm saying is: You wouldn't have been privy to the relationships between senior civil servants with regard to major government policy and their relationships with ministers in the Cabinet.

JUDGE MOLLOY: Not on specific files, but, you know, in terms of discussions about their own practices and perceptions of people who have been moved on, there would be opportunity to discuss concerns and misgivings and stresses and challenges of the job, which I think occurs amongst similarly placed colleagues in any situation.

MR. RALPH: I believe my time is up.

I certainly have many more questions to ask, but thank you, Mr. Judge Molloy.

THE COMMISSIONER: Thank you, Mr. Ralph.

JUDGE MOLLOY: Thank you, Sir.

THE COMMISSIONER: Nalcor Energy.

MR. SIMMONS: No questions.

Thank you, Commissioner.

THE COMMISSIONER: Concerned Citizens Coalition.

MR. BUDDEN: Good day, Mr. Justice Molloy.

It's Geoff Budden on behalf of the Concerned Citizens Coalition, which if you've been following the Inquiry you would be aware that the coalition is a group of individuals who – mostly former senior civil servants who, for many years, have been observers and critics of the Muskrat Falls Project.

I just have two brief areas for you today, you'll be happy to know. The first one is, really, where Mr. Ralph left off – or near the end of his examination. The – having to do with the notes, the missing notes from Ms. Mullaley and Mr. Bown and Ms. Brewer, as well, to a lesser degree.

As you're aware, Ms. Mullaley was clerk of the Executive Council at the time this notebook was created. Are you aware of that – were you, Judge Molloy?

JUDGE MOLLOY: Yes.

MR. BUDDEN: And the notes, of course, that we're interested in are to do with the financial close and related events of the – probably the largest capital project in the history of this province. You're, obviously, aware of that as well?

JUDGE MOLLOY: Yes.

MR. BUDDEN: I guess my question to you is a somewhat general one: In such circumstances, I would suggest to you that the notes of the clerk of the Executive Council – the highest civil servant in our province, talking about matters of such significance – is there really ever a situation where such notes could be regarded, in your opinion, as transitory?

JUDGE MOLLOY: I certainly think it would be very unlikely that the entirety of the notebook would qualify as transitory. You know, parts that made it into Cabinet submissions, as briefing notes, whatever, certainly those could be considered transitory, but, you know, depending on the size, the volume, the time period under which a notebook was kept, I think it would be surprising to agree that the entirety of it is transitory.

MR. BUDDEN: And, I guess I would suggest to you – and this really grows out of the Phase 3 mandate as has come up here – I would suggest to you, I guess, for you to agree or disagree or perhaps inform us further that it would be a positive recommendation of this Commission that the original working notes of a – somebody at the senior level of the civil – of the public service, such as the clerk of the Executive Council, such as a deputy minister, should always be preserved rather than be – or at least should never be regarded as transitory.

What would you have to say about that, Judge Molloy?

JUDGE MOLLOY: I think that's certainly one avenue that could be pursued at a length. I just want to be clear that, you know, we're talking about Julia Mullaley –

MR. BUDDEN: I'm sorry. I'm trying my best but I'm really having a lot of trouble hearing you. If you –

JUDGE MOLLOY: Oh, sorry.

MR. BUDDEN: – if there is any way you could possibly speak clearer.

JUDGE MOLLOY: It is one avenue to lift things that have to be kept. But the tools are there right now in terms of, you know, the information management system, it's just that they're not being robustly applied, in my view. I mean, the three individuals you referenced, I mean, they're cognizant professionals trying to do their best as, I believe, you know, the majority of the civil servants that appeared before the Inquiry. But if you don't have a robust information management system, then probably you do need to define categories of records that cannot be regarded as transitory or destroyed.

MR. BUDDEN: Yes, we are, after all, talking about events of very recent years, you know, 2013, 2014; and since then, even more recent. So, if I understand you, if I heard you correctly, you're suggesting that it's no monumental task to develop a protocol where such records may be preserved?

JUDGE MOLLOY: Well, if not, I agree with – I guess, in short, I agree with your suggestion that it is a viably alternative to say these types of things can't be destroyed.

MR. BUDDEN: Yeah.

The – just before I move on to the next subject, did – this Commission spent a considerable time attempting to – well, not the Commission itself, but it's been a problem before this Commission that these records have gone missing. Have you any insight at all, any suggestion as to what might have happened in this instance?

JUDGE MOLLOY: No. I mean I'm not aware of the specifics, what happened with any of these things, Mr. Budden, I guess –

MR. BUDDEN: Sure.

JUDGE MOLLOY: – go back to the outset of – you know, my understanding was simply that the Commission thought it might be helpful to hear my views, generally, on these issues and I – you know, I don't have any particular knowledge of any of the specific instances that had been referenced.

MR. BUDDEN: Are you aware – and this goes to your general knowledge – I realize all situations are unique, but are you aware of other instances where relatively recent records at that level of government – records by the clerk, by other senior public servants – have likewise gone missing, not to be found in circumstances where it was regarded important to find them?

JUDGE MOLLOY: Yeah. I'm aware of instances where records, you know, have not been handled according to the protocols. Yes, I mean, reports of them, I don't recall right now, but there are many examples, I think, of realizing after somebody has left, that the protocols weren't necessarily strictly adhered to.

MR. BUDDEN: Okay.

The – my other line of questioning is to do with earlier comments that came up in Mr. Ralph's examination. You were asked what your – the annual budget of your office was and I believe you said about $1.3 million, in that ballpark. That's correct, is it?

JUDGE MOLLOY: That's my recollection, in that ballpark, yes.

MR. BUDDEN: Okay. How did the resources – and you would've, I presume, in your several years in that position, had the opportunity to meet with and to interact with other provincial commissioners occupying similar offices, would that be true?

JUDGE MOLLOY: In terms of my own office, I think we were – we had, you know, say, perhaps – I don't know, I think we were well staffed compared to the smaller jurisdictions. You know, obviously – we have to look at realistic comparators, which isn't Ontario or BC or Alberta where they had hundreds of employees. I felt we were – I felt we were adequately resourced.

MR. BUDDEN: And the office – and much was made by Mr. Ralph, of certain, I guess, certain recommendations or options that had been proposed and the suggestion seemed to be that they would take money away from other government priorities. Are you able to comment on what kind of – would it – would it double the budget of your office, raise it into any other significant degree to adopt some of these other processes?

JUDGE MOLLOY: Yeah. And I guess it comes down to, I guess, a misconception that's evolved over the years, including in the media. My comment about resources – the need for extra resources had absolutely nothing to do with my office or my staff. The ATIPP Office and the department, their coordinators, the people that they have devoted to the work, those are (inaudible) people who experience the over 300 per cent increase in the number of requests.

Those are people that I was consistently identifying – or an area I was consistently identifying as under-resourced. We were managing to – in my particular office, we kept up with the extra work by the various operational efficiencies and other measures that we put in place. So we've been able to keep up with it.

But the coordinators who, in meeting with them, are talking about emotional, mental breakdowns, the – you know, the dissolution of relationships

and other things. Those are people who, in my view – and as I stated publicly a number of occasions, you know, the system was – kept going, but kept going on their backs and they were the ones who are actually suffering.

MR. BUDDEN: So it wasn't a question, if I understood you correctly – and I didn't hear every word you said – it wasn't a question of resources as much as perhaps a question of will, of political will or bureaucratic will?

JUDGE MOLLOY: No. Resources for people doing the – people in government, in the public bodies processing the requests –

MR. BUDDEN: Mm-hmm.

JUDGE MOLLOY: – not my – not, you know, that's –

MR. BUDDEN: Oh. No, I didn't –

JUDGE MOLLOY: – in a different body.

MR. BUDDEN: – I wasn't suggesting your office, but I'm suggesting the office you're dealing with. Was – is – would inability to meet those requests be more an issue of the resources in those departments – the financial resource not being available or more, in your opinion, a question of the will not being there to address these requests?

JUDGE MOLLOY: No. I don't know about the will, but certainly the – you know, I fairly concede that the will would require an investment of resources to support the people in that role and the – you know, I think everybody in Newfoundland and Labrador is aware that my time as Privacy Commissioner, and right now, the financial challenges the government is facing is – they're substantial.

MR. BUDDEN: Yeah.

Thank you, Mr. Justice, I have no further questions.

THE COMMISSIONER: Thank you.

JUDGE MOLLOY: Thank you.

THE COMMISSIONER: Edmund Martin?

MR. CONSTANTINE: No questions, Commissioner.

THE COMMISSIONER: Kathy Dunderdale's gone.

Former Provincial Government Officials?

MR. J. KING: No questions.

THE COMMISSIONER: Julia Mullaley/Charles Bown?

MR. FITZGERALD: No questions, Commissioner.

THE COMMISSIONER: Robert Thompson?

MR. COFFEY: No questions.

THE COMMISSIONER: The Consumer Advocate?

Former Nalcor Board – not there.

Newfoundland Power – not there.

Redirect, Ms. Muzychka?

MS. MUZYCHKA: No questions.

THE COMMISSIONER: All right.

Judge Molloy, thank you very much for your time.

So we're adjourned now until tomorrow morning at 9:30.

So just for the public's knowledge, tomorrow morning is an in camera session related to water management. The witnesses we will be calling for this stage of the water management – and this relates to looking at the water management issue subsequent to the Quebec Court of Appeal decision recently had. Those people that are – will be testifying, first of all, will be Philip Raphals who will be providing evidence. Peter Hickman from CF(L)Co will also be providing some evidence and then we'll have a panel of Todd Stanley, Gilbert Bennett and as well the Consumer Advocate, Dennis Browne, who will be speaking to the water management issue.

As I indicated earlier, the reason why we're doing this in camera is that this is ongoing litigation. We don't know whether or not the Quebec Court of Appeal decision will actually be appealed. I don't, in any way, want to influence that in any way, shape or form. The purpose is basically for me to determine at what state we are with regards to water management and what – and its assessment with regards to the government policy. So, therefore, that's why that is in camera.

And then we'll come back on Wednesday for the public sessions, and on Wednesday we'll be hearing from an individual who will be speaking about the management of large-scale projects in other jurisdictions.

Mr. Coffey?

MR. COFFEY: Commissioner, 9:30 beginning time on Wednesday?

THE COMMISSIONER: On Wednesday, 9:30.

MR. COFFEY: Thank you, Commissioner.

THE COMMISSIONER: And tomorrow morning 9:30 as well, I believe. Yes, 9:30 tomorrow morning.

All right, good. Thank you very much.

CLERK: All rise.

This Commission of Inquiry is concluded for the day.