

<p style="text-align: center;">COMMISSION OF INQUIRY ON HORMONE RECEPTOR TESTING</p> <p style="text-align: center;">BEFORE THE HONOURABLE JUSTICE CAMERON - COMMISSIONER</p> <p style="text-align: center;">June 13, 2008</p> <p>Appearances:</p> <p>Bernard Coffey, Q.C. Commission Co-counsel Sandra Chaytor, Q.C. Commission Co-counsel</p> <p>Rolf Pritchard/Stephen Mills Her Majesty in Right of NL</p> <p>Peter Browne/Jane Hennebury Doctors Kara Laing et al</p> <p>Daniel Simmons Eastern Regional Integrated Health Authority</p> <p>Darlene Russell Members of the Breast Cancer Testing Class Action</p> <p>Mark Pike NL Medical Association Jennifer Newbury Canadian Cancer Society (NL Division) Blair Pritchett. Central, Western and Labrador-Grenfell Regional Integrated Health Authorities</p>	<p style="text-align: center;">LIST OF EXHIBITS</p> <p>EXHIBIT P-1639 Pg. 4</p> <p>EXHIBIT P-1634 Pg. 80</p>
<p style="text-align: center;">TABLE OF CONTENTS</p> <p>MS. MARILYN MCCORMACK - RESUMES THE STAND</p> <p>Examination by Sandra Chaytor, Q.C. Pgs. 4 - 68</p> <p>Examination by Daniel Simmons Pgs. 68 - 79</p> <p>Examination by Rolf Pritchard Pgs. 79 - 82</p> <p>MR. GARY CAKE - AFFIRMED</p> <p>Examination by Bernard Coffey, Q.C. Pgs. 82 - 313</p> <p>Certificate</p>	<p style="text-align: right;">Page 4</p> <p>1 COMMISSIONER: 2 Q. Please be seated. Ms. Chaytor. 3 MS. MARILYN MCCORMACK, EXAMINATION BY SANDRA CHAYTOR, 4 Q.C. 5 CHAYTOR, Q.C.: 6 Q. Good morning, Commissioner. Good morning, Ms. 7 McCormack. 8 MS. MCCORMACK: 9 A. Good morning, Ms. Chaytor. 10 CHAYTOR, Q.C.: 11 Q. A housekeeping item first this morning, 12 Commissioner. There was a document referred 13 to by Mr. Ritter yesterday in his evidence, 14 being the generic job description for a 15 clinical chief. We have that document now and 16 I would ask, please, if it could be entered as 17 an exhibit? The exhibit number is 1639. 18 COMMISSIONER: 19 Q. 1639 entered. 20 EXHIBIT P-1639 ENTERED INTO EVIDENCE. 21 CHAYTOR, Q.C.: 22 Q. Thank you. Ms. McCormack, when we left 23 yesterday, we were looking at P-0172, please, 24 Registrar. This is your e-mail that you sent 25 to Ms. Hennessey, being the final copy on, or</p>

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1 you indicated to be the final copy on August
 2 18th. And we were talking about at page 4 of
 3 the exhibit, please. Towards the bottom of
 4 the page there was discussion that you had
 5 with, I believe you said Ms. Predham about 22
 6 people having, or women, it says, were greatly
 7 impacted by the change in status. And I
 8 understood you to say that that was you were
 9 trying figure out how many people had the most
 10 significant changes?
 11 MS. MCCORMACK:
 12 A. That's correct.
 13 CHAYTOR, Q.C.:
 14 Q. Do you know how the number 22 was derived?
 15 And you can scroll down if you wish.
 16 MS. MCCORMACK:
 17 A. I'm not really sure. I think that was the
 18 number that was provided to me by Eastern
 19 Health.
 20 CHAYTOR, Q.C.:
 21 Q. Okay. And did you have any discussion with
 22 Ms. Predham around that issue?
 23 MS. MCCORMACK:
 24 A. Not -
 25 CHAYTOR, Q.C.:

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1 Q. As to how she got the 22?
 2 MS. MCCORMACK:
 3 A. Oh, how she--no. I just assumed she knew the
 4 information and passed it along.
 5 CHAYTOR, Q.C.:
 6 Q. And what did you understand again the 22
 7 meant?
 8 MS. MCCORMACK:
 9 A. That these were the women that were most
 10 impacted by the change or the problems that
 11 they had with the ER/PR testing.
 12 CHAYTOR, Q.C.:
 13 Q. Okay. And was it Mr. Cake who asked you to
 14 obtain that information?
 15 MS. MCCORMACK:
 16 A. Yes.
 17 CHAYTOR, Q.C.:
 18 Q. And what did you understand that Mr. Cake was
 19 trying to determine? For example, was he
 20 interested at any point in receiving any
 21 percentages of how many patients had been
 22 impacted, was he trying to figure out any
 23 calculation?
 24 MS. MCCORMACK:
 25 A. I'm not sure that he was trying to figure out

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1 any calculation, but I think what he was
 2 trying to do was understand how many people
 3 were affected by this and how many may have
 4 had a change in treatment or may have been--
 5 you know, and what the extent of that
 6 treatment was.
 7 CHAYTOR, Q.C.:
 8 Q. Okay. And at one point we did see the 20
 9 percent figure had been in some draft, it's
 10 not in the draft that we have, but there's
 11 evidence in the e-mails back and forth between
 12 yourself and Ms. Hennessey on that. Who asked
 13 for that 20 percent or who asked for a
 14 percentage in terms of overall people with
 15 changes in results, do you recall any
 16 discussion around that?
 17 MS. MCCORMACK:
 18 A. I don't think we asked for a percentage. I
 19 think it was provided in the information from
 20 Eastern Health to help, and then in
 21 discussions with Moira Hennessey she asked
 22 that that be removed because she said they
 23 weren't really certain that that was the
 24 actual number.
 25 CHAYTOR, Q.C.:

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1 Q. Okay. Did you have any discussions yourself
 2 with Ms. Predham about that 20 percent figure
 3 or how that was derived?
 4 MS. MCCORMACK:
 5 A. No, I did not.
 6 CHAYTOR, Q.C.:
 7 Q. And it's not your recollection that Mr. Cake
 8 asked for anything in the way of percentages?
 9 MS. MCCORMACK:
 10 A. No, not at all.
 11 CHAYTOR, Q.C.:
 12 Q. Now, if we could look then, please, at P-0072
 13 at page 4? And I understood from what you've
 14 told us that you were writing the word
 15 "greatly" perhaps came, I believe you said
 16 yesterday, as well, may have been a word used
 17 by Ms. Predham in saying those were the people
 18 with the greatest impact, and that's what you
 19 were trying to convey here?
 20 MS. MCCORMACK:
 21 A. Exactly.
 22 CHAYTOR, Q.C.:
 23 Q. Now, Ms. McCormack, I'm sure you're aware that
 24 the final note that goes forward does not have
 25 the word "greatly" in this sentence; it's

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1 removed. So that it then reads, "Eastern
 2 Health advises 22 women were impacted by the
 3 change in status of the ER/PR receptor test."
 4 In having the sentence or the note go forward
 5 with the word "greatly" removed, is the same
 6 intent that you were trying to convey being
 7 conveyed by the removal of the word "greatly"?
 8 Bearing in mind that you were trying to say
 9 who was most impacted, how many were most
 10 impacted, when you remove the word "greatly"
 11 does that change the meaning of that sentence?
 12 MS. MCCORMACK:
 13 A. To me, personally, it does. However, I think
 14 it still indicates that there was an impact,
 15 and I guess it was difficult for, I guess,
 16 health didn't feel that they could state, you
 17 know, who was the most impacted.
 18 CHAYTOR, Q.C.:
 19 Q. Yes.
 20 MS. MCCORMACK:
 21 A. And I guess that's why they wanted it removed.
 22 CHAYTOR, Q.C.:
 23 Q. Okay. So it was the Department of Health who
 24 wanted the word "greatly" removed?
 25 MS. MCCORMACK:

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1 A. Yes.
 2 CHAYTOR, Q.C.:
 3 Q. And who at the Department of Health?
 4 MS. MCCORMACK:
 5 A. Moira.
 6 CHAYTOR, Q.C.:
 7 Q. Okay. And I'll ask you a little more detail
 8 about that. If we could bring up, please, P-
 9 1636? This is the next e-mail exchange that
 10 we have on this issue. And it's you writing
 11 to Mr. Cake again on August 18th. It's now
 12 11:45 in the morning. And if you'll recall,
 13 the last exhibit that I saw, that I showed
 14 you, your e-mail, I didn't point it out to
 15 you, but your e-mail was just before 11:00 in
 16 the morning.
 17 MS. MCCORMACK:
 18 A. Yes.
 19 CHAYTOR, Q.C.:
 20 Q. 10:59. You recall that?
 21 MS. MCCORMACK:
 22 A. Yes.
 23 CHAYTOR, Q.C.:
 24 Q. So it's about 45, 46 minutes later you're
 25 saying that Moira approved the note. "Two

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1 typos which I corrected. I will give to
 2 Marilyn," and I understand that's Marilyn
 3 Summers, is that correct?
 4 MS. MCCORMACK:
 5 A. That's correct.
 6 CHAYTOR, Q.C.:
 7 Q. "Marilyn to forward, if you are okay with
 8 that." Signed, "Marilyn." So 45, 46 minutes
 9 after you sent what you indicate to be the
 10 final copy to Ms. Hennessey, you're indicating
 11 to Mr. Cake that Moira, Ms. Hennessey, has now
 12 approved the note?
 13 MS. MCCORMACK:
 14 A. Yes.
 15 CHAYTOR, Q.C.:
 16 Q. Okay. So what's your recollection of what
 17 transpired in those 45, 46 minutes?
 18 MS. MCCORMACK:
 19 A. I would have sent the draft of the note to
 20 Moira by e-mail. And then we had a
 21 conversation and she pointed out there were
 22 two typos that she had picked up in the
 23 briefing note, and I said I could correct them
 24 on my end. And she said the note was okay to
 25 go from her perspective. So I then contacted

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1 or forwarded the information to Gary advising
 2 him that the note had been approved by the
 3 Department of Health and that if he was okay
 4 with the note going, I would forward it to
 5 Marilyn Summers, who was the person that
 6 entered it into the database and then
 7 circulated to where it needed to go.
 8 CHAYTOR, Q.C.:
 9 Q. Okay. And you say that's what you would have
 10 done. Do you recall that, is that exactly
 11 what happened?
 12 MS. MCCORMACK:
 13 A. Yes.
 14 CHAYTOR, Q.C.:
 15 Q. That is what happened?
 16 MS. MCCORMACK:
 17 A. Yes.
 18 CHAYTOR, Q.C.:
 19 Q. So you do recall this happening. What were
 20 the two typos which Moira indicated that she
 21 wanted corrected?
 22 MS. MCCORMACK:
 23 A. I'm not quite sure -
 24 CHAYTOR, Q.C.:
 25 Q. Do you recall that?

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1 MS. MCCORMACK:
 2 A. - what they are, no.
 3 CHAYTOR, Q.C.:
 4 Q. Okay. And would you consider the removal of
 5 the word "greatly" in the context that we've
 6 discussed, would you consider that a typo?
 7 MS. MCCORMACK:
 8 A. No.
 9 CHAYTOR, Q.C.:
 10 Q. Okay. So whatever the typos were, the two
 11 typos, it didn't include removal of the word
 12 "greatly"?
 13 MS. MCCORMACK:
 14 A. No.
 15 CHAYTOR, Q.C.:
 16 Q. Did you remove the word "greatly"?
 17 MS. MCCORMACK:
 18 A. No.
 19 CHAYTOR, Q.C.:
 20 Q. Okay. Do you recall any discussion with Moira
 21 Hennessey or any reluctance on her part or her
 22 ability to approve the note or to sign off on
 23 the note?
 24 MS. MCCORMACK:
 25 A. No.

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1 CHAYTOR, Q.C.:
 2 Q. And if Ms. Hennessey has indicated that she
 3 was not in the position to approve because Mr.
 4 Abbott wasn't, she wasn't able to reach Mr.
 5 Abbott or hadn't heard back from Mr. Abbott or
 6 anything to that effect, was that conveyed to
 7 you?
 8 MS. MCCORMACK:
 9 A. Definitely not. When I spoke with her, as far
 10 as she was concerned the note was good to go.
 11 She didn't ask me to hold it, she didn't
 12 indicate that she needed to bring it to the
 13 deputy. I assumed all of that stuff had been
 14 done.
 15 CHAYTOR, Q.C.:
 16 Q. So there was no discussion about the
 17 availability or unavailability of Mr. Abbott?
 18 MS. MCCORMACK:
 19 A. Definitely not. And as you can appreciate, we
 20 had gone back and forth on this note for quite
 21 some time, so if she had said to me, I need
 22 more time, as she did when she first got the
 23 information from Eastern Health, I certainly
 24 wouldn't have put the note forward until they
 25 said it was ready to go.

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1 CHAYTOR, Q.C.:
 2 Q. Okay. And when you sent the note to Mr. Cake,
 3 it had the word "greatly" in it. When you
 4 last saw the note, did it have the word
 5 "greatly" in it?
 6 MS. MCCORMACK:
 7 A. No.
 8 CHAYTOR, Q.C.:
 9 Q. It didn't have the word "greatly" in it?
 10 MS. MCCORMACK:
 11 A. No.
 12 CHAYTOR, Q.C.:
 13 Q. Okay. So who removed the word "greatly"?
 14 MS. MCCORMACK:
 15 A. I really can't answer that question, I don't
 16 know.
 17 CHAYTOR, Q.C.:
 18 Q. Did you notice when the note -
 19 MS. MCCORMACK:
 20 A. Not until you brought it to my attention.
 21 CHAYTOR, Q.C.:
 22 Q. Okay. So you didn't realize that until this
 23 process came up?
 24 MS. MCCORMACK:
 25 A. That's correct.

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1 CHAYTOR, Q.C.:
 2 Q. Through the Inquiry process that the word
 3 "greatly" had even been removed?
 4 MS. MCCORMACK:
 5 A. That's right.
 6 CHAYTOR, Q.C.:
 7 Q. Okay. Now, one of the--perhaps we could bring
 8 up, then, let's look at, please, 1448? No,
 9 I'm sorry, let's try 0125, page 31? Ms.
 10 McCormack, do you know if Mr. Cake may have
 11 deleted the word "greatly" after you forwarded
 12 it to him?
 13 MS. MCCORMACK:
 14 A. I don't think so.
 15 CHAYTOR, Q.C.:
 16 Q. Why not?
 17 MS. MCCORMACK:
 18 A. Because normally he would not do that. If he
 19 had any concerns, he probably would have
 20 brought it back to me to have it corrected.
 21 CHAYTOR, Q.C.:
 22 Q. Can he, can he access the system and delete
 23 the word if he saw fit?
 24 MS. MCCORMACK:
 25 A. Oh, he could, yes. Once it was entered into

Page 17

1 the system, he certainly could.
 2 CHAYTOR, Q.C.:
 3 Q. Okay. And if we look at then page 31. I'm
 4 sorry, this is the final note that goes
 5 forward. And one thing that Ms. Hennessey
 6 pointed out to us was in this paragraph on
 7 page 34, I think it was this word here, "suit"
 8 which was actually "suite". Do you recall
 9 that being a typo?
 10 MS. MCCORMACK:
 11 A. Yes, I do.
 12 CHAYTOR, Q.C.:
 13 Q. Okay. But you don't recall what the other one
 14 might have been?
 15 MS. MCCORMACK:
 16 A. No, I don't, I'm sorry.
 17 CHAYTOR, Q.C.:
 18 Q. And do you recall any discussion in that time
 19 period, 45, 46 minutes between when you would
 20 have discussed the matter, it appears, with
 21 Ms. Hennessey, do you recall any discussion
 22 with her about any concern about the word
 23 "greatly" because it wasn't used in the
 24 numbers that had been provided to her by
 25 Eastern Health, do you recall her suggesting

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1 anything along those lines or any discussion
 2 all about the word "greatly"?
 3 MS. MCCORMACK:
 4 A. I think that we did have a discussion about
 5 that word and that she wasn't really
 6 comfortable with that, even though I think, I
 7 know that Eastern Health had given me that
 8 information, Heather.
 9 CHAYTOR, Q.C.:
 10 Q. So what do you recall about your discussion
 11 with her around the word "greatly"?
 12 MS. MCCORMACK:
 13 A. Well, I guess we were discussing the note in
 14 general, like, is it ready to go. And Gary
 15 had--I had shared the information with Gary,
 16 he had reviewed the note and he didn't have
 17 any further questions. I was comfortable with
 18 the note, and so I needed Eastern Health--
 19 sorry, Department of Health's approval, if
 20 they were satisfied with the information in
 21 the note that it would go forward. So I think
 22 it was in that last discussion that we had
 23 that -
 24 CHAYTOR, Q.C.:
 25 Q. That she did -

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1 MS. MCCORMACK:
 2 A. - we may have discussed this -
 3 CHAYTOR, Q.C.:
 4 Q. - she did express some concerns around the use
 5 of the word "greatly"?
 6 MS. MCCORMACK:
 7 A. Yes.
 8 CHAYTOR, Q.C.:
 9 Q. Did you know she would then or someone would
 10 then be deleting the word "greatly"?
 11 MS. MCCORMACK:
 12 A. Quite possibly, I just, you know, I'm not sure
 13 that we talked about who would do that.
 14 CHAYTOR, Q.C.:
 15 Q. But you didn't do it?
 16 MS. MCCORMACK:
 17 A. Not that I can recall if I did.
 18 CHAYTOR, Q.C.:
 19 Q. And did you have any concerns with the word
 20 "greatly" being removed?
 21 MS. MCCORMACK:
 22 A. Well, no, because again, like, this note, even
 23 though I had a larger role in the preparation
 24 of the note from Cabinet Secretariat
 25 perspective than what we normally would have,

Page 20

1 this was a Department of Health briefing note.
 2 So whatever they were satisfied to have in the
 3 note or felt should be included, was included,
 4 and anything they asked to have removed, it
 5 was removed. Because Cabinet Secretariat
 6 generally don't compile notes or even format
 7 them that often for departments, so whatever
 8 health was comfortable with is what would have
 9 gone forward, which is why we had to have
 10 their approval before we sent it.
 11 CHAYTOR, Q.C.:
 12 Q. And even if that--even if that were, though,
 13 information which was conveyed directly to you
 14 and that you understood the intent of that
 15 information to say who had been most impacted
 16 as opposed to just 22 impacted?
 17 MS. MCCORMACK:
 18 A. But again, it wasn't really what I thought was
 19 important in that note, it was what health
 20 felt comfortable doing. Because normally it
 21 would have been the Department of Health
 22 obtaining the information from Eastern Health
 23 and then compiling the note. So when they
 24 wanted the word removed, I guess it was
 25 removed.

Page 21

1 CHAYTOR, Q.C.:

2 Q. So you recall vaguely some discussion with Ms.

3 Hennessey around the use of the word

4 "greatly"?

5 MS. MCCORMACK:

6 A. Yes, I do.

7 CHAYTOR, Q.C.:

8 Q. And her not being comfortable with it?

9 MS. MCCORMACK:

10 A. That's right.

11 CHAYTOR, Q.C.:

12 Q. And what was her rationale, why would she not

13 be comfortable with saying that 22 women were

14 greatly impacted?

15 MS. MCCORMACK:

16 A. I'm not sure what her rationale was. But I

17 think they had to be comfortable with the

18 information just as they weren't comfortable

19 with the percentage and asked to have that

20 removed, I didn't really question her about

21 that.

22 CHAYTOR, Q.C.:

23 Q. And it didn't concern you that taking the word

24 out ultimately might lead the reader to think

25 that, you know, as bad as it is, 22 people

Page 22

1 have been impacted as opposed to looking down

2 through, and again, this is in the summary

3 section of the note as opposed to reading the

4 entire note and seeing other numbers which

5 would suggest otherwise, it didn't -

6 MS. MCCORMACK:

7 A. Well, the other information was certainly in

8 the note.

9 CHAYTOR, Q.C.:

10 Q. Yes.

11 MS. MCCORMACK:

12 A. You know, the details were there about the

13 numbers of people that they said were impacted

14 by this problem, and I guess, perhaps she felt

15 it was subjective and shouldn't be there, in

16 terms of degree.

17 CHAYTOR, Q.C.:

18 Q. And did she suggest that to you? Was there--

19 did she suggest that?

20 MS. MCCORMACK:

21 A. No, no.

22 CHAYTOR, Q.C.:

23 Q. Okay. You're just -

24 MS. MCCORMACK:

25 A. That's right, I'm just surmising, based on -

Page 23

1 CHAYTOR, Q.C.:

2 Q. Surmising it.

3 MS. MCCORMACK:

4 A. - the fact that she wanted it removed.

5 CHAYTOR, Q.C.:

6 Q. And your concern originally about this note,

7 and going back and asking several questions

8 about this note was that the information

9 seemed confusing to you, a new person coming

10 on the scene and having to deal with all this

11 information, it seemed confusing?

12 MS. MCCORMACK:

13 A. Yes.

14 CHAYTOR, Q.C.:

15 Q. And you went through some efforts to make sure

16 that the information going forward had a

17 degree of clarity. Did it cause you any

18 concern that in the summary, the reference to

19 22 women being impacted is not consistent with

20 other portions of the note?

21 MS. MCCORMACK:

22 A. No, it didn't, because again, the chart was

23 there that gave all of the information that

24 the Health department wanted to go forward.

25 CHAYTOR, Q.C.:

Page 24

1 Q. Okay. And this is the final note we've

2 brought up here, 0125, and at page 34--33,

3 sorry, at the bottom of the page, of course,

4 the summary we see indicates "Eastern Health

5 advises 22 women were impacted by the change

6 in status." So the word "greatly" is removed

7 at that point. So this final version then, on

8 August 18th, 2006, which obviously ultimately

9 ends up in the Premier's office, who--how did

10 this version get to where it had to go?

11 MS. MCCORMACK:

12 A. Well, once the note was approved by the

13 Department of Health, I advised Gary Cake that

14 the note was approved by the Department and

15 then asked for his approval to forward it to

16 Marilyn Summers so that she could enter it

17 into the Trim database and circulate the note

18 where it needed to go.

19 CHAYTOR, Q.C.:

20 Q. Okay. So your e-mail at 11:45 on that morning

21 to Gary and Mr. Cake is back to you by 12:10,

22 so shortly thereafter, saying "yes, please

23 do." That's at 1636 please. You're saying

24 that--there's no attachment to that, but

25 you're saying that that would have had the

Page 25

1 changed version at that point in time with the
 2 word "greatly" removed?
 3 MS. MCCORMACK:
 4 A. Yes, I would think.
 5 CHAYTOR, Q.C.:
 6 Q. And if we look at 1637, you get back to Mr.
 7 Cake and you say "thanks." If we could have
 8 P-1011, please? This is an e-mail sometime
 9 later, and I'll ask you about that in a
 10 moment. It's you to Mr. Thompson in August of
 11 last year, 2007, and you're indicating this is
 12 the note that would have went to Marilyn
 13 Summers, and here we have an e-mail attached
 14 from yourself to Marilyn Summers at 12:15
 15 p.m., August 18th. "The attached note has
 16 been approved by Gary and is ready for
 17 distribution to the Premier. I worked under
 18 the Premier's briefing note working 2006-issue
 19 notes. It is titled 'update on pathology
 20 reports and legal action for women diagnosed
 21 with breast cancer.' Will you now move this
 22 electronic copy to the final notes category or
 23 should I do that? Please advise." So at
 24 12:15, you've sent it on to Marilyn Summers
 25 and the version is the version that I just

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1 took you through with the word "greatly"
 2 removed and with the typo that we referred to
 3 in the word "suite" is also changed.
 4 MS. MCCORMACK:
 5 A. Yes.
 6 CHAYTOR, Q.C.:
 7 Q. So somewhere along the line, the changes were
 8 made and you're not sure by whom, but there
 9 was some discussion between yourself and Ms.
 10 Hennessey around that?
 11 MS. MCCORMACK:
 12 A. That's correct.
 13 CHAYTOR, Q.C.:
 14 Q. What does it mean you worked under the note
 15 under the Premier's briefing notes?
 16 MS. MCCORMACK:
 17 A. It's just a directory in the Trim database.
 18 It's not for distribution. It's where we
 19 would put the note before Marilyn Summers took
 20 it from that directory and actually entered it
 21 in as a final note in the Premier's directory.
 22 CHAYTOR, Q.C.:
 23 Q. Were there any other documents in that
 24 electronic file folder pertaining to this
 25 issue?

Page 27

1 MS. MCCORMACK:
 2 A. No.
 3 CHAYTOR, Q.C.:
 4 Q. And once Ms. Summers then moved the note to
 5 the final notes category, what happened to the
 6 working draft or the working drafts?
 7 MS. MCCORMACK:
 8 A. It would have been removed from there.
 9 CHAYTOR, Q.C.:
 10 Q. So nothing--so who removes it?
 11 MS. MCCORMACK:
 12 A. Marilyn. Marilyn would actually take the note
 13 and actually move it from the working
 14 directory into the final directory.
 15 CHAYTOR, Q.C.:
 16 Q. So it physically just gets moved from one to
 17 the other?
 18 MS. MCCORMACK:
 19 A. That's correct.
 20 CHAYTOR, Q.C.:
 21 Q. Okay, and when you went in to work on the
 22 Premier's briefing notes, it was--there was no
 23 other briefing note in that folder dealing
 24 with the ER/PR issue?
 25 MS. MCCORMACK:

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1 A. No, the notes in that particular directory at
 2 the time would be notes that Cabinet
 3 Secretariat were processing in that current
 4 time period.
 5 CHAYTOR, Q.C.:
 6 Q. Okay, so that's current -
 7 MS. MCCORMACK:
 8 A. That's why it's called a working directory.
 9 CHAYTOR, Q.C.:
 10 Q. Yes, okay. So if I have the time line then
 11 correct, this is at 12:15 p.m. So we saw
 12 under P-0172 that at 10:59 a.m., so shortly
 13 before 11:00, you had sent what you called the
 14 final copy to Ms. Hennessey. That did have
 15 the word "greatly" in it. Then at 11:45, you
 16 told Mr. Cake that Ms. Hennessey had approved
 17 the note?
 18 MS. MCCORMACK:
 19 A. Yes.
 20 CHAYTOR, Q.C.:
 21 Q. And asked for his blessing to sign off on the
 22 note?
 23 MS. MCCORMACK:
 24 A. Yes.
 25 CHAYTOR, Q.C.:

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1 Q. And at that point, you had corrected two
 2 typos?
 3 MS. MCCORMACK:
 4 A. Yes.
 5 CHAYTOR, Q.C.:
 6 Q. One of which you think was the word "suite"?
 7 MS. MCCORMACK:
 8 A. Yes.
 9 CHAYTOR, Q.C.:
 10 Q. But you don't know what the other one was, but
 11 it would not have been the word "greatly"?
 12 MS. MCCORMACK:
 13 A. No, typo to me would be a misspelled word.
 14 CHAYTOR, Q.C.:
 15 Q. Okay. Then at 12:10, I think it was, Mr. Cake
 16 got back to you and said "yes, go ahead."
 17 MS. MCCORMACK:
 18 A. Yes.
 19 CHAYTOR, Q.C.:
 20 Q. And then at 12:15, you told Ms. Summers to go
 21 ahead, she could move it into the final?
 22 MS. MCCORMACK:
 23 A. That's correct.
 24 CHAYTOR, Q.C.:
 25 Q. Okay, and if she could move it over to the

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1 final folder. So from your point of view, I
 2 guess the note is done by 12:15?
 3 MS. MCCORMACK:
 4 A. Yes.
 5 CHAYTOR, Q.C.:
 6 Q. If we could look at 1448, please? And this is
 7 your e-mail on the bottom -
 8 MS. MCCORMACK:
 9 A. Yes.
 10 CHAYTOR, Q.C.:
 11 Q. - to Ms. Hennessey at 10:59 and then Ms.
 12 Hennessey forwards on to Debbie Humphries, who
 13 we understand, I guess, would be--would she be
 14 close to the equivalent in position to Marilyn
 15 Summers?
 16 MS. MCCORMACK:
 17 A. Yes, she would be administrative support in
 18 the Department of Health.
 19 CHAYTOR, Q.C.:
 20 Q. Okay. So then at 1:19 p.m., so almost an hour
 21 after you had sent along to Ms. Summers, she's
 22 sending the note along to--or a note along to
 23 Ms. Humphries asking her to "please replace
 24 the note you put in Eastern's directory
 25 yesterday with this version. We need to

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1 discuss two small edits to this note when you
 2 are ready to deal with this request."
 3 MS. MCCORMACK:
 4 A. Yes.
 5 CHAYTOR, Q.C.:
 6 Q. So about an hour later, she's mentioning that
 7 they need to discuss two small edits to the
 8 note.
 9 MS. MCCORMACK:
 10 A. Yes.
 11 CHAYTOR, Q.C.:
 12 Q. Would the note have been further edited by the
 13 Department after it has already been forwarded
 14 on to the Premier's final directory?
 15 MS. MCCORMACK:
 16 A. Well, she may have corrected, on her copy, the
 17 things that she discussed with me, like the
 18 two typos, and perhaps even removed the word
 19 "greatly."
 20 CHAYTOR, Q.C.:
 21 Q. Okay. So there's a version of the note that
 22 goes into your directory?
 23 MS. MCCORMACK:
 24 A. Yes.
 25 CHAYTOR, Q.C.:

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1 Q. And there's a version of the note that goes
 2 into the Department of Health's directory?
 3 MS. MCCORMACK:
 4 A. Yes, it should be one and the same actually.
 5 CHAYTOR, Q.C.:
 6 Q. But what guarantee is it that they are?
 7 MS. MCCORMACK:
 8 A. Well, other than, as I said, if Moira had
 9 approved the note with those recommended
 10 changes, she would have made them perhaps on
 11 her side as well, and then entered it into
 12 their own directory in the Department of
 13 Health.
 14 CHAYTOR, Q.C.:
 15 Q. So it's not a situation where the note
 16 actually gets finalized in the Department and
 17 sent on to you and then that note is what goes
 18 into the Premier's directory?
 19 MS. MCCORMACK:
 20 A. That is normally what happens, and in this
 21 case, the final copy got sent to Moira. She
 22 picked up on the two typos and then we
 23 discussed--perhaps I took out the word
 24 "greatly." I don't remember, but at the end
 25 of the day, she agreed that the note was fine

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1 to go as was with those corrections, which I
 2 made, and sent to Gary, and then the note was
 3 filed on our end and I guess she advised
 4 Debbie Humphries to enter the note in the
 5 directories that they keep in the Department
 6 of Health.
 7 CHAYTOR, Q.C.:
 8 Q. And at some point after this, there's going to
 9 be two small edits to the note?
 10 MS. MCCORMACK:
 11 A. Well, I guess she was--I would take from that,
 12 but I don't really know, but I would take from
 13 that that she is advising Debbie that there
 14 needs to be two edits. Perhaps she asked
 15 Debbie to do the edits on their note. I'm not
 16 sure.
 17 CHAYTOR, Q.C.:
 18 Q. So there's nothing to prevent, if this is the
 19 case, there's nothing to prevent that the note
 20 gets further changed, the version that ends up
 21 in the Department of Health is further changed
 22 after it's already been signed off on your
 23 end, at Cabinet Secretariat end?
 24 MS. MCCORMACK:
 25 A. Well, I don't know why they would want to.

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1 However, that's possible. I mean, I would not
 2 know what was in their directory, other than
 3 once they gave final approval for the note
 4 that was sent to them, then we would have
 5 entered it into the directory. They were
 6 basically telling me at that point that the
 7 note is okay to go.
 8 CHAYTOR, Q.C.:
 9 Q. And what you're saying is that the normal
 10 practice would be the note would be finalized
 11 in the Department -
 12 MS. MCCORMACK:
 13 A. The note would have been written in the
 14 Department, approved in the Department, sent
 15 to Cabinet Secretariat and then any changes
 16 that normally would have been made to it would
 17 have gone back, and as I explained in the
 18 beginning, what happened in this case, because
 19 she was travelling, in our discussions and
 20 because Gary had directed me to format the
 21 note in its proper format, I did that work for
 22 Health and then kept passing it back to them
 23 to make sure that they were satisfied that the
 24 note was actually reflective of what they
 25 wanted to go forward. So as I said, that was

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1 very unusual because normally all of that
 2 would have happened in the Department of
 3 Health before it came to Cabinet Secretariat.
 4 CHAYTOR, Q.C.:
 5 Q. And it appears on the 18th though, she's back
 6 in the office?
 7 MS. MCCORMACK:
 8 A. Yes.
 9 CHAYTOR, Q.C.:
 10 Q. Yes. She's not travelling on this day.
 11 MS. MCCORMACK:
 12 A. No.
 13 CHAYTOR, Q.C.:
 14 Q. So why wouldn't the normal practice have
 15 prevailed? Why wouldn't the note be finalized
 16 by the Department and then the changes made
 17 there and sent on to you and then the same
 18 version exists in both places?
 19 MS. MCCORMACK:
 20 A. Well, I think I explained that. When the note
 21 came over from Mr. Abbott, it wasn't in its
 22 proper format. He had obviously gotten the
 23 information from Eastern Health and sent it
 24 directly to Mr. Cake. When Mr. Cake received
 25 it, he knew it wasn't in the proper format.

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1 He sent it to me to do the follow up and
 2 because Moira was travelling, in terms of our
 3 communication, both verbally and on the e-
 4 mail, I agreed that I would help them by
 5 formatting the note and through all of the
 6 evidence that I gave here today or in the last
 7 day and a half or day, I suppose -
 8 CHAYTOR, Q.C.:
 9 Q. Seems longer than it has been.
 10 MS. MCCORMACK:
 11 A. It does, yes. I mean, basically what I did
 12 was prepare the note and make sure that
 13 Department of Health was satisfied that the
 14 information in the note was what they wanted
 15 to go forward.
 16 CHAYTOR, Q.C.:
 17 Q. Yes, and I understood all that, and I
 18 understand how it originated, but I was just
 19 thinking why, on the 18th, to ensure that
 20 there is no discrepancy between the notes and
 21 that--why wouldn't there just be one note, one
 22 version at this point in time. That was what
 23 I was trying to get at.
 24 MS. MCCORMACK:
 25 A. Yes, I understand, yes.

1 CHAYTOR, Q.C.:

2 Q. Because there is the potential then that there

3 could be, in fact, two different versions of

4 the note, and certainly at this point in time,

5 what you had sent on, you're saying that the

6 changes were already made and it appears the

7 changes aren't already made in the

8 Department's -

9 MS. MCCORMACK:

10 A. In the note that was in the Department, that's

11 correct.

12 CHAYTOR, Q.C.:

13 Q. And whether or not then those changes get made

14 or whether or not they're the same two edits -

15 MS. MCCORMACK:

16 A. Yes.

17 CHAYTOR, Q.C.:

18 Q. - we don't know, I guess.

19 MS. MCCORMACK:

20 A. That's true.

21 CHAYTOR, Q.C.:

22 Q. If we could go back then to--actually this,

23 it's 1011, please? And if we look at page

24 one, this is your e-mail to Mr. Thompson,

25 August 24th of 2007, and why are you, on

1 CHAYTOR, Q.C.:

2 Q. Okay. So what questions, other than there was

3 some issue, you say, what whether or not the

4 Department had, in fact, signed off on the

5 note. What other questions did Mr. Thompson

6 have for you around this note?

7 MS. MCCORMACK:

8 A. I don't think he had too many, just to ask me

9 if I had any, you know, further recollection

10 or knew if there was any other information

11 that he should be aware of, and I knew that

12 the communication in Cabinet Secretariat with

13 departments was largely e-mail, as well as

14 verbal, and I was concerned that the actual

15 records of the e-mails were not available. So

16 I had looked for it, and actually, in the

17 first attempt to try to find them, I couldn't

18 find them, and then one day I ended up with

19 the--I don't know how it happened, but I ended

20 up looking through, searching through my own

21 directories for something else and all of a

22 sudden I found them. So I wanted to let Mr.

23 Thompson know right away that I had found

24 them, and I sent him the information, and

25 provided to him in hard copy as well.

1 August 24th 2007, sending this on to Mr.

2 Thompson?

3 MS. MCCORMACK:

4 A. Because when I left Cabinet Secretariat for my

5 new position, none of my Cabinet Secretariat

6 e-mails would have followed me into that new

7 position, and in that summer, the following

8 year, or that August, Mr. Thompson had

9 contacted me because I think there was some

10 issue about whether or not the Department had

11 actually signed off on the note, and I said I

12 clearly remember the discussions with Moira

13 around the note, but I couldn't find my e-

14 mails. So the office of the Chief Information

15 Officer came to my new office and helped

16 retrieve the e-mail documents and I found the

17 note in the Cabinet Secretariat filing system

18 in my new office and I copied all of the

19 information that I had in those notes, which

20 includes some of the e-mails that are here in

21 the evidence, and I advised Mr. Thompson that

22 I had in fact found them, which in my opinion

23 verified the fact that, you know, this note

24 had in fact been approved by the Department of

25 Health.

1 CHAYTOR, Q.C.:

2 Q. And when you were at Cabinet Secretariat, were

3 you using Outlook for e-mail?

4 MS. MCCORMACK:

5 A. I'm not sure if we were on Outlook then or

6 GroupWise, but at some point it changed, so

7 when I was there, I'm not quite sure.

8 CHAYTOR, Q.C.:

9 Q. So ultimately, though, the e-mails that we

10 have belong to you, you were able to retrieve

11 yourself?

12 MS. MCCORMACK:

13 A. Yes, with the help of the office of the chief

14 information officer, and then the Cabinet

15 Secretariat administrative person came and got

16 them off my system again, because it wasn't

17 appropriate for me to have them in my current

18 working environment.

19 CHAYTOR, Q.C.:

20 Q. Did Mr. Thompson have any questions for you

21 regarding the content of the note?

22 MS. MCCORMACK:

23 A. No.

24 CHAYTOR, Q.C.:

25 Q. Have you ever had discussions with him

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1 regarding the content of the note?
 2 MS. MCCORMACK:
 3 A. I have had discussions with him in terms of
 4 preparation for the hearing. And I think we
 5 may have talked about that change in the
 6 wording.
 7 CHAYTOR, Q.C.:
 8 Q. Okay, and when did you have those discussions
 9 with Mr. Thompson?
 10 MS. MCCORMACK:
 11 A. Oh just in preparation for the appearance here
 12 at the Commission.
 13 CHAYTOR, Q.C.:
 14 Q. Okay, and so that's recently in the past few
 15 weeks, I take it?
 16 MS. MCCORMACK:
 17 A. Yes. And discussions about your recollections
 18 about the use of the word "greatly"?
 19 MS. MCCORMACK:
 20 A. Yes.
 21 CHAYTOR, Q.C.:
 22 Q. And did you also have discussions about the
 23 section of the report--or sorry, the note
 24 referring to the external reports and the
 25 status of the external reviews?

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1 MS. MCCORMACK:
 2 A. Yes, I think it was Mr. Thompson that advised
 3 me, in fact, that there had been reports that
 4 had been received, which I had not picked up
 5 on.
 6 CHAYTOR, Q.C.:
 7 Q. And have you had any discussions with Ms.
 8 Hennessey since all this came about?
 9 MS. MCCORMACK:
 10 A. One discussion. She came to our office, I'm
 11 not exactly sure of the time, but it was in
 12 recent times and before she appeared here, to
 13 attend a meeting with some other agency staff,
 14 it wasn't to meet with me and she just passed
 15 by and said hello and we just chatted a little
 16 bit. She asked if I was nervous about coming
 17 to the Inquiry and I said no, not really and
 18 she said--we did talk about the word "greatly"
 19 because I said, I knew when I had been
 20 interviewed by you this had come up and I
 21 said, Moira, I really can't remember if I had
 22 taken that out, if you had taken that out,
 23 but, you know, I just said we'd just have to
 24 explain it as we remembered it. And that was
 25 the extent of our conversation on that date.

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1 CHAYTOR, Q.C.:
 2 Q. And what did she indicate to you was her
 3 recollection on that?
 4 MS. MCCORMACK:
 5 A. On that day, I don't think she could recall
 6 either. I think she was kind of agreeing with
 7 me at that point, saying, well I may have, you
 8 may have, but I think subsequent to that she
 9 did advise that she had taken that out or had
 10 recommended it come out.
 11 CHAYTOR, Q.C.:
 12 Q. And what's your knowledge of that?
 13 MS. MCCORMACK:
 14 A. I probably saw her on the Inquiry.
 15 CHAYTOR, Q.C.:
 16 Q. If we could look, please, at P-1477? This is
 17 a letter that's written by Mr. Pritchard to
 18 myself and Mr. Coffey, May 23rd of this year
 19 and it involves some evidence of Ms. Hennessey
 20 and it has--part of it has to do with you, so
 21 I just want to bring your attention to it.
 22 This is her recollection at least put forward
 23 in this note or in this letter as to the
 24 circumstances around August 18th briefing
 25 note. And if you just want to take a moment

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1 and just read down through the first couple of
 2 paragraphs, I'm then going to take your
 3 attention to this paragraph, so if you just
 4 want to read what comes before that? And if
 5 there's anything along the way that you're
 6 reading that is not in keeping with your
 7 recollection, you can point it out to us.
 8 Okay?
 9 MS. MCCORMACK:
 10 A. Uh-hm.
 11 CHAYTOR, Q.C.:
 12 Q. I just want to take you then, she notes about
 13 being contacted by you shortly after she comes
 14 back from her vacation and her contact then
 15 with Ms. Predham to get the retesting results.
 16 She started a table and the table typed August
 17 14th. Then she says, "I advised Ms. McCormack
 18 on August 14th at 10:33 p.m. that the table
 19 will be sent to her on August 15th. I also
 20 provided feedback on a note she was
 21 preparing." And I take it that's the e-mail
 22 we referred to yesterday.
 23 MS. MCCORMACK:
 24 A. Yes.
 25 CHAYTOR, Q.C.:

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1 Q. But she indicates that she provided feedback
 2 on a note that you were preparing. Do you
 3 have any comment on that?
 4 MS. MCCORMACK:
 5 A. Well, yes, I do because the note really is a
 6 Health note, but I was helping to put the note
 7 together, so I formatted the note with the
 8 information provided to me by the Department
 9 of Health and Eastern Health. It still was
 10 not a Cabinet Secretariat note, it was a
 11 Department of Health note.
 12 CHAYTOR, Q.C.:
 13 Q. Okay, and then "the table was sent to Ms.
 14 McCormack on August 15th and she inserted it
 15 into the note." Now you've told the
 16 Commissioner that the table was inserted into
 17 the note by, presumably Ms. Hennessey or
 18 someone in the department -
 19 MS. MCCORMACK:
 20 A. Yes.
 21 CHAYTOR, Q.C.:
 22 Q. - and sent to you.
 23 MS. MCCORMACK:
 24 A. Yes.
 25 CHAYTOR, Q.C.:

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1 Q. So you take issue with that?
 2 MS. MCCORMACK:
 3 A. Yes.
 4 CHAYTOR, Q.C.:
 5 Q. "Ms. McCormack then sent me some questions"
 6 and those are the list of questions that she
 7 replied to from Labrador and we looked at that
 8 e-mail.
 9 MS. MCCORMACK:
 10 A. Yes.
 11 CHAYTOR, Q.C.:
 12 Q. "And Ms. McCormack subsequently added some
 13 information to the note." And I take it, you
 14 take no issue with that, you did add
 15 information to the note.
 16 MS. MCCORMACK:
 17 A. No, that's correct.
 18 CHAYTOR, Q.C.:
 19 Q. "On August 18th, Ms. McCormack sent a note to
 20 me at 10:59 a.m. indicating it was the final
 21 note." And we looked at that e-mail.
 22 MS. MCCORMACK:
 23 A. Yes, we did.
 24 CHAYTOR, Q.C.:
 25 Q. "If I approved of same. She subsequently

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1 called me. I advised her that I was not in a
 2 position to approve the note, as I had not
 3 heard back from Mr. Abbott." Now, how about
 4 that portion?
 5 MS. MCCORMACK:
 6 A. That is definitely not true. I would not have
 7 sent that note. If she had indicated to me
 8 that they were not comfortable with that note
 9 going forward, I would have waited. I had
 10 waited from the 31st of July until this date
 11 to finalize the note with Health's approval
 12 and I definitely would not--if she had said
 13 she needed more time, Mr. Abbott hadn't signed
 14 off on it and she did not approve it, I can
 15 assure you, I would not have let it go and nor
 16 would Mr. Cake. If I had told him that they
 17 needed the deputy's signature or that they
 18 needed to be sure that the deputy was aware,
 19 he would not have let me send the note.
 20 CHAYTOR, Q.C.:
 21 Q. Okay.
 22 MS. MCCORMACK:
 23 A. So I take exception to that.
 24 CHAYTOR, Q.C.:
 25 Q. Okay. "During the conversation we agreed to

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1 remove the word 'greatly' from page 3, as the
 2 word was not used in the draft test results
 3 document provided by Heather Predham, Eastern
 4 Health." How about that portion? Agreement
 5 between yourself and Ms. Hennessey to remove
 6 the word "greatly"?
 7 MS. MCCORMACK:
 8 A. Yes, I think we did at that point, but in
 9 terms of the results not being documented, I
 10 know in my conversation with Heather that she
 11 used the word "greatly".
 12 CHAYTOR, Q.C.:
 13 Q. Yes. And what difference really, I guess is
 14 my question, because I took you to the table
 15 and we can't see the use of the number 22.
 16 MS. MCCORMACK:
 17 A. No.
 18 CHAYTOR, Q.C.:
 19 Q. So that also wasn't in the draft document
 20 provided by Ms. Predham? So what difference
 21 was it, why is the concern over the word
 22 "greatly", as opposed to the concern over the
 23 use of the information at all, when there's no
 24 written record of it from Eastern Health?
 25 MS. MCCORMACK:

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1 A. I'm sorry, could you repeat that? I don't
 2 quite -
 3 CHAYTOR, Q.C.:
 4 Q. I don't blame you. My point is that the
 5 number 22 is not in Ms. Predham's
 6 documentation either, and yet the concern
 7 seems to be about the use of the word
 8 "greatly" and the reason given here being that
 9 because it's not used in the draft test
 10 results document provided by Ms. Predham.
 11 Well not only is the word "greatly" not there,
 12 I don't see the number "22" there?
 13 MS. MCCORMACK:
 14 A. That's right, and of course the request for
 15 the information about how many women or
 16 persons--actually I asked women, I'm sure, how
 17 many women were most impacted came from
 18 Cabinet Secretariat. It was a question that
 19 Gary had asked of me, which I asked of Heather
 20 and she gave me that number. So it probably
 21 wasn't in the table or wasn't in the table,
 22 but I'm not sure why she--I guess she'd felt
 23 that because the information wasn't actually
 24 written, I can't answer why she didn't have
 25 any concerns about the numbers.

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1 CHAYTOR, Q.C.:
 2 Q. And Ms. Hennessey had no problems with any
 3 other information that you received verbally
 4 from Ms. Predham, including the information
 5 about the external review reports?
 6 MS. MCCORMACK:
 7 A. That's correct, because she was reading this
 8 note and getting back to me with any concerns,
 9 that she had pointed out a number of things
 10 that she wanted done and made some suggestions
 11 about what should be included. And all of the
 12 recommendations that she made to me were
 13 certainly followed up.
 14 CHAYTOR, Q.C.:
 15 Q. Overall in preparing the briefing note, did
 16 you have difficulty in getting information or
 17 getting answers to questions that you had
 18 around the note?
 19 MS. MCCORMACK:
 20 A. Not really, I mean I found when I had a
 21 discussion with Heather at Moira's suggestion,
 22 that she was familiar with the file and she
 23 was able to explain to me, like the kinds of
 24 things that I wasn't clear on. For example,
 25 the role of the panel and how many women were

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1 impacted and how many women potentially could
 2 be part of the lawsuit, where the lawsuit
 3 started. So I found her to be knowledgeable
 4 and I took the information that she gave me to
 5 be accurate.
 6 CHAYTOR, Q.C.:
 7 Q. Okay, and you said you had "a" discussion. I
 8 understood yesterday that you had more than
 9 one discussion?
 10 MS. MCCORMACK:
 11 A. Oh yes, I did, I'm sorry about that.
 12 CHAYTOR, Q.C.:
 13 Q. Did it seem to take an unusual amount of time
 14 to get the information?
 15 MS. MCCORMACK:
 16 A. Yes.
 17 CHAYTOR, Q.C.:
 18 Q. And was that from both the department and
 19 Eastern Health, was there delay in getting
 20 back to you? For example, did Ms. Predham,
 21 did you phone Ms. Predham up and she gave you
 22 the information or did she have to get back to
 23 you?
 24 MS. MCCORMACK:
 25 A. Oh no, when I called her, I didn't always get

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1 her the minute that I called her, but if I
 2 left a message, she did call me back and she
 3 provided the information to the questions as
 4 soon as we connected. In terms of the time
 5 getting back and forth between Health and
 6 myself, I think it's because of the work that
 7 Moira was doing at the time and the fact that
 8 she was travelling and she also was relying on
 9 obtaining information from Eastern Health in
 10 order to prepare the note.
 11 CHAYTOR, Q.C.:
 12 Q. And after then submitting the final note which
 13 we saw at P-0125, page 31, after submitting
 14 the final note, were you ever contacted by
 15 anyone in the Premier's office or Cabinet
 16 Secretariat seeking clarification as to any of
 17 the information?
 18 MS. MCCORMACK:
 19 A. No.
 20 CHAYTOR, Q.C.:
 21 Q. And I take it nobody asked any questions
 22 around the content of the note?
 23 MS. MCCORMACK:
 24 A. No, that's correct.
 25 CHAYTOR, Q.C.:

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1 Q. So when did you next hear anything? This is
 2 then August 18th, 2006, when do you next hear
 3 anything about this note?
 4 MS. MCCORMACK:
 5 A. Oh, in the summer of '07 when Mr. Thompson was
 6 looking or discussing with me the e-mails and
 7 the approval of the note, and I started to
 8 look for the e-mails and get the Cabinet
 9 Secretariat directory brought to my, you know,
 10 brought to my new office so I could look for
 11 the e-mails that I knew were there.
 12 CHAYTOR, Q.C.:
 13 Q. And what did you understand to be the concern
 14 about this note? I know you've told us about
 15 the concern about whether it was signed off or
 16 not or approved by the department, but why was
 17 -
 18 MS. MCCORMACK:
 19 A. My understanding at the time was a couple of
 20 things. Number one, we knew the Inquiry was
 21 taking place. I think there was some
 22 indication that perhaps Minister Osborne
 23 hadn't been advised of the note.
 24 CHAYTOR, Q.C.:
 25 Q. So you were told that?

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1 MS. MCCORMACK:
 2 A. I do (sic).
 3 CHAYTOR, Q.C.:
 4 Q. Mr. Thompson tell you that?
 5 MS. MCCORMACK:
 6 A. Perhaps, yeah. And I wanted to be sure that--
 7 I was certain, I knew as a Cabinet officer
 8 that I did not let anything go from my desk
 9 that didn't have departmental approval, it was
 10 one of the strict policies of the Cabinet
 11 Secretariat that you didn't let information go
 12 unless it was approved by the department to go
 13 forward, because ultimately, as I said, it was
 14 a Department of Health note for the Premier.
 15 CHAYTOR, Q.C.:
 16 Q. Were there any portions of the note that were
 17 of particular concern or significance to Mr.
 18 Thompson?
 19 MS. MCCORMACK:
 20 A. Not that I'm aware of.
 21 CHAYTOR, Q.C.:
 22 Q. Okay, and so did you sit down with him and
 23 actually go through the note?
 24 MS. MCCORMACK:
 25 A. No.

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1 CHAYTOR, Q.C.:
 2 Q. You didn't have a draft of the note during
 3 your discussions?
 4 MS. MCCORMACK:
 5 A. No.
 6 CHAYTOR, Q.C.:
 7 Q. And why was that note of importance?
 8 MS. MCCORMACK:
 9 A. I'm not sure why you're -
 10 CHAYTOR, Q.C.:
 11 Q. Yeah, why that note? Why was that note of -
 12 MS. MCCORMACK:
 13 A. Well I guess because of the Inquiry and
 14 because of the concerns that there was some
 15 conflicting information about how the note was
 16 processed and whether or not it was approved
 17 and I think that was certainly of importance
 18 to government.
 19 CHAYTOR, Q.C.:
 20 Q. Okay, was there any discussion about the
 21 content of the note having the numbers in that
 22 note?
 23 MS. MCCORMACK:
 24 A. Oh yes, I think that was the other thing, by
 25 this point people were aware that some of the

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1 information in the note may not have been
 2 accurate, and so it was trying to piece
 3 together all of that information why that was
 4 the case.
 5 CHAYTOR, Q.C.:
 6 Q. And what about the issue that the note is back
 7 in August of 2006 and contains a fair degree
 8 of information about changes in test results
 9 and the numbers, which don't ultimately come
 10 out in December of 2006, was there discussion
 11 about the note being of importance from that
 12 respect?
 13 MS. MCCORMACK:
 14 A. Yes, I think so, yes.
 15 CHAYTOR, Q.C.:
 16 Q. And what do you recall being discussed about
 17 that?
 18 MS. MCCORMACK:
 19 A. I think there was a lot of concern about
 20 whether or not the database was accurate and
 21 obviously the information that was provided
 22 was not reflective of what was coming out at
 23 that particular time?
 24 CHAYTOR, Q.C.:
 25 Q. I'm sorry, which database was accurate?

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1 MS. MCCORMACK:
 2 A. I think the information that--whatever
 3 databases Eastern Health relied on to actually
 4 provide this information, didn't appear to be--
 5 the numbers kept changing as I understand it.
 6 CHAYTOR, Q.C.:
 7 Q. Okay, what about the--my question is the fact
 8 that government had and whether the numbers
 9 changed, you know, somewhat, for the most part
 10 I would suggest to you the numbers in August
 11 of '06 aren't that different from the numbers
 12 that ultimately are available in December of
 13 2006 and whether they changed beyond that, but
 14 my question is whether or not there was any
 15 concern about the note from the perspective of
 16 the government in that this is a note dated
 17 August, 2006, and it contains most of that
 18 information at that point in time, was there
 19 any discussion about that?
 20 MS. MCCORMACK:
 21 A. No.
 22 CHAYTOR, Q.C.:
 23 Q. And so until this information was then brought
 24 to your attention, some time in the summer of
 25 2007, you didn't even realize that the word

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1 "greatly" had been changed. In fact, you
 2 didn't realize that until you came to see us?
 3 MS. MCCORMACK:
 4 A. That's correct.
 5 CHAYTOR, Q.C.:
 6 Q. Did you--do you remember the technical
 7 briefing in December 2006?
 8 MS. MCCORMACK:
 9 A. The technical briefing? I'm not sure.
 10 CHAYTOR, Q.C.:
 11 Q. Eastern Health did a media technical briefing,
 12 December 11th, 2006 and there was some news
 13 coverage around that. Were you still
 14 following the news at that point in time?
 15 MS. MCCORMACK:
 16 A. No, I wasn't following it at all.
 17 CHAYTOR, Q.C.:
 18 Q. You weren't doing media monitoring at that
 19 point in time?
 20 MS. MCCORMACK:
 21 A. Not on this issue, no.
 22 CHAYTOR, Q.C.:
 23 Q. In December 2006? And would anybody else in
 24 Cabinet Secretariat be doing that?
 25 MS. MCCORMACK:

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1 A. Very likely Paula Burt because she would have
 2 been the Cabinet officer responsible for
 3 Department of Health.
 4 CHAYTOR, Q.C.:
 5 Q. Okay, and you, yourself, don't recall just
 6 personally hearing in the news anything about
 7 the issue?
 8 MS. MCCORMACK:
 9 A. I can't recall, you know, specific time, I
 10 know there was a lot of, obviously there was a
 11 lot of media attention to the issue, but at
 12 what particular times, I've been hearing it,
 13 you know, since the note. I didn't really pay
 14 a lot of attention to it.
 15 CHAYTOR, Q.C.:
 16 Q. So did you realize in December 2006 that
 17 Eastern Health had not released all of the
 18 numbers which would have available and which
 19 you had or similar numbers back in August of
 20 2006?
 21 MS. MCCORMACK:
 22 A. I'm not sure I realized at that point, but
 23 obviously I knew there was more problems with
 24 this issue than what I was aware of at the
 25 time this note was compiled.

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1 CHAYTOR, Q.C.:
 2 Q. So, in December 2006 there's some media
 3 coverage which indicates that Eastern Health
 4 had held this technical briefing and they
 5 weren't saying how many people overall had had
 6 changed results.
 7 MS. MCCORMACK:
 8 A. Um-hm.
 9 CHAYTOR, Q.C.:
 10 Q. Did that catch your attention at the time?
 11 MS. MCCORMACK:
 12 A. It didn't, no, simply because I wasn't
 13 responsible for the department and I wasn't
 14 really paying attention to that. I would
 15 assume Paula would have been following that or
 16 someone at Cabinet Secretariat.
 17 CHAYTOR, Q.C.:
 18 Q. And in May 2007, of course, that becomes a
 19 much broader discussed or much bigger issue in
 20 the media in terms of then by that point in
 21 time all of the numbers have been publicly
 22 released.
 23 MS. MCCORMACK:
 24 A. Yes.
 25 CHAYTOR, Q.C.:

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1 Q. And do you recall then around that point in
 2 time hearing the media coverage?
 3 MS. MCCORMACK:
 4 A. No, because in April of 2007 I left Cabinet
 5 Secretariat and went on vacation or actually
 6 my daughter's wedding in Costa Rica and I
 7 didn't return to the office until the middle
 8 of May. And at that point it wasn't Cabinet
 9 Secretariat, it was Fire and Emergency
 10 Services. So, I wasn't really following any
 11 of the media during that period of time.
 12 CHAYTOR, Q.C.:
 13 Q. Okay. Excuse me, just a moment. If we could
 14 go back please to 0125, page 31. I'm just
 15 about finished Ms. McCormack. And this is the
 16 final briefing note.
 17 MS. MCCORMACK:
 18 A. Yes.
 19 CHAYTOR, Q.C.:
 20 Q. And you'll note the numbers included, "109
 21 patient ER/PR status changed from negative to
 22 positive and there are treatment
 23 recommendations, 109".
 24 MS. MCCORMACK:
 25 A. Yes.

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1 CHAYTOR, Q.C.:
 2 Q. "And those include patients who have been
 3 impacted by the delay in receiving Tamoxifen
 4 and patients whose results have not changed
 5 significantly, but the clinical definition of
 6 positive and negative has changed since time
 7 of diagnosis". So, if you just compare that
 8 then to the information under the summary,
 9 that "Eastern Health advises 22 women were
 10 impacted by the change in status of ER/PR
 11 receptor tests, these women had changes in the
 12 progress of their disease from the initial
 13 confirmation of the disease and the beginning
 14 of their treatment to the retesting". Did you
 15 make any connection between those two numbers?
 16 MS. MCCORMACK:
 17 A. I seem to recall, like, in our discussion or
 18 my discussion, I should say, with Heather that
 19 when we were discussing the change in
 20 treatment and the change in peoples' status
 21 given the kind of disease it was, as I
 22 understood it from here, and as I've said, I'm
 23 not 100 percent familiar with this particular
 24 cancer, that it was possible that these women
 25 may have had changes regardless of what kind

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1 of treatment they had because of the nature of
 2 disease. I never really looked at the numbers
 3 in great detail. And then when the technical
 4 briefing was offered, I figured if someone
 5 needed more specific information on the
 6 medical or the legal that that would be
 7 provided through that process.
 8 CHAYTOR, Q.C.:
 9 Q. I'm sorry, there was a technical briefing
 10 offered?
 11 MS. MCCORMACK:
 12 A. Well, in the--if you--under the -
 13 CHAYTOR, Q.C.:
 14 Q. Action required.
 15 MS. MCCORMACK:
 16 A. - action--yes. I'm referring to should the
 17 Premier require further details, officials
 18 from health -
 19 CHAYTOR, Q.C.:
 20 Q. As well as their legal -
 21 MS. MCCORMACK:
 22 A. - as well as their legal counsel would be
 23 available for in-person briefing. So, I
 24 figured if there was anyone that had specific
 25 questions about the medical or the legal

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1 aspects, that that could be provided by that
 2 consultation.
 3 CHAYTOR, Q.C.:
 4 Q. Ms. McCormack, did you have then any other
 5 involvement in the ER/PR issue?
 6 MS. MCCORMACK:
 7 A. No.
 8 CHAYTOR, Q.C.:
 9 Q. Is there anything else that we haven't covered
 10 that you think would be of relevance or
 11 importance for the Commissioner to know?
 12 MS. MCCORMACK:
 13 A. Yes, one thing from yesterday I wanted to
 14 correct, if I could. You asked me a question
 15 about the TBATs in relation to my resume. And
 16 I had explained that the TBATs were actually
 17 Treasury Board recommendations and that isn't
 18 really correct. TBAT refers to--I thought
 19 about this last night, so I was bothered by in
 20 the night and spoke to counsel this morning
 21 about it--what TBAT refers to, it's "To Be
 22 Attached To".
 23 CHAYTOR, Q.C.:
 24 Q. Okay.
 25 MS. MCCORMACK:

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1 A. And if you recall in my earlier evidence I
 2 talked about when we searched the trim
 3 database, you can see what information is in
 4 the database and then these TBATs would
 5 indicate what would be available that's
 6 actually not in there--like, for example, if
 7 there was a report that wasn't attached to the
 8 Cabinet submission, but is part of the Cabinet
 9 submission, the TBAT would indicate that. If
 10 there were recommendations or e-mails that had
 11 specific comments, say, from finance, if there
 12 was financial impacts or justice comments or
 13 whatever, the TBAT would indicate that. Now,
 14 some of those TBATs, if they're like, just e-
 15 mails or one pages, would be attached in the
 16 database or would be included in the database,
 17 an actual copy of it. If it was a lengthy
 18 report, those would be indicated in the
 19 database, but would be available in the actual
 20 hard records centre of Cabinet Secretariat.
 21 So, I wanted to correct that because -
 22 CHAYTOR, Q.C.:
 23 Q. Okay, thank you.
 24 MS. MCCORMACK:
 25 A. A Treasury Board note actually would be a TBAT

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1 in a Cabinet submission.
 2 CHAYTOR, Q.C.:
 3 Q. Okay. And just one final point about the 22,
 4 the sentence that goes forward, "Eastern
 5 Health advises 22 women were impacted by the
 6 change in status of the ER/PR receptor tests."
 7 Bearing in mind the information that you did
 8 receive, because you're the person who
 9 received this information directly from
 10 Eastern Health, that sentence going forward as
 11 it's written there, do you believe that was an
 12 accurate statement?
 13 MS. MCCORMACK:
 14 A. Yes, I believe it was an accurate statement.
 15 I think my question was how many were--who was
 16 the most--how many were greatly impacted, I
 17 guess, and that was the information that was
 18 provided to me by Heather.
 19 CHAYTOR, Q.C.:
 20 Q. The idea of 22 women were impacted?
 21 MS. MCCORMACK:
 22 A. Yes.
 23 CHAYTOR, Q.C.:
 24 Q. By the change in status of their ER/PR
 25 receptor test, you believe that to be an

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1 accurate statement?
 2 MS. MCCORMACK:
 3 A. Well, I think there were more than 22.
 4 CHAYTOR, Q.C.:
 5 Q. Yes.
 6 MS. MCCORMACK:
 7 A. Yes.
 8 CHAYTOR, Q.C.:
 9 Q. That's my point.
 10 MS. MCCORMACK:
 11 A. Yes.
 12 CHAYTOR, Q.C.:
 13 Q. So do you believe that's an accurate
 14 statement?
 15 MS. MCCORMACK:
 16 A. In retrospect, I would say no, perhaps the
 17 word "greatly" should have been left in there.
 18 CHAYTOR, Q.C.:
 19 Q. And at the time that you agreed to take the
 20 word "greatly" out, to have it omitted from
 21 the final version going forward to the Premier
 22 and the Premier's office, did that cause you
 23 concern that the information going forward
 24 would not be accurate?
 25 MS. MCCORMACK:

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1 A. Again, it was a health note and health was not
 2 comfortable with having that information in
 3 it, and I couldn't let it go forward if they
 4 were not satisfied to have the note go
 5 forward.
 6 CHAYTOR, Q.C.:
 7 Q. Those are my questions, Ms. McCormack. Thank
 8 you.
 9 MS. MCCORMACK:
 10 A. You're very welcome.
 11 CHAYTOR, Q.C.:
 12 Q. Thank you, Commissioner. Some of the other
 13 lawyers may have questions for you.
 14 MS. MCCORMACK:
 15 A. Thank you.
 16 COMMISSIONER:
 17 Q. Thank you, Ms. Chaytor. Mr. Simmons?
 18 MS. MARILYN MCCORMACK, EXAMINATION BY MR. DANIEL SIMMONS
 19 MR. SIMMONS:
 20 Q. Thank you, Commissioner. Good morning, Ms.
 21 McCormack, I'm Dan Simmons and I'm the counsel
 22 for Eastern Health here.
 23 MS. MCCORMACK:
 24 A. Good morning.
 25 MR. SIMMONS:

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1 Q. I won't be very long with you.
 2 MS. MCCORMACK:
 3 A. Fine.
 4 MR. SIMMONS:
 5 Q. Exhibit P-0172, please? You've seen this
 6 before, this is a message that has the final
 7 copy of the briefing note attached to it. Can
 8 we go to page 5, please? This is the briefing
 9 note dated August 18th, 2006 on the bottom. I
 10 think you were just showed it there a few
 11 minutes ago.
 12 MS. MCCORMACK:
 13 A. Yes.
 14 MR. SIMMONS:
 15 Q. And you were asked a number of questions
 16 already about this paragraph under "Reasons
 17 For the Erroneous Results", the one that says
 18 that "Eastern Health has engaged external
 19 consultants to review the procedures at the
 20 laboratory. When all results are received,
 21 they'll be reviewed and the recommendations
 22 will be implemented. The goal is to have the
 23 laboratory accredited."
 24 MS. MCCORMACK:
 25 A. Yes.

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1 MR. SIMMONS:
 2 Q. And I believe you told us yesterday, as well,
 3 that when you spoke to Health Predham at
 4 Eastern Health about this, she had told you
 5 something about this and I believe you also
 6 mentioned accreditation when you described
 7 that to us -
 8 MS. MCCORMACK:
 9 A. Yes, she had told me that was the plan.
 10 MR. SIMMONS:
 11 Q. Okay. Now, what kind of accreditation did you
 12 understand her to be talking about at that
 13 point, how much did you know about it or what
 14 that was?
 15 MS. MCCORMACK:
 16 A. I didn't know a lot about it. I just assumed
 17 that accrediting anything would make it better
 18 and up to standard, whatever professional
 19 standard may be.
 20 MR. SIMMONS:
 21 Q. Um-hm. Okay. Did you know anything about
 22 what sort of accrediting bodies there were or
 23 where you'd go, who would accredit the lab or
 24 how that would happen? Did you make any
 25 inquiries about that?

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1 MS. MCCORMACK:
 2 A. No, I did not.
 3 MR. SIMMONS:
 4 Q. Right, okay. Did you know whether there had
 5 been any accreditation done up to that point
 6 or whether accreditation was something that
 7 was in the works or going to be worked on?
 8 MS. MCCORMACK:
 9 A. My understand is the goal was to have it
 10 accredited.
 11 MR. SIMMONS:
 12 Q. Right.
 13 MS. MCCORMACK:
 14 A. So I assumed that there wasn't--it wasn't at
 15 this point in time.
 16 MR. SIMMONS:
 17 Q. Okay. And did you draw any connection in your
 18 mind between those external reports and this
 19 goal of accreditation?
 20 MS. MCCORMACK:
 21 A. Yes, I did.
 22 MR. SIMMONS:
 23 Q. And what kind of connection did you make
 24 regarding those?
 25 MS. MCCORMACK:

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1 A. Well, my understanding is that once the
 2 external consultant reviewed, that there would
 3 be recommendations which Eastern Health would
 4 implement and then that would lead to the
 5 accreditation of the lab.
 6 MR. SIMMONS:
 7 Q. Right. So that implementation of the
 8 recommendations would be something that would
 9 be done before they could move towards looking
 10 for an accreditation?
 11 MS. MCCORMACK:
 12 A. Yes, that would be my understanding, yes.
 13 MR. SIMMONS:
 14 Q. Okay. Now, you've also told us yesterday, I
 15 believe, in answer to some questions from Ms.
 16 Chaytor, that you didn't outright ask Ms.
 17 Predham whether the reports from the external
 18 reviewers had been received or not?
 19 MS. MCCORMACK:
 20 A. That's correct.
 21 MR. SIMMONS:
 22 Q. Okay. So she--so that question not having
 23 been asked, I presume then that she didn't say
 24 to you the reports have not been received?
 25 MS. MCCORMACK:

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1 A. No. She told me that external consultants
 2 were engaged.
 3 MR. SIMMONS:
 4 Q. Yes.
 5 MS. MCCORMACK:
 6 A. To do the review.
 7 MR. SIMMONS:
 8 Q. Okay.
 9 MS. MCCORMACK:
 10 A. She didn't indicate any reports had been
 11 received or any recommendations had been
 12 implemented.
 13 MR. SIMMONS:
 14 Q. Right. But did she tell to you that--did she
 15 tell you that the reports have not been
 16 received?
 17 MS. MCCORMACK:
 18 A. No.
 19 MR. SIMMONS:
 20 Q. Okay. You were also showed--oh, this note
 21 here, I just want to confirm, you never did
 22 send any version of this note back to Ms.
 23 Predham for her to look at, did you?
 24 MS. MCCORMACK:
 25 A. No, I did not.

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1 MR. SIMMONS:
 2 Q. No. And did you inquire of Ms. Hennessey
 3 whether any version of this note was being
 4 sent back to Eastern Health for them to sign
 5 off on or approve before it went forward?
 6 MS. MCCORMACK:
 7 A. No, because the responsibility to sign off on
 8 the note was the Department of Health and I
 9 knew that they were obtaining information from
 10 Eastern Health. I don't know that they--if
 11 they did send it back and forth like that. I
 12 assume that she probably would do that.
 13 MR. SIMMONS:
 14 Q. But from your, from your -
 15 MS. MCCORMACK:
 16 A. I never asked.
 17 MR. SIMMONS:
 18 Q. - own knowledge, you know you didn't send it
 19 back to Heather Predham or -
 20 MS. MCCORMACK:
 21 A. Oh, I definitely did not.
 22 MR. SIMMONS:
 23 Q. - anyone at Eastern Health and you assumed
 24 that health might, but you don't know whether
 25 they did or not?

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1 MS. MCCORMACK:
 2 A. That's correct.
 3 MR. SIMMONS:
 4 Q. Okay. And you were also shown yesterday the
 5 briefing or referred to the briefing note that
 6 was in Cabinet Secretariat's materials which
 7 dated way back to October of '05, you recall
 8 that?
 9 MS. MCCORMACK:
 10 A. Yes, that's correct.
 11 MR. SIMMONS:
 12 Q. And that did mention external review reports,
 13 but said that it was expected, the reports
 14 would be received within a couple of weeks or
 15 a few weeks of that time of October of '05.
 16 MS. MCCORMACK:
 17 A. Yes.
 18 MR. SIMMONS:
 19 Q. So you had that information?
 20 MS. MCCORMACK:
 21 A. I did.
 22 MR. SIMMONS:
 23 Q. You never were provided, by health, with
 24 copies of any other briefing notes that they
 25 had -

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1 MS. MCCORMACK:
 2 A. That's correct.
 3 MR. SIMMONS:
 4 Q. - were you? Okay, I'll just show you one, P-
 5 0125, please, page 8. This is a question and
 6 answer briefing note. It says "spring 2006"
 7 and if we scroll down to the end of it, it's
 8 dated March 15, 2006.
 9 MS. MCCORMACK:
 10 A. Yes.
 11 MR. SIMMONS:
 12 Q. So, it's after the one that you had in Cabinet
 13 Secretariat records and well before the one
 14 you were working on in August?
 15 MS. MCCORMACK:
 16 A. Yes.
 17 MR. SIMMONS:
 18 Q. And on page 8 which is the first page of the
 19 note, there's a key messages there and the
 20 third bullet under that says, "a quality
 21 review began immediately when the problem was
 22 discovered. Eastern Health has had the method
 23 of testing for ER/PR receptors reviewed by
 24 external consultants. Their recommendations
 25 have been implemented and the consultants

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1 returned to Eastern Health in early April for
 2 an assessment of progress". So, by statement,
 3 it certainly appears from that statement that
 4 there was knowledge in the Department of
 5 Health that external reviewers initial reports
 6 had been receive and there were
 7 recommendations that had been acted on. Does
 8 that read that way?
 9 MS. MCCORMACK:
 10 A. I would agree, however that wasn't shared with
 11 me.
 12 MR. SIMMONS:
 13 Q. Right, so you didn't know that.
 14 MS. MCCORMACK:
 15 A. I did not know.
 16 MR. SIMMONS:
 17 Q. Okay. Now, Ms. Hennessey when she was here
 18 also gave evidence concerning a conversation
 19 she recalled having with you on the 18th of
 20 August which was the date of the final
 21 briefing note that you worked on together.
 22 And she told us that in that conversation she
 23 told you that the external review reports had
 24 been received.
 25 MS. MCCORMACK:

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1 A. Definitely not.
 2 MR. SIMMONS:
 3 Q. Do you have any recollection that whatsoever?
 4 MS. MCCORMACK:
 5 A. No, I do not and if she had told me that, I
 6 would have corrected that information in the
 7 note or suggested that she would do so.
 8 MR. SIMMONS:
 9 Q. Okay. Thank you very much.
 10 MS. MCCORMACK:
 11 A. You're very welcome.
 12 THE COMMISSIONER:
 13 Q. Ms. Hennebury?
 14 MS. HENNEBURY:
 15 Q. I have no questions.
 16 THE COMMISSIONER:
 17 Q. Yes, do you have any questions, Mr. Pritchett?
 18 MR. PRITCHETT:
 19 Q. No, Madam, thank you.
 20 MS. RUSSELL:
 21 Q. No questions.
 22 THE COMMISSIONER:
 23 Q. No questions, Ms. Russell.
 24 MS. RUSSELL:
 25 Q. No questions.

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1 THE COMMISSIONER:
 2 Q. Mr. Pike?
 3 MR. PIKE:
 4 Q. No questions.
 5 THE COMMISSIONER:
 6 Q. Mr. Pritchard?
 7 MR. PRITCHARD:
 8 Q. (Inaudible) questions.
 9 MS. MARILYN MCCORMACK, EXAMINATION BY MR. ROLF PRITCHARD
 10 MR. PRITCHARD:
 11 Q. Good morning, Ms. McCormack.
 12 MS. MCCORMACK:
 13 A. Good morning.
 14 MR. PRITCHARD:
 15 Q. Thank you, Commissioner. Ms. McCormack,
 16 there's just a couple of things I wanted to
 17 clear up with you. While we have the briefing
 18 notes up, perhaps we could look at P-0125,
 19 page 31, please. And this is the Cabinet
 20 Secretariat version of the August 18 briefing
 21 note. And as we know now there's a section in
 22 it that contains the chart, but I think in
 23 your evidence, Ms. Hennessey put the chart
 24 into the briefing note, is that correct?
 25 MS. MCCORMACK:

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1 A. Yes, that's correct.
 2 MR. PRITCHARD:
 3 Q. All right. And I just wanted to ask now with
 4 respect to the numbers in the chart, did you
 5 ever do any manipulations of those numbers or
 6 play with those numbers or try to -
 7 MS. MCCORMACK:
 8 A. No, I did not change anything in that chart?
 9 MS. MCCORMACK:
 10 A. Okay. And just for your own personal
 11 interest, did you sort of play with those
 12 numbers or make any inquiries about what the
 13 numbers meant or was it just sort of a block
 14 of text as far as I was concerned?
 15 MS. MCCORMACK:
 16 A. I didn't make any inquiries about the numbers.
 17 I certainly asked some questions about the
 18 role of the panel and things like that, but
 19 nothing around the numbers. I didn't add them
 20 up or, you know, to see what the changes were.
 21 I figured she had clearly outlined that in her
 22 information.
 23 MR. PRITCHARD:
 24 Q. And no one explained to you what the
 25 significance of the numbers be or different

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1 manipulations of the numbers. Mr. Cake or Ms.
 2 -
 3 MS. MCCORMACK:
 4 A. No.
 5 MR. PRITCHARD:
 6 Q. - Hennessey or Ms. Predham?
 7 MS. MCCORMACK:
 8 A. No.
 9 MR. PRITCHARD:
 10 Q. Okay. And now when December of 2006 comes
 11 out, were you paying attention to this
 12 particular issue?
 13 MS. MCCORMACK:
 14 A. No.
 15 MR. PRITCHARD:
 16 Q. All right. Thank you very much. Those are
 17 all my questions.
 18 THE COMMISSIONER:
 19 Q. Anything arising, Ms. Chaytor?
 20 CHAYTOR, Q.C.:
 21 Q. No, Commissioner.
 22 THE COMMISSIONER:
 23 Q. Thank you. Thank you, Ms. McCormack, very
 24 much for your contribution.
 25 MS. MCCORMACK:

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1 A. You're welcome.
 2 THE COMMISSIONER:
 3 Q. Would you like to take the morning break, so
 4 that we can switch gears for the next witness.
 5 CHAYTOR, Q.C.:
 6 Q. Yes, we have another witness.
 7 THE COMMISSIONER:
 8 Q. All right, well, we'll take the break now.
 9 (RECESS)
 10 THE COMMISSIONER:
 11 Q. Please be seated. Mr. Coffey?
 12 COFFEY, Q.C.:
 13 Q. Thank you, Commissioner. The next witness is
 14 Gary Cake.
 15 MR. CAKE:
 16 A. Good morning.
 17 COFFEY, Q.C.:
 18 Q. Good morning, sir.
 19 MR. GARY CAKE (AFFIRMED) EXAMINATION BY BERNARD COFFEY,
 20 Q.C.
 21 REGISTRAR:
 22 Q. Would you please state and spell your complete
 23 name for the Commission?
 24 MR. CAKE:
 25 A. Sure, it's Gary Cake, C-A-K-E.

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1 COFFEY, Q.C.:
 2 Q. I take it that Gary is spelled G-A-R-Y.
 3 MR. CAKE:
 4 A. Single R, that's right.
 5 COFFEY, Q.C.:
 6 Q. Thank you, sir. Commissioner, before I begin
 7 with Mr. Cake there is one exhibit please,
 8 Exhibit P-1634. I'd like to have that
 9 entered, please.
 10 THE COMMISSIONER:
 11 Q. Entered.
 12 EXHIBIT P-1634 MARKED AND ENTERED.
 13 COFFEY, Q.C.:
 14 Q. Thank you. Mr. Cake, could you tell the
 15 commissioner please, give her a general
 16 outline of your educational background and
 17 your professional background.
 18 MR. CAKE:
 19 A. Certainly, yes. I have a joint honours degree
 20 from Memorial University in sociology and
 21 psychology and a Master of Arts in Sociology
 22 from Queens University in Kingston Ontario.
 23 COFFEY, Q.C.:
 24 Q. And your professional background?
 25 MR. CAKE:

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1 A. My professional background has been
 2 exclusively within the public service. I
 3 joined the public service in 1981, worked for
 4 perhaps half a dozen departments throughout my
 5 career.
 6 COFFEY, Q.C.:
 7 Q. Could you just take us through those without
 8 getting into the details of it, what
 9 departments have you worked in?
 10 MR. CAKE:
 11 A. Okay. I commenced with the Department of
 12 Rural Agriculture and Northern Development;
 13 from there I would have moved to the Alcohol
 14 and Drug Dependency Commission; from there I
 15 would have moved to the Petroleum Directorate;
 16 the Intergovernmental Affairs Secretariat; the
 17 Economic Recovery Commission; the former
 18 Department of Development and Rural Renewal.
 19 Following that I believe was seconded to
 20 Cabinet Secretariat for approximately two
 21 years.
 22 COFFEY, Q.C.:
 23 Q. And when was that, first, the secondment, do
 24 you recall?
 25 MR. CAKE:

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1 A. In Cabinet Secretariat?

2 COFFEY, Q.C.:

3 Q. Yes.

4 MR. CAKE:

5 A. I'm going to say roughly 2002, I can't be

6 precise on that. Following that I was

7 appointed as Executive Secretary of Policy and

8 Planning with the former Department of Labour

9 and was there until approximately the spring

10 of 2004 when I was appointed as assistant

11 secretary for Economic Policy with Cabinet

12 Secretariat. And in March of '06 I was

13 transferred to Assistant Secretary for Social

14 Policy at Cabinet Secretariat.

15 COFFEY, Q.C.:

16 Q. Okay. Your first stint with the Cabinet

17 Secretariat, that secondment, what was your

18 position at the time?

19 MR. CAKE:

20 A. Cabinet officer.

21 COFFEY, Q.C.:

22 Q. And could you explain to the Commissioner what

23 a Cabinet Officer does?

24 MR. CAKE:

25 A. Certainly, yes. A cabinet officer would be

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1 assigned selected departments and would be

2 dedicated to working with those departments in

3 terms of assisting them where requested with

4 the preparation of Cabinet papers and once

5 those Cabinet papers are formally submitted to

6 preparing the analysis of the Cabinet

7 submission for relevant committee of Cabinet.

8 COFFEY, Q.C.:

9 Q. And would a Cabinet officer do anything other

10 than prepare Cabinet briefings?

11 MR. CAKE:

12 A. Yes, the Cabinet officer would offer to

13 provide any assistance that a department might

14 be seeking in terms of processes for

15 government decision making, what types of

16 matters should be the subject of a Cabinet

17 submission versus other processes; would be

18 generally mauldering the significant files

19 that rest with a department on any given point

20 in time.

21 COFFEY, Q.C.:

22 Q. And rest with a given department that is

23 within the responsibility area of that

24 particular Cabinet officer?

25 MR. CAKE:

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1 A. That's correct. Usually a Cabinet Officer

2 will be assigned three or four departments and

3 be responsible for those departments and all

4 of the interactions of those departments with

5 the Cabinet Secretariat.

6 COFFEY, Q.C.:

7 Q. Mr. Cake, at the time you were doing that

8 secondment, do you recall what departments you

9 were responsible for or would it have changed

10 over time while you were the Cabinet officer?

11 MR. CAKE:

12 A. I don't believe in my case that it did change.

13 I can recall having responsibility for Natural

14 Resources. I was working on the economic

15 policy side at the time. So, I recall

16 certainly Natural Resources, Finance,

17 Fisheries, and Environment and Conservation.

18 COFFEY, Q.C.:

19 Q. Then you indicated in 2004 you were appointed

20 as a -

21 MR. CAKE:

22 A. Yes, yes -

23 COFFEY, Q.C.:

24 Q. What's the exact title?

25 MR. CAKE:

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1 A. Assistant Secretary to Cabinet for Economic

2 Policy.

3 COFFEY, Q.C.:

4 Q. Okay. And how many assistant secretaries to

5 Cabinet are there?

6 MR. CAKE:

7 A. There are two, economic policy and social

8 policy.

9 COFFEY, Q.C.:

10 Q. And in that role, first of all, do you recall

11 when in 2004 you were so appointed?

12 MR. CAKE:

13 A. I believe that it was May of 2004.

14 COFFEY, Q.C.:

15 Q. And as between yourself and the social policy

16 assistant secretary, how would things be

17 divided up between you? I take it between the

18 two of you, you covered everything, all

19 government departments?

20 MR. CAKE:

21 A. That's correct, yeah. So, it's basically

22 determined by the composition of the social

23 and economic policy committees of Cabinet. On

24 the social side, for example, you would have

25 departments that are involved in what I'll

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1 loosely term as social programming, Health,
 2 Education, Justice, Municipal Affairs, and
 3 there would be others as well, the Housing
 4 Corporation, Workers Compensation. Whereas on
 5 the economic policy side, it's more what I'll
 6 call the resource departments of Government,
 7 Fisheries, Forestry, Agriculture, Natural
 8 Resources, Finance, Industry Trade and Rural
 9 Development. So the division is based on the
 10 departments within Government at any given
 11 point in time.

12 COFFEY, Q.C.:
 13 Q. Now the assistant secretary reports to whom?
 14 MR. CAKE:
 15 A. The assistant secretary reports to the deputy
 16 clerk of the Executive Council.

17 COFFEY, Q.C.:
 18 Q. And I take it that's if there's a deputy
 19 clerk. In the absence of the deputy clerk,
 20 who do they report to?
 21 MR. CAKE:
 22 A. Would report directly to the clerk.

23 COFFEY, Q.C.:
 24 Q. Okay, and who reports to the assistant
 25 secretaries?

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1 MR. CAKE:
 2 A. What I've referred to as Cabinet officers
 3 report to the assistant secretaries.

4 COFFEY, Q.C.:
 5 Q. And for example, in your capacity as assistant
 6 secretary for economic policy, how many
 7 Cabinet officers would you have had reporting
 8 to you?
 9 MR. CAKE:
 10 A. It would vary over years, but generally, there
 11 was a time when our Cabinet officers focused
 12 exclusively on either--their assignments were
 13 either exclusively economic policy departments
 14 or exclusively social policy departments. At
 15 that time, you would perhaps have two to three
 16 officers at the most reporting to you. More
 17 recently, we've encouraged officers to take on
 18 both sides of the shop, if you like. So you
 19 might have four or five officers reporting to
 20 you on a single department or two.

21 COFFEY, Q.C.:
 22 Q. And for example, at this point in time, how
 23 many Cabinet officers are there?
 24 MR. CAKE:
 25 A. I believe there's five currently.

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1 COFFEY, Q.C.:
 2 Q. Okay, and between the five of them, they would
 3 cover off all Government departments?
 4 MR. CAKE:
 5 A. That's correct.

6 COFFEY, Q.C.:
 7 Q. During the period you were social policy
 8 assistant secretary, because during some of
 9 this time frame you were, how many Cabinet
 10 officers would have reported to you?
 11 MR. CAKE:
 12 A. Well, currently, I'd have to do a hand count,
 13 but I think all five officers are currently
 14 carrying at least one department, social
 15 department.

16 COFFEY, Q.C.:
 17 Q. So I'll be taking you through then, if you can
 18 recall it, what the situation was at various
 19 points in time, okay. In July of 2005, I take
 20 it that you would have been the assistant
 21 secretary for economic policy?
 22 MR. CAKE:
 23 A. That's correct.

24 COFFEY, Q.C.:
 25 Q. At that point, how many Cabinet officers would

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1 have reported to you?
 2 MR. CAKE:
 3 A. 2005, I would guess that there were two or
 4 three officers.

5 COFFEY, Q.C.:
 6 Q. It was back in the earlier days before the
 7 encouragement for the Cabinet officers to take
 8 on both -
 9 MR. CAKE:
 10 A. Exactly, yeah. I think we really started to
 11 emphasize that in 2005 and beyond.

12 COFFEY, Q.C.:
 13 Q. So in July 2005, you would have two to three
 14 reporting to you.
 15 MR. CAKE:
 16 A. Correct.

17 COFFEY, Q.C.:
 18 Q. In July of 2005, who did you report to?
 19 MR. CAKE:
 20 A. I would have reported to the deputy clerk.

21 COFFEY, Q.C.:
 22 Q. Who was the deputy clerk at the time?
 23 MR. CAKE:
 24 A. I'm--it would have either been Tim Murphy, who
 25 was the former deputy clerk, or Sandra Barnes,

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1 who is the current deputy clerk. I'm just a
 2 little hazy on that particular month.
 3 Thinking about it though, I believe that was a
 4 transition month between the two clerks and in
 5 fact, in that month, there was no deputy
 6 clerk.
 7 COFFEY, Q.C.:
 8 Q. Okay. And so at that point you would have
 9 reported it to, in the absence of any deputy
 10 clerk, you would have reported it to the clerk
 11 of the day?
 12 MR. CAKE:
 13 A. Correct.
 14 COFFEY, Q.C.:
 15 Q. And that would be Robert Thompson?
 16 MR. CAKE:
 17 A. That's correct, sir.
 18 COFFEY, Q.C.:
 19 Q. Who at that time, in July of 2005, was the
 20 assistant secretary for social policy?
 21 MR. CAKE:
 22 A. Sheree MacDonald.
 23 COFFEY, Q.C.:
 24 Q. And when you had taken on your role as
 25 assistant secretary for economic policy back

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1 in 2004, was Ms. MacDonald then in the social
 2 policy position?
 3 MR. CAKE:
 4 A. Not remembering precisely. I'm just trying to
 5 remember who the forerunner to Sheree might
 6 have been and when they moved on. My best
 7 recollection is working with Sheree, so that's
 8 my best guess.
 9 COFFEY, Q.C.:
 10 Q. So she'd been, up until July, 2005, she had
 11 been there for at least a period of months, if
 12 not longer?
 13 MR. CAKE:
 14 A. Yes.
 15 COFFEY, Q.C.:
 16 Q. She wasn't just new to the job in July of '05?
 17 MR. CAKE:
 18 A. That's correct.
 19 COFFEY, Q.C.:
 20 Q. Okay. Now, sir, the role then of an assistant
 21 secretary is what, what is their role and
 22 responsibility?
 23 MR. CAKE:
 24 A. The role of assistant secretary is to, I
 25 guess, supervise the analysis of Cabinet

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1 submissions. And by that I mean to review
 2 Cabinet submissions and work with the officer
 3 in seeing that the key issues that we think
 4 should be brought out around a Cabinet
 5 submission are reflected in an analysis
 6 prepared for a committee of Cabinet. Also
 7 again, to be available to offer advice to
 8 departments on, you know, any matters that
 9 they think one, you know, may need to come to
 10 Cabinet. So it's a similar role to that of an
 11 officer, though at a senior level, at a
 12 supervisory level, responsible for signing off
 13 on the analysis that are prepared around
 14 Cabinet papers. Also a significant difference
 15 is the assistant secretary access the
 16 secretary to the relevant policy committee of
 17 Cabinet, and by that I mean attends all the
 18 weekly meetings of the committee of Cabinet to
 19 which you're a support person, records the
 20 decisions of those Cabinet committees, sees
 21 that those decisions are reflected in the
 22 appropriate documentation that is forwarded on
 23 to the full Cabinet, and also would
 24 participate in the briefings for the Premier
 25 around Cabinet submissions.

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1 COFFEY, Q.C.:
 2 Q. And so that's Cabinet submissions. Does an
 3 assistant secretary have any other role? And
 4 I'm thinking in particular of briefing notes.
 5 MR. CAKE:
 6 A. Well, one role, yes, we'll talk about today,
 7 is assistant secretary would, you know, review
 8 and send, sign off, I guess, on briefing notes
 9 that departments are submitting for submission
 10 to the Premier.
 11 COFFEY, Q.C.:
 12 Q. And review and sign off on briefing notes
 13 departments are submitting. How--under what
 14 circumstances do, in your experience,
 15 departments come to submit briefing notes, how
 16 does that come about?
 17 MR. CAKE:
 18 A. Well they come about in a couple of ways, I
 19 guess. There may be matters that a minister
 20 wishes to inform the Premier of and a briefing
 21 note would serve as a format for doing that.
 22 There may be matters that a minister would
 23 wish to seek direction from the Premier on and
 24 a briefing note would be a format for
 25 achieving that. So those are the principle

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1 to--just going back to your question.
 2 COFFEY, Q.C.:
 3 Q. So that would be coming out of the department
 4 initiated briefing notes?
 5 MR. CAKE:
 6 A. Correct.
 7 COFFEY, Q.C.:
 8 Q. IE, the minister wants to inform the Premier
 9 about a particular matter or issue and
 10 therefore the minister might very well
 11 generate a briefing note?
 12 MR. CAKE:
 13 A. Correct.
 14 COFFEY, Q.C.:
 15 Q. Which would then pass through the Cabinet
 16 Secretariat and the assistant secretary
 17 responsible for that particular department?
 18 MR. CAKE:
 19 A. Correct.
 20 COFFEY, Q.C.:
 21 Q. On its way to the Premier's office. Or the
 22 minister might want to seek advice from the
 23 Premier and in the course of seeking that
 24 advice would generate a briefing note which in
 25 effect posed a question and put context to the

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1 question?
 2 MR. CAKE:
 3 A. Yes, yeah -
 4 COFFEY, Q.C.:
 5 Q. And it would be passed -
 6 MR. CAKE:
 7 A. - or and include a recommendation, a proposed
 8 course of action.
 9 COFFEY, Q.C.:
 10 Q. Okay. But seek actual direction, perhaps,
 11 from the Premier on it. Are there any times
 12 that briefing notes are not initiated by
 13 departments, can you tell us, and if so, what
 14 kind of circumstances are involved?
 15 MR. CAKE:
 16 A. Yes, there are occasions when we will request
 17 a briefing note on a matter and the most
 18 frequent occassion for that would be if, you
 19 know, if there's a significant matter, usually
 20 from the media comes to our attention and it's
 21 a matter which we think it would be beneficial
 22 for the Premier to be aware of it. On that
 23 type of circumstance we would request the
 24 department to prepare a briefing note.
 25 COFFEY, Q.C.:

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1 Q. And what sorts of factors come into play in
 2 deciding whether, from your perspective, it
 3 would be beneficial, to use your word, for the
 4 Premier to be aware of it?
 5 MR. CAKE:
 6 A. There's no written guidelines on that. It is,
 7 I think, a judgment call in my experience.
 8 But basically the criteria I would use is
 9 that, you know, if there's a significant
 10 public issue attracting media coverage,
 11 something which, you know, one might
 12 reasonably expect the question, the Premier
 13 might be questioned on, that would be the type
 14 of matter that we'd request a note on just so
 15 that he would be aware of the details behind
 16 the issue.
 17 COFFEY, Q.C.:
 18 Q. So that's--and you've pointed out that that
 19 would be largely in situations where a matter
 20 has arisen in the media as being talked about
 21 in the media?
 22 MR. CAKE:
 23 A. Yes, usually that would be the case, yeah.
 24 COFFEY, Q.C.:
 25 Q. What about a significant issue that has come

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1 to your attention as an assistant secretary
 2 that is not yet into the media but it is a
 3 significant issue, would you at times request
 4 a briefing note?
 5 MR. CAKE:
 6 A. Those circumstances would more often be the
 7 result of if a department is talking to us and
 8 asking advice on a matter that they are
 9 dealing with that would not be in the media
 10 and, you know, they're seeking advice on, you
 11 know, is this the type of an issue that, you
 12 know, we think would be beneficial for them to
 13 prepare a note on, we would provide feedback
 14 on that. It would be unusual in my experience
 15 for, as a central agency, us to be aware of or
 16 requesting a note on a matter that, you know,
 17 had not been a subject of any public
 18 attention.
 19 COFFEY, Q.C.:
 20 Q. And why is that?
 21 MR. CAKE:
 22 A. Well, principally because, you know, we are
 23 very busy in managing the matters that are
 24 coming to Cabinet and really would not have
 25 the time to be, you know, engaging with, you

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1 know, stakeholders in the province as to other
 2 issues that they may be working with
 3 departments on. If there are any issues in
 4 the province, those are usually issues that
 5 are the responsibility of one or other of the
 6 governments departments and we wouldn't, as a
 7 matter of course, you know, be out directly
 8 talking to stakeholder groups or clients of
 9 government departments.

10 COFFEY, Q.C.:

11 Q. And what about matters that might be perceived
 12 to be of, you know, significance, that are in
 13 that hinterland between not yet into the
 14 media, but have come to your attention because
 15 it may go into the media? As an assistant
 16 secretary a situation where you have reason to
 17 believe it's going to go into the media, but
 18 it's not there yet.

19 MR. CAKE:

20 A. Well, again, speaking from my personal
 21 experience, I mean, you know, the channel
 22 thorough which I would learn that something
 23 may become a media issue would be through the
 24 government departments that I'm working with,
 25 my contacts in those government departments.

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1 I wouldn't have any independent sources of
 2 information.

3 COFFEY, Q.C.:

4 Q. And having become so aware, what is the
 5 practice?

6 MR. CAKE:

7 A. I'm sorry, could you repeat that question?

8 COFFEY, Q.C.:

9 Q. Having become so aware from some of your
 10 contacts within the department or departments
 11 about a significant issue potentially going to
 12 receive media attention in the near future,
 13 what is your practice then in respect of
 14 briefing notes?

15 MR. CAKE:

16 A. Well, we'd have a discussion with the
 17 department as to whether they feel it's a
 18 matter that the Premier should be made aware
 19 of.

20 COFFEY, Q.C.:

21 Q. And you'd have a discussion, well, fair
 22 enough. What sorts of criteria would be
 23 talked about?

24 MR. CAKE:

25 A. I can't outline a set of criteria per se. You

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1 know, it's just a discussion, just a
 2 discussion, a consideration around how
 3 significant of a public policy issue it might
 4 be or how significant of a program delivery,
 5 service delivery issue, is it something that,
 6 you know, the minister while holding
 7 responsibility for the matter might wish the
 8 Premier be aware it's a matter he's dealing
 9 with, he or she are dealing with.

10 COFFEY, Q.C.:

11 Q. So I take it then in the course of that
 12 discussion if the department thinks the
 13 Premier should be made aware of it, would you
 14 ever nix that idea or interfere in it?

15 MR. CAKE:

16 A. That would be a rare occasion.

17 COFFEY, Q.C.:

18 Q. Okay. Can you think of any occasion?

19 MR. CAKE:

20 A. Well, no, in fact, I don't think we--we would
 21 not have the authority to say, no, this is not
 22 a matter, right, to submit a briefing note on.
 23 That isn't the call of the department.

24 COFFEY, Q.C.:

25 Q. So if the department thinks the--if you're

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1 made aware, as assistant secretary by the
 2 department of a matter about to become public
 3 that from the department's perspective the
 4 Premier should be made aware of, there would
 5 be a briefing note prepared and vetted by
 6 yourselves and land on the Premier's desk?

7 MR. CAKE:

8 A. Correct.

9 COFFEY, Q.C.:

10 Q. Okay. If the departments makes you, as an
 11 assistant secretary, aware of an issue about
 12 to become public of some potential
 13 significance, okay, and the department is not-
 14 is ambivalent about it or is not suggesting
 15 the Premier be made aware of it but is not
 16 saying he should not be, would you ever take
 17 it upon yourself to say, well, give me a
 18 briefing note because you think it's something
 19 the Premier should be made aware of?

20 MR. CAKE:

21 A. We would offer advice, you know, if they were
 22 ambiguous, we would have that discussion with
 23 them and offer advice.

24 COFFEY, Q.C.:

25 Q. And are there ever circumstances where you

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1 would just simply ask for one, period, ask for
 2 a briefing note?
 3 MR. CAKE:
 4 A. Yes, yes, there would be instances, yeah.
 5 COFFEY, Q.C.:
 6 Q. Whether or not they'd offered one up because
 7 of something you became aware of or they had
 8 made you aware of, you'd say, well, look, take
 9 it upon yourself to say, look, I want a
 10 briefing note on this?
 11 MR. CAKE:
 12 A. That's correct, yeah. Of course, you know,
 13 the prerogative is always with the department
 14 to challenge that, but, yes, we would--there
 15 are occasions when we will identify issues and
 16 request a note.
 17 COFFEY, Q.C.:
 18 Q. Now, in respect of these briefing notes that
 19 are meant for the Cabinet Secretariat and the
 20 Premier's office, distribution in that group,
 21 first of all, are the assistant secretaries on
 22 the distribution list?
 23 MR. CAKE:
 24 A. Yes.
 25 COFFEY, Q.C.:

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1 Q. The Premier is, as well, I take it?
 2 MR. CAKE:
 3 A. Correct.
 4 COFFEY, Q.C.:
 5 Q. The chief of staff?
 6 MR. CAKE:
 7 A. Correct.
 8 COFFEY, Q.C.:
 9 Q. The director of communications to the
 10 Premier's office?
 11 MR. CAKE:
 12 A. That's correct.
 13 COFFEY, Q.C.:
 14 Q. The clerk and deputy clerk?
 15 MR. CAKE:
 16 A. That's correct, yeah.
 17 COFFEY, Q.C.:
 18 Q. Anyone else you can think of? And we'll be
 19 looking at it, but that generally would cover
 20 it?
 21 MR. CAKE:
 22 A. That's generally the group, yeah.
 23 COFFEY, Q.C.:
 24 Q. In your experience, Mr. Cake, because I take
 25 it now you've been there for a number or years

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1 as one assistant secretary or the other, how
 2 many such briefing notes would be filed, for
 3 example, annually?
 4 MR. CAKE:
 5 A. I believe the number is around four, four to
 6 five hundred.
 7 COFFEY, Q.C.:
 8 Q. And is there any particular format they're
 9 supposed to be in?
 10 MR. CAKE:
 11 A. Yes, there's a standard format that all
 12 departments would be aware of.
 13 COFFEY, Q.C.:
 14 Q. And we'll be looking at some of those, so I'll
 15 be taking you through, one in particular, I'll
 16 be taking you through the format. Is there
 17 any understanding as to the particular or a
 18 length they're supposed to be?
 19 MR. CAKE:
 20 A. Yes, we generally encourage around two pages,
 21 two pages or less would be what we would
 22 encourage, but they occasionally run over
 23 that.
 24 COFFEY, Q.C.:
 25 Q. And why is that, why kind of a sort of two-

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1 page unofficial limit?
 2 MR. CAKE:
 3 A. Simply because, you know, we encourage
 4 brevity. As you can imagine, the reader, the
 5 Premier's office is very busy, a lot of
 6 material flows through there, so I think our
 7 general feeling would be that an issue should
 8 be able to be summarized within a couple of
 9 pages.
 10 COFFEY, Q.C.:
 11 Q. And if an issue is summarized in, well, I'll
 12 say, you know, two to four pages, for example,
 13 is there any sort of procedure or provision
 14 for, though, dealing with an issue that's more
 15 complex than that or potentially more complex
 16 than can be captured in two to four pages, how
 17 would that be handled?
 18 MR. CAKE:
 19 A. Well, certainly a department can attach an
 20 appendix or any additional information that
 21 they feel might be important, so that is an
 22 option to them. But if it's an issue which
 23 you term as more important than that, it's,
 24 you know, perhaps an issue that should be
 25 brought to the Cabinet through a Cabinet

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1 submission.
 2 COFFEY, Q.C.:
 3 Q. More important, or more complex in the sense
 4 of to understand the potential nuances of it,
 5 that's what I'm getting at in terms of is
 6 there ever a situation where the submitter of
 7 the briefing note offers to provide a
 8 briefing?
 9 MR. CAKE:
 10 A. Yes, yeah, there would be, yeah.
 11 COFFEY, Q.C.:
 12 Q. How common is that? Like a briefing as in an
 13 oral briefing?
 14 MR. CAKE:
 15 A. There would be a standard understanding, I
 16 believe, that, you know, the minister,
 17 responsible minister and officials would be
 18 available for a follow-up briefing on any
 19 matter that's the subject of a briefing note.
 20 COFFEY, Q.C.:
 21 Q. Now, briefing notes coming out of a
 22 department, I gather that there have been some
 23 changes in recent times concerning the
 24 process, who's to sign off on them, how that's
 25 to be done?

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1 MR. CAKE:
 2 A. That's correct, there has been some recent
 3 changes.
 4 COFFEY, Q.C.:
 5 Q. And what year did they occur?
 6 MR. CAKE:
 7 A. 2007 comes to mind.
 8 COFFEY, Q.C.:
 9 Q. It was after May 15th, 2007, I take it?
 10 MR. CAKE:
 11 A. I think you're correct on that, yeah.
 12 COFFEY, Q.C.:
 13 Q. After the matter involving ER/PR became an
 14 issue in the middle of May?
 15 MR. CAKE:
 16 A. Correct.
 17 COFFEY, Q.C.:
 18 Q. I'm going to ask you about what the procedure
 19 was before the current regime was put in
 20 place.
 21 THE COMMISSIONER:
 22 Q. Sorry, Mr. Coffey, but before you do that,
 23 while this particular item is in my head, is
 24 there a classification within briefing notes
 25 or are all briefing notes equal, as it were?

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1 MR. CAKE:
 2 A. There are typically two types of briefing
 3 notes. One is what we call an issues note,
 4 which might cover any public issue. The other
 5 is a meeting note. Those would be briefing
 6 notes that are prepared for meetings which the
 7 Premier would be having.
 8 THE COMMISSIONER:
 9 Q. Okay.
 10 MR. CAKE:
 11 A. Generally with -
 12 THE COMMISSIONER:
 13 Q. For the purpose of preparing the Premier for
 14 the issues which might arise in the context of
 15 the meeting?
 16 MR. CAKE:
 17 A. Yes, generally for meetings with outside--
 18 representatives from outside Government.
 19 THE COMMISSIONER:
 20 Q. Okay. So those are the two classifications of
 21 briefing notes for him?
 22 MR. CAKE:
 23 A. Yes.
 24 THE COMMISSIONER:
 25 Q. Okay, thank you. Sorry, Mr. Coffey.

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1 COFFEY, Q.C.:
 2 Q. What was the protocol, as it were, I'll use
 3 that word advisedly, in relation to the
 4 preparation of, for example, an issues
 5 briefing note before May of 2007 or up to May
 6 of 2007? What was the arrangement? Who had
 7 to sign off? Who had to prepare it? Who had
 8 to sign off on it?
 9 MR. CAKE:
 10 A. The deputy minister of the department would
 11 normally sign off on those briefing notes and
 12 would, you know, provide a copy and make his
 13 or her minister aware of that note.
 14 COFFEY, Q.C.:
 15 Q. And would provide a copy to whom?
 16 MR. CAKE:
 17 A. To his or her minister.
 18 COFFEY, Q.C.:
 19 Q. Okay, and how would it end up at the Cabinet
 20 Secretariat then? I take it the department
 21 would do whatever it had to internally to
 22 prepare the note?
 23 MR. CAKE:
 24 A. Correct.
 25 COFFEY, Q.C.:

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1 Q. And the expectation was that it would at least
 2 land on the minister's desk to be looked at?
 3 MR. CAKE:
 4 A. Absolutely.
 5 COFFEY, Q.C.:
 6 Q. That was the expectation. What would then
 7 happen with respect to it arriving in the
 8 Cabinet Secretariat?
 9 MR. CAKE:
 10 A. So that would be sent to Cabinet Secretariat
 11 and we would distribute it to the distribution
 12 list that you referred to earlier.
 13 COFFEY, Q.C.:
 14 Q. Would there ever be any changes made by the
 15 Cabinet Secretariat personnel?
 16 MR. CAKE:
 17 A. Not without the approval of the department.
 18 In other words, we would--you know, if there
 19 were shortcomings, perceived shortcomings in a
 20 briefing note, we would work with the
 21 department to address those, but only after we
 22 had the sign off, the approval of the deputy
 23 minister or at least an assistant deputy
 24 minister in a department would we circulate
 25 that note.

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1 COFFEY, Q.C.:
 2 Q. So if there was further information required,
 3 at least on the initial note that landed in
 4 Cabinet Secretariat, clarification, further
 5 information to address potentially perceived
 6 shortcomings, as you put it -
 7 MR. CAKE:
 8 A. Yes.
 9 COFFEY, Q.C.:
 10 Q. - the department would be responsible for
 11 addressing those shortcomings and the Cabinet
 12 Secretariat, when it was satisfied as to form
 13 and substance -
 14 MR. CAKE:
 15 A. Correct.
 16 COFFEY, Q.C.:
 17 Q. - that they would, the Cabinet Secretariat, in
 18 your experience, was to bounce that off the DM
 19 or an ADM for them to finally say "we're
 20 satisfied for this to go"?
 21 MR. CAKE:
 22 A. Absolutely, yeah. There must be sign off by
 23 the deputy minister of the department before
 24 we would advance anything.
 25 COFFEY, Q.C.:

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1 Q. It would be by the deputy minister or the -
 2 MR. CAKE:
 3 A. If the deputy minister was not available, an
 4 assistant deputy minister would be accepted.
 5 COFFEY, Q.C.:
 6 Q. What, if any, process was in place prior to
 7 May of 2007 by which the Cabinet Secretariat
 8 would assure itself that an ADM or a DM had
 9 actually signed off on it?
 10 MR. CAKE:
 11 A. We would look for a communication from the
 12 department indicating they approved the
 13 briefing note.
 14 COFFEY, Q.C.:
 15 Q. I take it then, for example, if you, as an
 16 assistant secretary, requested a briefing note
 17 from a department that you would have certain
 18 things in mind, certain issues to address,
 19 should be addressed in the note, and at least
 20 when it made it to your desk, you would want
 21 to ensure that those were addressed, those
 22 issues were properly addressed?
 23 MR. CAKE:
 24 A. If I had a--like if it was a focused question
 25 -

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1 COFFEY, Q.C.:
 2 Q. Sure.
 3 MR. CAKE:
 4 A. - then I'd be looking to see that question
 5 addressed, yeah.
 6 COFFEY, Q.C.:
 7 Q. A focused answer, as it were?
 8 MR. CAKE:
 9 A. Yeah. On the other hand, it might be, you
 10 know, "tell us whatever you think we should
 11 know" about a given topic.
 12 COFFEY, Q.C.:
 13 Q. Now sir, take you to July of 2005, Exhibit P-
 14 0312, please? This is page one of Exhibit P-
 15 0312, Mr. Cake. It's an e-mail, Tuesday, July
 16 19th 2005 at 10:32 a.m. to Robert Thompson.
 17 The subject is a major health matter, and it's
 18 an e-mail from yourself. Just to help the
 19 Commissioner put this in context, this was a
 20 Tuesday, okay, and the middle of July. You,
 21 at that time, would have been the assistant
 22 secretary for economic policy?
 23 MR. CAKE:
 24 A. That's correct, yes.
 25 COFFEY, Q.C.:

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1 Q. Do you know if Sheree MacDonald, the assistant
 2 secretary for social policy, was working that
 3 day?
 4 MR. CAKE:
 5 A. No, I know for certain that she was not
 6 working.
 7 COFFEY, Q.C.:
 8 Q. Okay. Can you tell the Commissioner about
 9 that? About where she was and what the
 10 circumstance was at the time.
 11 MR. CAKE:
 12 A. She was on annual vacation for a period of
 13 three weeks that started the day previous.
 14 COFFEY, Q.C.:
 15 Q. The day previous. So, and this does involve
 16 the Department of Health.
 17 MR. CAKE:
 18 A. Correct.
 19 COFFEY, Q.C.:
 20 Q. So if this had been the week prior, if Ms.
 21 MacDonald was in the office that day, the
 22 communication about this would have gone to
 23 whom?
 24 MR. CAKE:
 25 A. It would have gone either to Ms. MacDonald or

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1 to the officer responsible for the Department
 2 of Health and Community Services.
 3 COFFEY, Q.C.:
 4 Q. The Cabinet officer at that time?
 5 MR. CAKE:
 6 A. Yes.
 7 COFFEY, Q.C.:
 8 Q. And I take it that Ms. MacDonald had left for
 9 annual leave the day before, had started her
 10 annual leave?
 11 MR. CAKE:
 12 A. Correct, yeah.
 13 COFFEY, Q.C.:
 14 Q. And was not back for three weeks?
 15 MR. CAKE:
 16 A. Correct.
 17 COFFEY, Q.C.:
 18 Q. In her absence, who was responsible for
 19 economic policy--I'm sorry, for social policy?
 20 MR. CAKE:
 21 A. Well, I would have been covering her
 22 responsibilities during that period, or if I'd
 23 just add to that, might have had the deputy
 24 clerk been in the office during that period,
 25 we likely would have shared that between us.

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1 But in this instance, a deputy clerk wasn't in
 2 place.
 3 COFFEY, Q.C.:
 4 Q. The position was not filled at the time?
 5 MR. CAKE:
 6 A. There was a transition period, I believe.
 7 COFFEY, Q.C.:
 8 Q. Do you know who the Cabinet officer at the
 9 time was who was responsible for the
 10 Department of Health?
 11 MR. CAKE:
 12 A. Yes, that was a gentleman by the name of Bruce
 13 Cooper.
 14 COFFEY, Q.C.:
 15 Q. And do you know if Mr. Cooper was working on
 16 July 19th, 2005?
 17 MR. CAKE:
 18 A. I know that Mr. Cooper was not working that
 19 week.
 20 COFFEY, Q.C.:
 21 Q. And what was he doing, do you know?
 22 MR. CAKE:
 23 A. He was also on annual leave.
 24 COFFEY, Q.C.:
 25 Q. So, sir, can you tell the Commissioner,

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1 please, what you recall about this particular
 2 day?
 3 MR. CAKE:
 4 A. Well, it's two years ago, so my memory is
 5 faint. I know that this occurred on a
 6 Tuesday, which is a busy day for us. That's
 7 when our Cabinet committees meet, the economic
 8 and social policy committees of Cabinet. I
 9 know that there were two committee meetings
 10 that day.
 11 COFFEY, Q.C.:
 12 Q. When you say "two committee" I take it, which
 13 committees were they?
 14 MR. CAKE:
 15 A. I'm sorry, the economic policy committee of
 16 Cabinet and the social policy committee of
 17 Cabinet.
 18 COFFEY, Q.C.:
 19 Q. What time of day do they meet?
 20 MR. CAKE:
 21 A. They generally meet at nine and eleven.
 22 COFFEY, Q.C.:
 23 Q. And how long do they generally run?
 24 MR. CAKE:
 25 A. It would vary depending on the agenda, but

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1 generally run anywhere from one to two hours.
 2 COFFEY, Q.C.:
 3 Q. And at that time, what, if anything, would
 4 your involvement be in the actual meetings of
 5 those Cabinet committees?
 6 MR. CAKE:
 7 A. I would generally have been responsible for
 8 going to those meetings, recording the
 9 decisions and bringing them back and working
 10 with the officers to prepare the documentation
 11 that we could forward in to the full Cabinet.
 12 COFFEY, Q.C.:
 13 Q. Okay, so go ahead, you know that there were
 14 two meetings that day.
 15 MR. CAKE:
 16 A. At any rate, that's--in terms of that day,
 17 that's the only thing I can offer with any
 18 certainty. My memory of this phone call is
 19 faint, I'll admit that upfront, so I'm
 20 thankful that there's a public record here in
 21 terms of that call. So it's a faint memory of
 22 receiving a phone call. I believe it would
 23 have been a very short phone call. This
 24 information was transmitted to me and I would
 25 have very quickly banged out this e-mail so as

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1 to pass the information on.
 2 COFFEY, Q.C.:
 3 Q. And what was your understanding as to why a
 4 phone call, this particular phone call would
 5 have come to you?
 6 MR. CAKE:
 7 A. Well, I think it only would have come to me
 8 because the assistant secretary and the
 9 Cabinet officer responsible for health,
 10 neither of them were available. So I was
 11 likely next on the list and in terms of the
 12 secretary that would have taken the call.
 13 COFFEY, Q.C.:
 14 Q. And why would the call be coming to the
 15 Cabinet Secretariat at all?
 16 MR. CAKE:
 17 A. Well, I guess the intent was to let us know
 18 that, you know, there was an issue about to
 19 become public involving the Eastern Health
 20 Board, that the Department intended to prepare
 21 a briefing note and so to let us know that
 22 this is an issue that would--they anticipated
 23 to unfold.
 24 COFFEY, Q.C.:
 25 Q. And would you have actually typed this

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1 yourself, the e-mail yourself?
 2 MR. CAKE:
 3 A. Yes, I would have, yeah.
 4 COFFEY, Q.C.:
 5 Q. And this would be sitting at your desk?
 6 MR. CAKE:
 7 A. Correct.
 8 COFFEY, Q.C.:
 9 Q. Now at the time, did you know who Carolyn
 10 Chaplin was?
 11 MR. CAKE:
 12 A. I wouldn't--first of all, I wasn't covering
 13 Department of Health, so I wouldn't have had
 14 any great knowledge. The name might have been
 15 familiar, but no, this probably would have
 16 been the first communication I'd ever had with
 17 Carolyn Chaplin.
 18 COFFEY, Q.C.:
 19 Q. And so in your capacity as assistant
 20 secretary, filling in for social policy, you
 21 perceived your role in this particular context
 22 to be what?
 23 MR. CAKE:
 24 A. Well, I perceived my--my responsibilities
 25 would be the same as the responsibilities I

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1 would have on the economic policy, that side,
 2 to work with these departments in bringing
 3 forward Cabinet submissions and the assessment
 4 of those submissions and also to provide
 5 advice on any other issues that they might
 6 normally approach -
 7 COFFEY, Q.C.:
 8 Q. But in respect of this phone call, your role--
 9 before 10:32 a.m., you get a phone call. From
 10 your perspective, what was your role then?
 11 Somebody, as it were, has tagged you with the
 12 information.
 13 MR. CAKE:
 14 A. Okay.
 15 COFFEY, Q.C.:
 16 Q. They called you and tagged you. What was your
 17 role?
 18 MR. CAKE:
 19 A. Certainly, I viewed it as my responsibility to
 20 pass this information on to the clerk.
 21 COFFEY, Q.C.:
 22 Q. And why is that?
 23 MR. CAKE:
 24 A. Well, because on my read of it, it was an
 25 important issue and something that he would

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1 want to be aware of.
 2 COFFEY, Q.C.:
 3 Q. And why?
 4 MR. CAKE:
 5 A. Again, because there was a significant issue
 6 that had been discovered through the
 7 Department of Health. It was an issue that
 8 they intended to develop a briefing note
 9 around, meaning this is an issue that they
 10 felt would be important enough to alert the
 11 Premier's office to, and therefore the clerk
 12 should be made aware of that.
 13 COFFEY, Q.C.:
 14 Q. In sending this e-mail to Mr. Thompson, what,
 15 if anything, did you expect of him or
 16 anticipate that he would do?
 17 MR. CAKE:
 18 A. I had no particular expectation. I simply
 19 wanted him to be having the same information
 20 that I had.
 21 COFFEY, Q.C.:
 22 Q. And so, at the time, in preparing the e-mail,
 23 would you have been careful to include what
 24 information you did have at the time, all of
 25 it?

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1 MR. CAKE:
 2 A. I think so, yes, yeah.
 3 COFFEY, Q.C.:
 4 Q. And so it ends, your e-mail ends with a
 5 reference to "Carolyn has also alerted
 6 Elizabeth to this matter." That would be
 7 Elizabeth Matthews?
 8 MR. CAKE:
 9 A. That's correct.
 10 COFFEY, Q.C.:
 11 Q. And what, if any, significance did that have
 12 in relation to why tell that to Mr. Thompson?
 13 MR. CAKE:
 14 A. Well, that's information that was passed on to
 15 me and it would signal to him that the
 16 Premier's office, at least the director of
 17 communications, had also been alerted to this.
 18 COFFEY, Q.C.:
 19 Q. And at the time, what, if any, importance or
 20 significance did you understand there was to
 21 the Premier knowing?
 22 MR. CAKE:
 23 A. I had no understanding of the Premier being
 24 aware.
 25 COFFEY, Q.C.:

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1 Q. I appreciate, but why did you think--you
 2 understood, I take it, that this was the sort
 3 of matter that the Premier should know about?
 4 MR. CAKE:
 5 A. Well, I'm not sure I reached that conclusion.
 6 I was simply making the clerk aware that the
 7 Premier's office had been made aware. In
 8 terms of--just to elaborate, in terms of
 9 interaction with the Premier's office, that
 10 occurs almost exclusively through the clerk.
 11 So this would make him aware that the
 12 Premier's office had been directly contacted.
 13 COFFEY, Q.C.:
 14 Q. So what do you actually recall about what Ms.
 15 Chaplin told you?
 16 MR. CAKE:
 17 A. My recollections are not clear, I think this
 18 reflects everything that I would have been
 19 told.
 20 COFFEY, Q.C.:
 21 Q. And you, in the last sentence here, use the
 22 word "alerted". In the context, what did that
 23 mean?
 24 MR. CAKE:
 25 A. Advised, informed.

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1 COFFEY, Q.C.:
 2 Q. Okay. Did you understand Ms. Chaplin had
 3 spoken with Elizabeth Matthews?
 4 MR. CAKE:
 5 A. No, I didn't know in what form she had
 6 communicated.
 7 COFFEY, Q.C.:
 8 Q. Sir, in terms of a--well a health issue in
 9 relation to, a public health issue, in your
 10 career as assistant secretary, had you ever
 11 come across any sort of circumstance of the
 12 potential significance as to what you had been
 13 advised that morning? Is this the first time
 14 you had ever come across anything like this?
 15 MR. CAKE:
 16 A. Well yes, in fact, at that point in time I was
 17 not the assistant secretary for social policy,
 18 so I wouldn't have had any previous engagement
 19 on health matters.
 20 COFFEY, Q.C.:
 21 Q. But even in the office, talking about it,
 22 while you were, you know, within the office,
 23 you'd have contact with Sheree MacDonald at
 24 times in an informal way, so to your
 25 knowledge, at least while you had been in the

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1 Cabinet Secretariat, had there ever been
 2 anything like this come across your desks
 3 before, that you were aware of?
 4 MR. CAKE:
 5 A. Well, suffice it to say I recognize that this
 6 was a large and significant issue.
 7 COFFEY, Q.C.:
 8 Q. And it refers here to breast cancer testing
 9 program, see that in the second paragraph, the
 10 first line? "Has recently discovered errors
 11 in its breast cancer testing program."
 12 MR. CAKE:
 13 A. Yes.
 14 COFFEY, Q.C.:
 15 Q. That morning, what did you understand, if
 16 anything, about, you know, what sorts of
 17 errors there could be in breast cancer
 18 testing?
 19 MR. CAKE:
 20 A. Well I didn't have any understanding of what
 21 the nature of these errors might be, I think
 22 my first reflex would have been, you know,
 23 errors in terms of determining whether breast
 24 cancer was present or not.
 25 COFFEY, Q.C.:

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1 Q. To the uninitiated, talk about breast cancer
 2 testing, probably diagnosis errors, that's
 3 what your conclusion at the time was, as much
 4 as you thought about it at the time, you
 5 would--your kind of gut reaction would be this
 6 involves--people were misdiagnosed, told they
 7 had cancer and they didn't or told they didn't
 8 and they did, that was your -
 9 MR. CAKE:
 10 A. I think that would have been my gut reaction.
 11 COFFEY, Q.C.:
 12 Q. In terms of ER and PR and estrogen receptors
 13 and progesterone receptors, hormone receptors,
 14 at that time did you have any knowledge of
 15 that? Did you and Ms. Chaplin talk about
 16 that?
 17 MR. CAKE:
 18 A. No, none whatsoever.
 19 COFFEY, Q.C.:
 20 Q. The e-mail that you typed uses the word
 21 "errors", do you see that?
 22 MR. CAKE:
 23 A. Yes.
 24 COFFEY, Q.C.:
 25 Q. Was that your word or was that what Ms.

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1 Chaplin would have told you?
 2 MR. CAKE:
 3 A. Well it's the word that I typed, so whatever
 4 she told me, that's what I interpreted it as,
 5 I can't say precisely whether that's the term
 6 that she would have used.
 7 COFFEY, Q.C.:
 8 Q. And how much time would have passed--do you
 9 know how much time passed between Ms. Chaplin
 10 and you speaking and this e-mail being sent?
 11 MR. CAKE:
 12 A. I would imagine that I would have typed this
 13 immediately that the phone call would have
 14 ended.
 15 COFFEY, Q.C.:
 16 Q. At the time do you recall if you had any sense
 17 of how long Elizabeth--how long ago Elizabeth
 18 had been told about it?
 19 MR. CAKE:
 20 A. No, sir.
 21 COFFEY, Q.C.:
 22 Q. And, Mr. Cake, at the time, around 10:30 that
 23 morning, you anticipated at the time what
 24 would happen? You had gotten the phone call,
 25 I take it, would you have used a scratch pad

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1 to kind of take down -
 2 MR. CAKE:
 3 A. Yes, I would have likely scratched it on a
 4 piece of paper.
 5 COFFEY, Q.C.:
 6 Q. 1200 and 1500, like the numbers -
 7 MR. CAKE:
 8 A. Correct.
 9 COFFEY, Q.C.:
 10 Q. In order to make sure you kind of had it right
 11 before you typed it out.
 12 MR. CAKE:
 13 A. Correct.
 14 COFFEY, Q.C.:
 15 Q. And as you've indicated very promptly typed
 16 the e-mail and sent it to Mr. Thompson.
 17 MR. CAKE:
 18 A. Correct.
 19 COFFEY, Q.C.:
 20 Q. What did you anticipate would then happen at
 21 the time?
 22 MR. CAKE:
 23 A. Well the next event that I was anticipating
 24 was that we would receive a briefing note.
 25 COFFEY, Q.C.:

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1 Q. From whom?
 2 MR. CAKE:
 3 A. From the Department of Health.
 4 COFFEY, Q.C.:
 5 Q. And the briefing note you would have
 6 anticipated would address what?
 7 MR. CAKE:
 8 A. Would provide further information on the
 9 presumed problem errors, whatever the case
 10 might be, at Eastern Health.
 11 COFFEY, Q.C.:
 12 Q. And the nature of the errors, more details on
 13 that and how many people were involved, what
 14 the status was, I take it those sorts of
 15 things?
 16 MR. CAKE:
 17 A. Correct, yeah.
 18 COFFEY, Q.C.:
 19 Q. The issue--did you anticipate that the
 20 briefing note would address the issue of how
 21 this was going to be communicated to the
 22 patients and to the public?
 23 MR. CAKE:
 24 A. Well I note my message here indicated they
 25 were working on a strategy for advising

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1 patients and the public at large. I use the
 2 term "clients" at the time, so yes, I would
 3 have imagined that would be part of a briefing
 4 note.
 5 COFFEY, Q.C.:
 6 Q. Because I take it that would be important to
 7 the Premier's office and the Cabinet
 8 Secretariat to know, for example, when this
 9 was going to be announced? Is it going to be
 10 Thursday, in two days, or Friday or Monday,
 11 that sort of thing.
 12 MR. CAKE:
 13 A. Correct.
 14 COFFEY, Q.C.:
 15 Q. So it would be important to know the timing.
 16 MR. CAKE:
 17 A. Correct.
 18 COFFEY, Q.C.:
 19 Q. And you would have anticipated a briefing note
 20 would at least address that and the manner in
 21 which it was to be done.
 22 MR. CAKE:
 23 A. Correct.
 24 COFFEY, Q.C.:
 25 Q. The reference to "legal advice is being

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1 engaged in this process", which process is
 2 that?
 3 MR. CAKE:
 4 A. Well I don't recall the detail of discussion
 5 on that, so simply, I guess, in terms of
 6 developing the strategy around communications.
 7 COFFEY, Q.C.:
 8 Q. And that the communications aspect of it might
 9 involve legal considerations and legal advice
 10 would be sought, that was your understanding
 11 at the time?
 12 MR. CAKE:
 13 A. Again, I didn't have the details on the nature
 14 of the legal advice, but that might be a part
 15 of it.
 16 COFFEY, Q.C.:
 17 Q. Well, sir, at this point, July 19th, were you
 18 aware of the matter involving the Labrador
 19 Health Board and communications with patients?
 20 MR. CAKE:
 21 A. No, sir, I was not.
 22 COFFEY, Q.C.:
 23 Q. There was a class action had been certified, a
 24 matter of about roughly two weeks before, a
 25 week and a half, two weeks before that, there

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1 was media reports on it.
 2 MR. CAKE:
 3 A. I would have had no knowledge of that.
 4 COFFEY, Q.C.:
 5 Q. If we look please at page 3, thank you.
 6 THE COMMISSIONER:
 7 Q. Everybody has the mouse, okay. There's an
 8 easy way of getting to it on the top.
 9 COFFEY, Q.C.:
 10 Q. If I could, please, thank you.
 11 THE COMMISSIONER:
 12 Q. There we go.
 13 COFFEY, Q.C.:
 14 Q. This is page 3. Now this is an e-mail, sir,
 15 from Mr. Thompson to yourself at 10:51 a.m.
 16 It involves--the subject again is a major
 17 health matter. Were you--well we have reason
 18 to believe that about two minutes before that,
 19 Mr. Thompson had forwarded your e-mail to Mr.
 20 Brian Crawley, okay. Do you, at the time, did
 21 you become aware that Mr. Crawley was in the
 22 loop, as it were?
 23 MR. CAKE:
 24 A. No, sir.
 25 COFFEY, Q.C.:

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1 Q. And this is Mr. Thompson's response. Do you
 2 know if you spoke with Mr. Thompson about
 3 this?
 4 MR. CAKE:
 5 A. Whether I spoke with Mr. Thompson?
 6 COFFEY, Q.C.:
 7 Q. Yes.
 8 MR. CAKE:
 9 A. No, I don't believe so, sir.
 10 COFFEY, Q.C.:
 11 Q. Did you speak with Mr. Crawley, do you know?
 12 MR. CAKE:
 13 A. No, certainly not.
 14 COFFEY, Q.C.:
 15 Q. Did you speak with Ms. Matthews about it?
 16 MR. CAKE:
 17 A. No, I did not.
 18 COFFEY, Q.C.:
 19 Q. Did you speak to Mr. Williams about it?
 20 MR. CAKE:
 21 A. No, I did not.
 22 COFFEY, Q.C.:
 23 Q. And I'm asking in respect of any that day, at
 24 all, July 19th.
 25 MR. CAKE:

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1 A. No, I would not have.
 2 COFFEY, Q.C.:
 3 Q. So here Mr. Thompson is responding to you
 4 saying, "Thanks, please ensure the department
 5 and the board include in their com plan the
 6 assurance that once the solution is set into
 7 motion, that an evaluation will be done to
 8 determine the specific or systemic reasons why
 9 this occurred, so that the matter will be
 10 properly addressed in the long term. I"--
 11 that's Robert--"would like to see this aspect
 12 before it goes out, thanks." And of course,
 13 below that he's just responding to your e-
 14 mail, so your original e-mail of 10:32 is
 15 reproduced here. When you received this from
 16 Mr. Thompson, do you recall what you did with
 17 it?
 18 MR. CAKE:
 19 A. No, I don't recall specifically, sir, what I
 20 would have done with that.
 21 COFFEY, Q.C.:
 22 Q. Looking at it now, what does it require of
 23 you?
 24 MR. CAKE:
 25 A. This required feedback back to the Department

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1 of Health to advise them that this should be a
 2 piece of their communications plan.
 3 COFFEY, Q.C.:
 4 Q. And so I gather then that you understood Mr.
 5 Thompson, at that point, 10:51 a.m., would
 6 have had the expectation of you, the assistant
 7 secretary -
 8 MR. CAKE:
 9 A. Correct.
 10 COFFEY, Q.C.:
 11 Q. - that you would promptly send this on to the
 12 Department of Health, this very comment or
 13 something that duplicated it, instructions
 14 that duplicated it.
 15 MR. CAKE:
 16 A. Well I would have understood that he had the
 17 expectation that the communications plan would
 18 incorporate that dimension.
 19 COFFEY, Q.C.:
 20 Q. I'm asking, his expectation of you, would you
 21 understand his expectation of you at that time
 22 would have been to send this on?
 23 MR. CAKE:
 24 A. To communicate this, yes.
 25 COFFEY, Q.C.:

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1 Q. Because he uses the words "please ensure".
 2 MR. CAKE:
 3 A. Correct.
 4 COFFEY, Q.C.:
 5 Q. It's not even asked, it's "please ensure".
 6 Your understanding as to the comment, "I'd
 7 like to see this aspect before it goes out"
 8 you understood that referred to what?
 9 MR. CAKE:
 10 A. I'm not sure at the time, but certainly that
 11 he would like to see, you know, this element
 12 built into a communications plan. So not
 13 being certain where that communication plan
 14 would have been destined for, but clearly he
 15 was indicating he wanted this to be a part of
 16 that.
 17 COFFEY, Q.C.:
 18 Q. Now com plan in this context, on July 19th,
 19 2005, you understood com plan to be what?
 20 MR. CAKE:
 21 A. I understand that a communication plan would
 22 be the strategy and steps and activities that
 23 the department or perhaps in this case, either
 24 Eastern Health would be intending to undertake
 25 in communicating on this matter to the

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1 patients and to the broader public.
 2 COFFEY, Q.C.:
 3 Q. And did you have any understanding about
 4 whether that com plan would be reduced to
 5 writing?
 6 MR. CAKE:
 7 A. I would have had that expectation, yes.
 8 COFFEY, Q.C.:
 9 Q. And I gather you understood that Mr. Thompson
 10 wanted to see it before it was finalized?
 11 MR. CAKE:
 12 A. Correct.
 13 COFFEY, Q.C.:
 14 Q. And at that point in time you understood,
 15 looking below at your 10:32 a.m. e-mail, that
 16 the story, a major story will break as early
 17 as this Thursday, which is, at that point
 18 potentially less than 48 hours away.
 19 MR. CAKE:
 20 A. Correct.
 21 COFFEY, Q.C.:
 22 Q. But more likely about six days away, next
 23 Monday.
 24 MR. CAKE:
 25 A. Correct.

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1 COFFEY, Q.C.:
 2 Q. Break in this sense meant what to you?
 3 MR. CAKE:
 4 A. Well it would mean to me, reading it here now,
 5 that the Eastern Health was intending to have
 6 some communications, public communications
 7 around this matter.
 8 COFFEY, Q.C.:
 9 Q. That they would publicly announce it in some
 10 way?
 11 MR. CAKE:
 12 A. Correct.
 13 COFFEY, Q.C.:
 14 Q. Sir, the com plans in your experience are
 15 developed by what sorts of individuals?
 16 MR. CAKE:
 17 A. Director of communication.
 18 COFFEY, Q.C.:
 19 Q. And in this context the director of
 20 communications for the Department of Health
 21 was Ms. Chaplin?
 22 MR. CAKE:
 23 A. Correct.
 24 COFFEY, Q.C.:
 25 Q. And I gather about, within about 30 minutes of

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1 10:51 a.m., sometime around 10:20, you had
 2 been talking to Ms. Chaplin?
 3 MR. CAKE:
 4 A. Correct.
 5 COFFEY, Q.C.:
 6 Q. So would you have been able to ascertain Ms.
 7 Chaplin's e-mail address?
 8 MR. CAKE:
 9 A. Absolutely.
 10 COFFEY, Q.C.:
 11 Q. Do you know if you sought to do so?
 12 MR. CAKE:
 13 A. I can't say with any certainty, no.
 14 COFFEY, Q.C.:
 15 Q. What then happened, sir, do you know? You
 16 would have understood that you had to pass
 17 this e-mail or its equivalent on to Ms.
 18 Chaplin, certainly, that's the person we're
 19 talking about in this context?
 20 MR. CAKE:
 21 A. Correct.
 22 COFFEY, Q.C.:
 23 Q. So what then happened?
 24 MR. CAKE:
 25 A. Well I guess what I know did not happen is

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1 that I did not communicate via e-mail to
 2 either a member of the executive of the
 3 department or to Ms. Chaplin, because the
 4 records have not demonstrated that. I may
 5 have placed a phone call to the deputy or the
 6 assistant deputy or to Ms. Chaplin, but I
 7 don't have a distinct memory of that.
 8 COFFEY, Q.C.:
 9 Q. So when you say you don't have a distinct
 10 memory, I take it you don't recall at all
 11 whether you did or didn't -
 12 MR. CAKE:
 13 A. Correct.
 14 COFFEY, Q.C.:
 15 Q. Is that -
 16 MR. CAKE:
 17 A. That's correct.
 18 COFFEY, Q.C.:
 19 Q. In the context, from your perspective as Mr.
 20 Thompson, in effect, your boss, had asked you
 21 to communicate--emphatically in effect, asked
 22 you to communicate his request or his desire
 23 to the department about their com plan, would
 24 you have wanted to have some record that you
 25 had in fact done so?

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1 MR. CAKE:
 2 A. Hard to say at the time whether I wanted a
 3 record, I think my, you know, my feeling would
 4 have been if I had communicated that verbally,
 5 that would be sufficient, you know, the
 6 evidence would be in the document that came
 7 back as to whether I transmitted that or not
 8 and if not, there'd be an opportunity to
 9 correct it.
 10 COFFEY, Q.C.:
 11 Q. If the document came back, then your request,
 12 presumably at least you could tell whether
 13 your request had elicited the appropriate
 14 response.
 15 MR. CAKE:
 16 A. Correct.
 17 COFFEY, Q.C.:
 18 Q. But the problem arises if there's no document
 19 comes back, isn't there? Because you have no
 20 record that you've actually communicated it,
 21 you would agree with that?
 22 MR. CAKE:
 23 A. Well, if no document came, you're right,
 24 there'd be no evidence, absolutely, but the
 25 expectation was that a briefing note would be

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1 coming.
 2 COFFEY, Q.C.:
 3 Q. And the briefing note would include the com
 4 plan, that was the -
 5 MR. CAKE:
 6 A. Yes, or a summary of what's in that plan.
 7 COFFEY, Q.C.:
 8 Q. And you say, and you've just referred to the
 9 idea that you don't feel, perhaps, that you
 10 did forward or send an e-mail to Ms. Chaplin
 11 conveying either Mr. Thompson's own e-mail,
 12 forwarding it on, or the gist of it, in your
 13 own words, because no such e-mail had
 14 surfaced?
 15 MR. CAKE:
 16 A. That's correct, none had surfaced and as you
 17 would be aware for reasons that haven't been
 18 explained to me, you know, there's a large--e-
 19 mails for this period are--I've been unable to
 20 locate in my own computer.
 21 COFFEY, Q.C.:
 22 Q. So the fact that you were unable to locate
 23 other e-mails or e-mails around this time
 24 period within your own computer, I take it
 25 have people other than you actually tried?

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1 MR. CAKE:
 2 A. Yes, the OCIO, yes, under the supervision of
 3 Mr. Thompson.
 4 COFFEY, Q.C.:
 5 Q. And I take it you're certain, though, that
 6 there are many, many e-mails, not necessarily
 7 on this topic, but many e-mails that would
 8 have, you would have sent or received during
 9 that period?
 10 MR. CAKE:
 11 A. Absolutely, you know, I probably receive and
 12 send a hundred e-mails daily.
 13 COFFEY, Q.C.:
 14 Q. And they're all gone?
 15 MR. CAKE:
 16 A. That's correct.
 17 COFFEY, Q.C.:
 18 Q. So what I'm getting at, sir, is this, if you
 19 had sent one, had forwarded this, for example,
 20 to Ms. Chaplin that day, it could have joined
 21 the hundreds of others that have since
 22 vanished?
 23 MR. CAKE:
 24 A. That's correct.
 25 COFFEY, Q.C.:

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1 Q. So then in relation to the idea of whether or
 2 not you did or didn't send an e-mail to Ms.
 3 Chaplin conveying Mr. Thompson's views and
 4 requests, do you really know whether you sent
 5 an e-mail or not? Is it entirely possible
 6 that you did send an e-mail?
 7 MR. CAKE:
 8 A. It is entirely possible, I have to handicap
 9 that my e-mail records have not been
 10 retrievable.
 11 COFFEY, Q.C.:
 12 Q. And Ms. Chaplin's, I'm going to advise you,
 13 are generally in the same position, okay. So-
 14 -that is my understanding, Mr. Cake, you know
 15 when we look back at page 2, and I appreciate
 16 this one did not go to you, but this is an e-
 17 mail at 10:49 that morning from Mr. Thompson
 18 to Mr. Crawley, just forwarding, in effect,
 19 your e-mail, it's an attachment, "Major health
 20 matter.text" and he has appended or put a note
 21 there, his own words. As a practical matter,
 22 sir, on the morning of July 19th, being as
 23 busy as you were, okay, presumably because of
 24 these two meetings, committee meetings that
 25 were going on, is it more likely than not that

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1 you simply got Carolyn's e-mail address and
 2 forwarded this on to her? That's the simplest
 3 way of dealing with it, isn't it?
 4 MR. CAKE:
 5 A. The response I'd have from Robert?
 6 COFFEY, Q.C.:
 7 Q. Yes.
 8 MR. CAKE:
 9 A. That would have been a simple efficient way to
 10 communicate that.
 11 COFFEY, Q.C.:
 12 Q. And it has the added advantage of you actually
 13 having a record that you sent it.
 14 MR. CAKE:
 15 A. That's correct, yeah.
 16 COFFEY, Q.C.:
 17 Q. Now, sir, if we could, please, I'm going to
 18 look at page 5, have you look at page 5 of
 19 this exhibit, and I say--my comment then about
 20 efficiency, okay, if we just look back at,
 21 this is the e-mail that Carolyn Chaplin sent
 22 you at 2:37 p.m. that afternoon, do you see
 23 that?
 24 MR. CAKE:
 25 A. Correct, yes.

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1 COFFEY, Q.C.:
 2 Q. Well see, when we look back at page 4, this is
 3 an e-mail of 2:51 p.m. from yourself to Mr.
 4 Thompson and the attachment is an update
 5 Eastern Health matter.text and you've typed
 6 "FYIGC"--well in fact, you typed "Robert,
 7 FYIGC", so I take it then that the idea of
 8 actually just packaging something and
 9 forwarding it on, is readily apparent here,
 10 that the sort of thing you would do?
 11 MR. CAKE:
 12 A. Yes.
 13 COFFEY, Q.C.:
 14 Q. So if we look then at page, yes, page 5 of the
 15 exhibit, do you recall receiving this e-mail?
 16 MR. CAKE:
 17 A. Well as I've indicated, my memory is faint on
 18 that day but now that I look at it, it rings a
 19 bell.
 20 COFFEY, Q.C.:
 21 Q. And Ms. Chaplin has written, "Further to this
 22 morning and incoming information this
 23 afternoon, no action is required at this time.
 24 We have arranged a briefing with the health
 25 authority for the latter part of this week and

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1 we will be in a better position to forward
 2 relevant briefing materials at that time. No
 3 public announcement will be forthcoming this
 4 week and there's a possibility that the
 5 significance of any announcement will be
 6 minimized." Signed Carolyn Chaplin. And it's
 7 apparent that, as I just showed you, you sent
 8 that on at 2:51 p.m. to Mr. Thompson for this
 9 information. Now why would you have forwarded
 10 this to Mr. Thompson?
 11 MR. CAKE:
 12 A. Well just as I had alerted him to the issue in
 13 the morning, this would be the most recent
 14 information on this matter and I would want
 15 him to have that as early as possible.
 16 COFFEY, Q.C.:
 17 Q. For what purpose?
 18 MR. CAKE:
 19 A. So that he would be aware that there's a
 20 change in the circumstance, in terms of how
 21 the department is handling this matter, that
 22 they were arranging a briefing with the health
 23 authority, that the briefing materials that
 24 had been indicated earlier in the morning
 25 would be delayed presumably until after that

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1 meeting took place. So I wanted him to have
 2 the new information.
 3 COFFEY, Q.C.:
 4 Q. With the expectation from your perspective
 5 that he was to do what?
 6 MR. CAKE:
 7 A. Again, no particular expectation, just that he
 8 would be as well informed as I was made by
 9 this e-mail.
 10 COFFEY, Q.C.:
 11 Q. And the purpose in you both being informed was
 12 what?
 13 MR. CAKE:
 14 A. Well again, I presume that the department was
 15 giving us the initial heads up and now this
 16 update on this matter because it was a matter
 17 that they had determined the Premier's office
 18 should be made aware of and they were
 19 intending to prepare a briefing note to that
 20 effect.
 21 COFFEY, Q.C.:
 22 Q. Now, there's a reference here in the first one
 23 to "no action is required at this time". No
 24 action required of whom?
 25 MR. CAKE:

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1 A. I'm understanding that to mean by the Cabinet
2 Secretariat.
3 COFFEY, Q.C.:
4 Q. What, if any, action had been required of the
5 Cabinet Secretariat earlier?
6 MR. CAKE:
7 A. The action that would have been required would
8 have been to process the briefing note once it
9 arrived later that day.
10 COFFEY, Q.C.:
11 Q. Now is there anything in this brief--well,
12 first of all, having received this briefing
13 note, did you call Carolyn Chaplin or
14 otherwise contact her, do you recall?
15 MR. CAKE:
16 A. No, I don't have any recollection of doing
17 that.
18 COFFEY, Q.C.:
19 Q. If you had done so, do you think you'd
20 remember it?
21 MR. CAKE:
22 A. Hard to say. Hard to say whether I would have
23 remembered.
24 COFFEY, Q.C.:
25 Q. Well, if you had done so and were told

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1 something or this was elaborated upon, would
2 you have made some record of that?
3 MR. CAKE:
4 A. Yes.
5 COFFEY, Q.C.:
6 Q. And have you been able to find any such
7 record?
8 MR. CAKE:
9 A. No, sir, I haven't.
10 COFFEY, Q.C.:
11 Q. Okay. Now I say "contact her" I mean contact
12 her in any way, e-mail, phone calls, meetings,
13 anything.
14 MR. CAKE:
15 A. No, sir, no.
16 COFFEY, Q.C.:
17 Q. So this is what you had and all you had from
18 Ms. Chaplin or anybody else in the Department
19 of Health?
20 MR. CAKE:
21 A. That's correct, to the best of my
22 recollection.
23 COFFEY, Q.C.:
24 Q. And so I take it that looking at this, your
25 interpretation of this was what, at the time?

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1 MR. CAKE:
2 A. My interpretation was that the Department was
3 arranging for briefings with Eastern Health
4 and that they would become, I guess, better
5 informed and aware of the issues that was
6 arising at Eastern Health as a result of that
7 briefing, and that for the time being, the
8 plans around a public announcement was on
9 hold.
10 COFFEY, Q.C.:
11 Q. And what about the matter of the underlying
12 issue, like the 1200 to 1500 people over about
13 a seven-year period whose breast cancer
14 testing may have had errors, the underlying
15 substantive issue. Did you have any
16 understanding at the time about that?
17 MR. CAKE:
18 A. No, sir, none at all.
19 COFFEY, Q.C.:
20 Q. So that from your perspective, at the time,
21 that's kind of where the matter stood? That
22 hadn't changed since the morning.
23 MR. CAKE:
24 A. Correct, yeah.
25 COFFEY, Q.C.:

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1 Q. Mr. Cake, I gather you were filling in for Ms.
2 MacDonald for the following two and a half
3 weeks, in fact, I gather, while she was away?
4 MR. CAKE:
5 A. That's correct.
6 COFFEY, Q.C.:
7 Q. Do you know if you ever brought this matter to
8 the attention of Mr. Cooper when he returned
9 to work?
10 MR. CAKE:
11 A. I don't have any record of having done that.
12 COFFEY, Q.C.:
13 Q. Do you know if any inquiries have been made of
14 Mr. Cooper?
15 MR. CAKE:
16 A. I have spoken to Mr. Cooper to ask him about
17 any communications, that e-mail specifically,
18 and he's confirmed that he has no e-mails or
19 record of any discussion we might have had.
20 COFFEY, Q.C.:
21 Q. Because I take it if he'd returned to work the
22 following Monday, that this would, in effect,
23 land in his lap most--this sort of a matter
24 would land in his lap most immediately?
25 MR. CAKE:

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1 A. That's correct, yeah.
 2 COFFEY, Q.C.:
 3 Q. In the normal course.
 4 MR. CAKE:
 5 A. I think so.
 6 COFFEY, Q.C.:
 7 Q. Mr. Cake, at the time, July 19th, was there
 8 any system in place in Cabinet Secretariat to
 9 ensure that this sort of a matter was followed
 10 up on?
 11 MR. CAKE:
 12 A. Well, you know, the only system would be, you
 13 know, each officer and every official, I
 14 guess, who has had engagement on an issue
 15 would have their own means of reminding
 16 themselves that a file was active.
 17 COFFEY, Q.C.:
 18 Q. And in your case, that means was what?
 19 MR. CAKE:
 20 A. In my case, that means would have been taking
 21 an e-mail like this, putting it on the corner
 22 of my desk, what I refer to as the keep in
 23 view file, and -
 24 COFFEY, Q.C.:
 25 Q. KIV file?

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1 MR. CAKE:
 2 A. Correct.
 3 COFFEY, Q.C.:
 4 Q. Yes, we heard that from Dr. Williams who had
 5 spent a stint with the Government at one
 6 point. So the keep in view approach, KIV.
 7 And your practice at the time was to print it
 8 off, I take it, and leave it on the corner of
 9 the desk?
 10 MR. CAKE:
 11 A. Correct.
 12 COFFEY, Q.C.:
 13 Q. How does something get off the corner of the
 14 desk, as it were? Get removed from the KIV
 15 status.
 16 MR. CAKE:
 17 A. Well, usually there's been some development
 18 around that file that satisfies you that, you
 19 know, the matter is either, you know, been
 20 dealt with and not something you any longer
 21 need to keep an eye on or if that's not the
 22 case, it would stay on the corner of the desk.
 23 COFFEY, Q.C.:
 24 Q. And do you know if these e-mails--I take it
 25 it's the first e-mail and your response, your

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1 e-mail to Mr. Thompson, which is your first
 2 substantive record of the fact that you've
 3 notified Mr. Thompson, and the record of the
 4 e-mail of Ms. Chaplin to yourself that
 5 afternoon and your forwarding that on to Mr.
 6 Thompson, because that's a bundle, as it were,
 7 in your world. Am I correct in that, a
 8 bundle?
 9 MR. CAKE:
 10 A. Correct, yeah.
 11 COFFEY, Q.C.:
 12 Q. That could end up in a KIV stack on the corner
 13 of your desk. Until a briefing note comes in,
 14 this is outstanding, isn't it?
 15 MR. CAKE:
 16 A. Yes. I guess the uncertainty, I don't know
 17 whether I printed these particular ones off,
 18 but that would be my general practice.
 19 COFFEY, Q.C.:
 20 Q. Is this the sort of matter that would be
 21 worthy of a KIV approach by yourself?
 22 MR. CAKE:
 23 A. It would certainly be a candidate.
 24 COFFEY, Q.C.:
 25 Q. And in the circumstances, Mr. Cake, where Mr.

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1 Cooper was not around, on vacation, Ms.
 2 MacDonald was not going to be back for two and
 3 a half weeks, and you had been the one, as it
 4 were, and I used the word this morning, kind
 5 of tagged, as it were, by Ms. Chaplin with the
 6 information within Cabinet Secretariat, and
 7 were then coordinating the response or charged
 8 with coordinating or communicating the
 9 response to the Department from Mr. Thompson
 10 and were told "no action required at this
 11 time" that afternoon, but a briefing note will
 12 be along, that bearing in mind that 1200 to
 13 1500, the significance of this, it's very
 14 likely that that ended up in a KIV file, isn't
 15 it?
 16 MR. CAKE:
 17 A. Well, yes, there's a good chance I would have
 18 printed off that e-mail and kept it on the
 19 corner of my desk, yeah.
 20 COFFEY, Q.C.:
 21 Q. And Mr. Cake, what sort of thing would have
 22 had to have happened for it to be removed from
 23 the corner of your desk? Well, we know--I
 24 gather we know, like we know in the sense of--
 25 well, I'll ask you. Did you ever see a

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1 briefing note arising out of this?
 2 MR. CAKE:
 3 A. No, sir, I did not.
 4 COFFEY, Q.C.:
 5 Q. So it wouldn't be removed because a briefing
 6 note came in and "I got my briefing note. I
 7 can shred the e-mails."
 8 MR. CAKE:
 9 A. Correct, yes.
 10 COFFEY, Q.C.:
 11 Q. So what other sort of thing would have to
 12 happen for this sort of a matter to be removed
 13 from your KIV practice?
 14 MR. CAKE:
 15 A. Well, had I sent it on to Bruce or to Ms.
 16 MacDonald, it would go that way, or if simply,
 17 it's conceivable that it might have sat there
 18 awaiting that next development and that
 19 development didn't come for the period of time
 20 I was covering the responsibilities, that I
 21 would have just moved it off my desk after
 22 that time.
 23 COFFEY, Q.C.:
 24 Q. Now in terms of a KIV approach, do you
 25 actually date the KIV? Are they dated?

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1 MR. CAKE:
 2 A. No, I generally just record the e-mail and
 3 whatever information is in the e-mail itself.
 4 COFFEY, Q.C.:
 5 Q. And here, for example, looking at this e-mail,
 6 you were being advised "arranged a briefing
 7 with the health authority for the latter part
 8 of this week" which would be the 21st or 22nd,
 9 presumably, Thursday or Friday, and "will be
 10 in a better position to forward relevant
 11 briefing materials at that time," which would
 12 be Thursday, Friday or perhaps the following
 13 Monday. So you would have understood at that
 14 time that by early the following week, you'd
 15 have a briefing note. Is that a fair -
 16 MR. CAKE:
 17 A. That would be, yes, one reasonable scenario,
 18 yeah.
 19 COFFEY, Q.C.:
 20 Q. Say, by the 26th of July, the following
 21 Tuesday, you would expect a briefing note?
 22 MR. CAKE:
 23 A. Yes, unless there were circumstances they
 24 decided there's no reason to proceed.
 25 COFFEY, Q.C.:

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1 Q. But from your perspective, is there anything
 2 that you've seen in the record here which
 3 would have caused you to tell them "we don't
 4 want a briefing note. We don't need a
 5 briefing note"?
 6 MR. CAKE:
 7 A. No. No, I would have expected that if they
 8 were indeed proceeding with--you know, if the
 9 issue had, as they had initially communicated
 10 to me, if it was of that significance and/or
 11 if they were intending to have a public
 12 announcement around that, that we would have
 13 received a briefing note prior to that
 14 happening.
 15 COFFEY, Q.C.:
 16 Q. And sir, in the circumstances at the time, and
 17 again, just try to allow the Commissioner to
 18 get some sense of it, with the people absent
 19 that week from the office, you know, absent in
 20 the sense of on vacation, would there have
 21 been somebody filling in for Mr. Cooper in his
 22 role?
 23 MR. CAKE:
 24 A. Well, our arrangement normally, when Cabinet
 25 officers are on holidays, the other officers

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1 would generally handle their responsibilities
 2 during that period of time.
 3 COFFEY, Q.C.:
 4 Q. Do you know who was filling for Mr. Cooper at
 5 the time?
 6 MR. CAKE:
 7 A. Not at that point in time, no, I don't, sorry.
 8 COFFEY, Q.C.:
 9 Q. And is there any mechanism in place or any
 10 record kept as to, for example, you, if, for
 11 example, you were to send or charge a Cabinet
 12 officer with following up on something, is
 13 there any record kept of that, the fact that
 14 you've passed it off to a particular Cabinet
 15 officer?
 16 MR. CAKE:
 17 A. Well, had I done that via an e-mail, there'd
 18 be that record. That would be the most
 19 reliable record. If I had scrawled a note and
 20 sent it to an officer, then less likely.
 21 COFFEY, Q.C.:
 22 Q. I take it that there's no kind of mechanism
 23 though in place on July 19th, 2005, by which
 24 within Cabinet Secretariat, you could kind of
 25 alert somebody, create a file, we got to keep

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1 track of this? At that time, there was no
 2 such system in place?
 3 MR. CAKE:
 4 A. Well, I certainly could have made that
 5 suggestion to an officer.
 6 COFFEY, Q.C.:
 7 Q. Okay, and if they did so, would there actually
 8 be a file or some sort of record keeping
 9 system created for it?
 10 MR. CAKE:
 11 A. If they had created a physical file, I think
 12 there would be, yes.
 13 COFFEY, Q.C.:
 14 Q. And if they don't create a physical file, is
 15 there any kind of electronic equivalent
 16 created?
 17 MR. CAKE:
 18 A. No, not per se.
 19 COFFEY, Q.C.:
 20 Q. And what I'm asking around here, sir, is so
 21 the Commissioner can get some sense of what,
 22 if any, kind of record keeping system overall
 23 there was within Cabinet Secretariat to keep
 24 track of major issues. Was there any actual
 25 kind of centralized record keeping system?

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1 MR. CAKE:
 2 A. Well, there is a central--there are two, I
 3 guess. One is there's a highly sophisticated
 4 record keeping system around the core of our
 5 business, which is Cabinet submissions,
 6 Cabinet meetings, etcetera. So there's an
 7 extremely sophisticated system around that,
 8 and similarly, for briefing notes, there is a
 9 fairly sophisticated system. They are logged
 10 and stored in shared directories.
 11 COFFEY, Q.C.:
 12 Q. That's the final version of a briefing note, I
 13 take it?
 14 MR. CAKE:
 15 A. Correct.
 16 COFFEY, Q.C.:
 17 Q. How about the draft versions?
 18 MR. CAKE:
 19 A. Once the drafts are finalized and the what we
 20 call the working directory, the copy would be
 21 deleted from that.
 22 COFFEY, Q.C.:
 23 Q. But once it makes it into that registry with
 24 the stamp, as it were, on it, and we'll see
 25 that in August 18th, 2006.

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1 MR. CAKE:
 2 A. Yes.
 3 COFFEY, Q.C.:
 4 Q. There's a permanent record kept of that?
 5 MR. CAKE:
 6 A. Absolutely.
 7 COFFEY, Q.C.:
 8 Q. And then kept track of?
 9 MR. CAKE:
 10 A. Absolutely.
 11 COFFEY, Q.C.:
 12 Q. But until there's actually a finalized
 13 briefing note while an issue hadn't made it
 14 quite that far, is there any record system?
 15 MR. CAKE:
 16 A. Well, I mean, each official obviously has a
 17 prerogative of creating a physician file and
 18 if they like, you know, once they're done with
 19 that file, they can choose to have that sent
 20 to our central registry.
 21 COFFEY, Q.C.:
 22 Q. But is there any protocol requiring them to
 23 create such a file?
 24 MR. CAKE:
 25 A. There is for Cabinet submissions. There would

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1 not be for what I'll refer to as day-to-day
 2 issues.
 3 COFFEY, Q.C.:
 4 Q. Such as this?
 5 MR. CAKE:
 6 A. Correct.
 7 COFFEY, Q.C.:
 8 Q. Mr. Cake, looking at the e-mails of July 19th,
 9 did you expect, as the assistant secretary at
 10 the time, that you would--that a briefing note
 11 would be forthcoming from the department, you
 12 know, within a week or thereabouts?
 13 MR. CAKE:
 14 A. I would have expected that, you know, if the
 15 seriousness and magnitude of the, you know,
 16 potential errors that were first brought to
 17 our attention was, in fact, realized and there
 18 was an intention to, you know, certainly make
 19 a public announcement around that, that just
 20 as the department had committed to providing
 21 us with that briefing note on that matter on
 22 the 19th, that that would have, that's the
 23 course they would have pursued whenever--at
 24 that point in time.
 25 COFFEY, Q.C.:

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1 Q. Before it became public?
 2 MR. CAKE:
 3 A. Correct.
 4 COFFEY, Q.C.:
 5 Q. Before they announced it?
 6 MR. CAKE:
 7 A. Pardon me?
 8 COFFEY, Q.C.:
 9 Q. Before they announced it?
 10 MR. CAKE:
 11 A. Correct.
 12 COFFEY, Q.C.:
 13 Q. Now, what about if the problem didn't really
 14 change a whole lot, you know, the underlying
 15 recognition that there's a problem here and
 16 we're working on it, but there is a problem,
 17 nonetheless, a medical problem, but a decision
 18 was made by the people involved that it was
 19 involving the department and the board, in
 20 this context, that it was not going to go
 21 public at that point, would you have
 22 anticipated at the time or did you anticipate
 23 at the time, do you think, that I'm going to
 24 get a briefing note regardless?
 25 MR. CAKE:

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1 A. I wouldn't necessarily have anticipated
 2 briefing note in that circumstance. If
 3 something changes whereby the minister and the
 4 executive of the department determined that
 5 there's a course of action they're taking
 6 within their authority and jurisdiction and
 7 doesn't warrant the attention of the Premier,
 8 then we wouldn't expect a note.
 9 COFFEY, Q.C.:
 10 Q. Well, okay, doesn't warrant it. But say the
 11 problem didn't really change, the actual
 12 underlying problem didn't change, the only
 13 thing that changed was we're not going to make
 14 it public at this point, we, the department
 15 and we, the board, between us, are not going
 16 to make it public, does that then, in that
 17 circumstance, not warrant the Premier's
 18 attention?
 19 MR. CAKE:
 20 A. It may well, but it's ultimately the judgment
 21 of the minister and the deputy of the
 22 department, you know, whether that's a path
 23 they'll pursue, and if so, whether it's a path
 24 they'll pursue via briefing note or phone call
 25 or meeting -

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1 COFFEY, Q.C.:
 2 Q. No, but say they decide we're not going public
 3 with it, which is apparently what happened
 4 here, okay, and I say the collective we in
 5 this context, they did not go public in the
 6 summer of 2005, so from your perspective as an
 7 assistant secretary it would be the minister
 8 and those working for him would be taking it
 9 upon themselves to determine that because it's
 10 not going public, we're not going to tell the
 11 Premier about it in a briefing note?
 12 MR. CAKE:
 13 A. That's correct, yeah.
 14 COFFEY, Q.C.:
 15 Q. Despite the fact that the underlying matter is
 16 just, arguably just as serious as when we
 17 started out?
 18 MR. CAKE:
 19 A. Despite that, it's ultimately the judgment of
 20 the minister and the executive whether and how
 21 they wish to communicate the current status of
 22 any file to the Premier's office.
 23 COFFEY, Q.C.:
 24 Q. Do you know if there's any understanding,
 25 written or tacet otherwise on, just kind of

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1 generally understood that the Premier's office
 2 expects to be notified about a matter of
 3 serious public significance whether or not
 4 it's going to go public?
 5 MR. CAKE:
 6 A. Well, I believe, Mr. Coffey -
 7 COFFEY, Q.C.:
 8 Q. I appreciate everybody understands here, I
 9 take it, that if it's going public, the
 10 Premier's office wants to know, fair enough.
 11 But when it's not going to go public yet or
 12 may not go public for awhile or may not go
 13 public forever, ever go public, is it any
 14 understanding about whether or not the
 15 Premier's office is or is not to be informed
 16 about certain things of potential public
 17 significance like this matter?
 18 MR. CAKE:
 19 A. I believe there's a general appreciation or
 20 understanding that the Premier's office would
 21 like to be made aware of major issues, you
 22 know, that ministers are dealing with.
 23 COFFEY, Q.C.:
 24 Q. And that's whether or not they're in the
 25 public domain or not?

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1 MR. CAKE:
 2 A. Correct, I think that's fair.
 3 COFFEY, Q.C.:
 4 Q. Well, if they're in the public domain, they
 5 want to know, but even if it's not in the
 6 public domain, it's your understanding that
 7 Mr. Williams' approach would be he'd like he
 8 and his staff to know?
 9 MR. CAKE:
 10 A. I think that's a fair assumption, but there's
 11 no written rule or guidelines, but -
 12 COFFEY, Q.C.:
 13 Q. Are you able to tell, explain to the
 14 Commissioner--well, first of all, do you know
 15 if the Cabinet Secretariat in July and August,
 16 2005 ever sought a briefing note after July
 17 19th?
 18 MR. CAKE:
 19 A. I do not believe that we did seek a briefing
 20 note.
 21 COFFEY, Q.C.:
 22 Q. Are you able to explain why you didn't?
 23 MR. CAKE:
 24 A. Well, I can only really speak to my own--for
 25 the three weeks that I would have covered the

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1 piece, I think having received this notice I
 2 would have made the judgment that the
 3 department would come forward when they felt
 4 it was appropriate to come forward and, you
 5 know, rely on, again, the department, the
 6 minister and his executive to determine
 7 whether and when that should occur.
 8 COFFEY, Q.C.:
 9 Q. And so from your perspective, then, I take it
 10 that if they chose never to come forward with
 11 it, would that be satisfactory?
 12 MR. CAKE:
 13 A. Well, that's a determination they would need
 14 to make, I mean, that's a judgment each
 15 department is tasked with.
 16 COFFEY, Q.C.:
 17 Q. If we could, please, look at Exhibit P-0134?
 18 Now, this is an e-mail, sir, it's actually two
 19 e-mails, one of July 19th, one of July 20th,
 20 and you're neither the originate nor
 21 recipient. But the first e-mail in time from
 22 Carolyn Chaplin to Deborah Thomas, it is
 23 Tuesday, July 19th, 4:05 p.m. The subject is
 24 "Briefing of Minister." Ms. Chaplin writes,
 25 "Can you forward this to Susan, as well. I

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1 can't seem to find her address on my system.
 2 I have spoken with the minister and everyone
 3 else in here and all are fine with proceeding
 4 with a briefing on Thursday a.m. I will be
 5 coming in for that one and then assessing
 6 where we are. As you can see, John has asked
 7 for briefing materials in advance of the
 8 meeting," in this context would be John
 9 Abbott, "but these will not go beyond the
 10 department for now." Okay. "Thanks,
 11 Carolyn." Do you recall during July, 2005
 12 ever being made aware there was apparently an
 13 agreement by the department that the briefing
 14 materials would not be circulated beyond the
 15 department?
 16 MR. CAKE:
 17 A. No, sir.
 18 COFFEY, Q.C.:
 19 Q. Okay. In the context, Mr. Cake, bearing in
 20 mind what you had been told verbally that
 21 morning and had been instructed that morning
 22 by Mr. Thompson to ensure happened, would it
 23 have been of some relevance to you to know
 24 that apparently this sort of undertaking had
 25 been given?

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1 MR. CAKE:
 2 A. In what way, if you could please just -
 3 COFFEY, Q.C.:
 4 Q. Well, in the sense of here, apparently, Ms.
 5 Chaplin is telling Ms. Thomas, who I can tell
 6 you worked with Eastern Health at the time,
 7 okay.
 8 MR. CAKE:
 9 A. Okay.
 10 COFFEY, Q.C.:
 11 Q. She was the media relations officer with
 12 Eastern Health. So apparently we have here
 13 the director of communications for the
 14 Department of Health telling the media
 15 relations officer for Eastern Health that
 16 there will be a briefing Thursday a.m. John
 17 has asked for briefing materials in advance,
 18 that's the Deputy Minister, John Abbott, but
 19 these, that is, those briefing materials will
 20 not go beyond the department for now. So were
 21 you ever made aware, you've said you weren't
 22 made aware that this undertaking had been
 23 given, would you have been concerned about
 24 that bearing in mind what you had been
 25 informed of and been asked to do that morning?

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1 MR. CAKE:
 2 A. Not necessarily. I mean, again, we rely on
 3 the department, the executive of the
 4 department and the minister to determine when
 5 they wish to inform Cabinet Secretariat and
 6 the Premier's office about a matter. If they
 7 were indicating that they had further homework
 8 to do within the department in terms of
 9 assessing the magnitude of an issue and the
 10 action plan around that issue, wouldn't
 11 concern me that they would bring something
 12 forward prematurely, if you like, before they
 13 felt they were, you know, had their heads
 14 around, were managing the issue, had an action
 15 plan, etcetera.
 16 COFFEY, Q.C.:
 17 Q. Sir, I want to ask you about that. The notion
 18 of prematurely, what do you mean by that?
 19 MR. CAKE:
 20 A. Simply that they had the information that they
 21 felt was necessary before they wish to bring
 22 the matter to the attention of Cabinet
 23 Secretariat and the 8th Floor.
 24 COFFEY, Q.C.:
 25 Q. Necessary for what?

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1 MR. CAKE:
 2 A. To satisfy their objectives in bringing
 3 forward information.
 4 COFFEY, Q.C.:
 5 Q. Is there anything to prevent them from
 6 bringing forward a briefing note on day one
 7 and as new information becomes available,
 8 amending it and providing another one on day
 9 two?
 10 MR. CAKE:
 11 A. I'm still -
 12 COFFEY, Q.C.:
 13 Q. And doing the same thing on day three, is
 14 there any such -
 15 MR. CAKE:
 16 A. Absolutely not. And we have, we have
 17 occasion where we'll have a briefing note on
 18 a matter and a day or two days later we'll
 19 have an updated briefing note on the matter.
 20 So there's nothing to preclude that, you're
 21 absolutely correct.
 22 COFFEY, Q.C.:
 23 Q. So in the context here, premature means what?
 24 If there's a proviso for amendments as
 25 necessary, when would something be premature?

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1 MR. CAKE:
 2 A. Sorry, all I was simply indicating that is the
 3 onus is on the department to determine when it
 4 wishes to bring a matter forward.
 5 COFFEY, Q.C.:
 6 Q. Now here, I take it, that in the context of
 7 what Mr. Thompson had instructed you to do at
 8 10:51 that morning, in this context here it
 9 wasn't so much being left here in the
 10 department's discretion here, was it? I mean,
 11 there was a full expectation here by Mr.
 12 Thompson that he was to see a briefing note
 13 and what's more, he was to see certain things
 14 in it? This wasn't a discretion to the
 15 department, was it?
 16 MR. CAKE:
 17 A. Well, if I read it literally, it indicates
 18 that the--you know, there was specific
 19 direction on what the communication plan
 20 should include.
 21 COFFEY, Q.C.:
 22 Q. Um-hm.
 23 MR. CAKE:
 24 A. Though, in theory, if there was to be--if
 25 there was no communications plan, then, you

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1 know, we--then there'd be no need for
 2 including a particular piece of information in
 3 that.
 4 COFFEY, Q.C.:
 5 Q. Well, come on now, Mr. Cake, you're not
 6 seriously suggesting here, are you, that that
 7 was the situation here, if the department just
 8 chose and the board chose not to have a com
 9 plan, that they could tell Mr. Thompson and he
 10 would accept it, we're not going to bother
 11 with one? You're not -
 12 MR. CAKE:
 13 A. Well, only the department can speak to that.
 14 All I'm indicating is that we didn't see a
 15 communications plan.
 16 COFFEY, Q.C.:
 17 Q. And I understand that. But Mr. Thompson
 18 wanted one, you knew he wanted one, he
 19 instructed you in that regard, didn't he?
 20 MR. CAKE:
 21 A. He had instructed me to see that if a
 22 communications plan was coming forward, that
 23 it contain certain information.
 24 COFFEY, Q.C.:
 25 Q. And you understood then, what, that that left

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1 it to the discretion of the department and the
 2 board as to whether or not to have com plan
 3 at all?
 4 MR. CAKE:
 5 A. In my mind left it to the discretion of the
 6 department and the board as to when it would
 7 bring forward a communications plan.
 8 COFFEY, Q.C.:
 9 Q. But at the time Ms. Chaplin had told you,
 10 around 2:30, 2:37 that day that a com plan
 11 would be by late that--would be forthcoming
 12 late that week or early the next. So you
 13 understood, sir, didn't you, on July 19th that
 14 the department by the end of the week or early
 15 the following week, they'd have a briefing
 16 note along and you also understood that Mr.
 17 Thompson wanted a com plan and wanted certain
 18 things in it and it should be appended to or
 19 part of that briefing note?
 20 MR. CAKE:
 21 A. That was my understanding in the morning of
 22 the 19th.
 23 COFFEY, Q.C.:
 24 Q. Yeah.
 25 MR. CAKE:

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1 A. However, in the afternoon of the 19th, the
 2 department told us that the issue had altered.
 3 COFFEY, Q.C.:
 4 Q. Well, actually, when we look at, if we could,
 5 please, Exhibit P-0312, page 5, it's actually
 6 Carolyn Chaplin at that afternoon telling you
 7 that she will be forwarding the e-mail--I'm
 8 sorry, forwarding the e-mail, forwarding a
 9 briefing note? Not telling--she's saying a
 10 briefing note will be--"We'll be in a better
 11 position to forward relevant briefing
 12 materials at that time." which is later in the
 13 week?
 14 MR. CAKE:
 15 A. Correct.
 16 COFFEY, Q.C.:
 17 Q. So that's the time. So that afternoon at the
 18 same time you're being told no action is
 19 required at this time, you're also being told,
 20 we'll have a briefing note at the end of the
 21 week?
 22 MR. CAKE:
 23 A. Agree, yes, yeah.
 24 COFFEY, Q.C.:
 25 Q. And at the time, the last you heard from Mr.

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1 Thompson that morning was he wanted certain
 2 things?
 3 MR. CAKE:
 4 A. Correct.
 5 COFFEY, Q.C.:
 6 Q. Spelled out and wanted even--not only he
 7 wanted them, he wanted to see them before they
 8 were finalized, correct?
 9 MR. CAKE:
 10 A. That's correct, yes.
 11 COFFEY, Q.C.:
 12 Q. So in the circumstances, with all that in mind
 13 and Tuesday ends, July 19th ends and you go
 14 home, okay, can you tell the Commissioner how
 15 it is that no briefing note was ever
 16 forthcoming, from your perspective and the
 17 Cabinet Secretariat?
 18 MR. CAKE:
 19 A. Well, I cannot explain, you know, the decision
 20 making that the department made.
 21 COFFEY, Q.C.:
 22 Q. I'm asking you about the decision making that
 23 the Cabinet Secretariat made.
 24 MR. CAKE:
 25 A. Well, we were--we would have relied on the

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1 department to bring forward the briefing
 2 materials that they had intended to bring
 3 forward at the time that they judged
 4 appropriate.
 5 COFFEY, Q.C.:
 6 Q. And your KIV system did not cause that to be
 7 checked on again in a week or two or three
 8 while you were still acting secretary, acting
 9 assistant secretary for social policy? You
 10 see, Mr. Cake, the middle of the following
 11 week, around the 26th, 27th, you would have
 12 known that this matter was still outstanding.
 13 In your world this is a significant issue,
 14 something you'd never encountered before. You
 15 understood a briefing note would be along, you
 16 understood that Mr. Thompson wanted certain
 17 things done. Are you able to tell the
 18 Commissioner how it is that you never acted
 19 upon that?
 20 MR. CAKE:
 21 A. Well, I will offer some information in terms
 22 of the period shortly after that. I think I
 23 just indicated on that day we'd had two
 24 meetings of committees of Cabinet. We had
 25 probably a dozen papers coming out of those

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1 two committees going to Cabinet. We were
 2 preparing for a major Cabinet retreat on July
 3 25th in the west coast of a province. So we
 4 were preparing materials for a Cabinet agenda
 5 with 25 items and so that was a very busy
 6 period taking us into the 25th -
 7 COFFEY, Q.C.:
 8 Q. Which was a Monday.
 9 MR. CAKE:
 10 A. Following on the 25th we would have had the
 11 decisions of Cabinet on up to 25 items to
 12 action. So I guess what I'm suggesting is it
 13 was an immensely busy period for us. If the
 14 department chose not to come forward during
 15 that following week, it doesn't surprise me
 16 that we wouldn't have, wouldn't have chased
 17 after this story at that point in time.
 18 COFFEY, Q.C.:
 19 Q. Okay. So that's the week--the 25th was the
 20 following Monday. The 26th you'd have all
 21 these new tasks, that Tuesday?
 22 MR. CAKE:
 23 A. Um-hm.
 24 COFFEY, Q.C.:
 25 Q. I'm just going to do the arithmetic. I

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1 believe if the 25th was a Monday, August 1
 2 would have been a Monday, correct?
 3 MR. CAKE:
 4 A. Correct.
 5 COFFEY, Q.C.:
 6 Q. And August 2, August 3rd was probably Regatta
 7 Day. But the 4th, 5th you were still
 8 performing that function. Was Ms. MacDonald
 9 off--or back the following Monday, on the 8th,
 10 or was she back on the 15th, do you know?
 11 MR. CAKE:
 12 A. I have a record but I don't believe she was
 13 back on the 8th. I think her vacation
 14 finished on the 12th, is my recollection.
 15 COFFEY, Q.C.:
 16 Q. So running even into the following week you
 17 were still in the position of substituting for
 18 her. So are you able to advise the
 19 Commissioner how it was, and I appreciate you
 20 were busy it at the time, in the immediate
 21 week, but how this just, because as you say,
 22 it was just kind of sitting on a corner of the
 23 desk, if it made it there, but sitting there
 24 and you never sent--you have no record or
 25 memory of ever sending another e-mail,

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1 following up with a phone call, sending a
 2 letter asking where is that briefing note,
 3 what's going on?
 4 MR. CAKE:
 5 A. Well, if I were to offer an explanation, it
 6 would be that twofold. Our core business is
 7 to support the decision making of Cabinet,
 8 that is our first and foremost task, to ensure
 9 that the government decision making processes
 10 are efficient and effective, so for me
 11 personally, that's where my first priorities
 12 would go. This type of matter, I guess the
 13 second piece is this type of matter is a
 14 matter on which we would rely on the
 15 responsible minister and executive to bring
 16 forward when they were ready to do that. I
 17 think the combination of those two factors,
 18 you know, would explain why we wouldn't chase
 19 after this in the next couple of weeks, at
 20 least.
 21 COFFEY, Q.C.:
 22 Q. Okay. Do you know--Mr. Cake, do you know,
 23 like in July of 2005, into August of 2005,
 24 what happened to this? I mean, that's the
 25 real kind of, the kind of question that's kind

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1 of sitting out there I'll pose. The
 2 information comes in, certain things are done.
 3 There's no response from the department in the
 4 sense of they don't provide a briefing note,
 5 and the Cabinet Secretariat doesn't go looking
 6 for one. And do you know how it is, it's
 7 possible that the Cabinet Secretariat never
 8 goes looking for one until, I gather, October?
 9 How could that be?
 10 MR. CAKE:
 11 A. Well, the only additional information I would
 12 offer and I think that's been offered to the
 13 Commission is when Ms. MacDonald would have
 14 returned to the office, she like I has a
 15 regular process of meeting with deputies,
 16 usually in September, to determine what are
 17 the key issues that department is dealing with
 18 with the next six months. I understand that
 19 Ms. MacDonald met with the deputy, this was
 20 not identified as a priority issue for the
 21 department, it was not identified as an issue
 22 at all. So you know, we provide opportunities
 23 for departments to apprise us of issues
 24 they're dealing with, issues which they feel
 25 either will require Cabinet direction or

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1 perhaps the Premier's direction. This was not
 2 on that list and as such it doesn't surprise
 3 me that it was not until the media story broke
 4 in October that we were not looking for a
 5 briefing note.
 6 COFFEY, Q.C.:
 7 Q. Sir, now the briefing note, well, the only one
 8 that we're aware of that exists is the July
 9 20th one.
 10 COMMISSIONER:
 11 Q. Mr. Coffey, we're going to take the lunch
 12 break soon as you get a convenient spot, you
 13 can take the break, if you will, please.
 14 COFFEY, Q.C.:
 15 Q. Thank you. It's P-0075, please? Now, this is
 16 a briefing note, it's--Mr. Cake, just show
 17 you. It's prepared July 20th, 2005 there at
 18 the bottom right-hand side. It's on Eastern
 19 Health letterhead. And it's three pages long.
 20 It's certainly not in a format that the
 21 Cabinet Secretariat, I gather, would use? You
 22 see that, it just has background and the word
 23 "actions." And that wouldn't be in the format
 24 that Cabinet Secretariat would use, would it
 25 be?

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1 MR. CAKE:
 2 A. Pardon me?
 3 COFFEY, Q.C.:
 4 Q. That's not the format that Cabinet Secretariat
 5 would use here?
 6 MR. CAKE:
 7 A. No, I don't think so.
 8 COFFEY, Q.C.:
 9 Q. No.
 10 MR. CAKE:
 11 A. Not quickly skimming it.
 12 COFFEY, Q.C.:
 13 Q. No, sir, if this briefing note was forwarded
 14 to your office electronically in July of 2005,
 15 okay, or in August, for that matter, 2005, to
 16 your attention, how would that be kept track
 17 of?
 18 MR. CAKE:
 19 A. If this were forwarded to our office, it would
 20 be for the purpose of sending it to the 8th
 21 Floor and therefore it would be what I'll call
 22 properly formatted in the standard format for
 23 all briefing notes and registered in our
 24 system.
 25 COFFEY, Q.C.:

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1 Q. Okay. So this would have kind of entered the
 2 editing, proper formatting stage?
 3 MR. CAKE:
 4 A. Correct.
 5 COFFEY, Q.C.:
 6 Q. If something is improperly formatted came
 7 along?
 8 MR. CAKE:
 9 A. Correct.
 10 COFFEY, Q.C.:
 11 Q. And do you know if you've ever--well, I don't
 12 know if you've ever seen it up until today,
 13 but back in 2005 had you seen this?
 14 MR. CAKE:
 15 A. I can say with--I don't recall ever seeing
 16 this, no.
 17 COFFEY, Q.C.:
 18 Q. Thank you. Commissioner, after lunch.
 19 COMMISSIONER:
 20 Q. Luncheon break. We'll met at five after two.
 21 Thank you.
 22 (LUNCH BREAK)
 23 COMMISSIONER:
 24 Q. Please be seated. Mr. Coffey?
 25 COFFEY, Q.C.:

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1 Q. Thank you, Commissioner. Mr. Cake, before I
 2 leave July of 2005, if you did KIV this
 3 matter, okay, if you did, I take it that as
 4 there was never a briefing note, to your
 5 knowledge, forthcoming in July or August of
 6 2005, it wouldn't have gotten off your desk
 7 for that reason?
 8 MR. CAKE:
 9 A. Correct.
 10 COFFEY, Q.C.:
 11 Q. Okay. I take it from what you've told us that
 12 another possible possibility if it was KIVED
 13 that it would be removed would be that you had
 14 tasked somebody else with doing or keeping
 15 track of it?
 16 MR. CAKE:
 17 A. It's a possibility.
 18 COFFEY, Q.C.:
 19 Q. Okay. And that could either be the person,
 20 the return of the person you were substituting
 21 for, Ms. MacDonald, in August, to work,
 22 correct?
 23 MR. CAKE:
 24 A. Correct.
 25 COFFEY, Q.C.:

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1 Q. Or a Cabinet officer, either Mr. Cooper or
 2 someone else?
 3 MR. CAKE:
 4 A. Correct.
 5 COFFEY, Q.C.:
 6 Q. Was tasked with it. And have you been able to
 7 ascertain if any Cabinet officer was so
 8 tasked?
 9 MR. CAKE:
 10 A. No, I have not, no.
 11 COFFEY, Q.C.:
 12 Q. You've made inquiries, though, in that regard?
 13 MR. CAKE:
 14 A. Correct.
 15 COFFEY, Q.C.:
 16 Q. You've asked Mr. Cooper. Have you asked
 17 anybody else?
 18 MR. CAKE:
 19 A. No, just Mr. Cooper.
 20 COFFEY, Q.C.:
 21 Q. do you know who was substituting for Mr.
 22 Cooper that week?
 23 MR. CAKE:
 24 A. I don't know that now, right now, no.
 25 COFFEY, Q.C.:

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1 Q. Okay. And have you made inquiries of Ms.
 2 MacDonald?
 3 MR. CAKE:
 4 A. Yes, I have.
 5 COFFEY, Q.C.:
 6 Q. And been advised of what?
 7 MR. CAKE:
 8 A. She has no recollection of being asked to
 9 follow up on this issue.
 10 COFFEY, Q.C.:
 11 Q. How long could a--would a KIV like that, you
 12 know, in the circumstances potentially sit on
 13 a corner of your desk?
 14 MR. CAKE:
 15 A. Well, that's difficult to say. In this case,
 16 you know, it likely would have sat there until
 17 Ms. McDonald returned to work on the 12th, I
 18 believe it was, of August.
 19 COFFEY, Q.C.:
 20 Q. And I take it at that point you'd be, in light
 21 of your workload, would be, I won't say
 22 enthusiastic, but somewhat not reluctant to
 23 pass it on to her?
 24 MR. CAKE:
 25 A. You're absolutely correct.

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1 COFFEY, Q.C.:
 2 Q. Yeah. Now, you've indicated, as well, this
 3 morning, that you have reason to believe that
 4 Ms. MacDonald met with Mr. Abbott in September
 5 of 2005 to kind of get a heads up as to the
 6 top four or five issues?
 7 MR. CAKE:
 8 A. Issues anticipated over the next three to
 9 four, six months.
 10 COFFEY, Q.C.:
 11 Q. And when did you have a conversation with Ms.
 12 MacDonald about that?
 13 MR. CAKE:
 14 A. I've had it since my initial interview with
 15 yourself in the spring.
 16 COFFEY, Q.C.:
 17 Q. Okay. So before--that wasn't until 2008?
 18 MR. CAKE:
 19 A. Correct.
 20 COFFEY, Q.C.:
 21 Q. Okay. Do you ever recall having any
 22 discussion with Ms. MacDonald about the ER/PR,
 23 what we now know as ER/PR in July of 2005 for
 24 you would have been breast cancer testing,
 25 okay, have you ever discussed the matter with

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1 Ms. MacDonald before May of 2007?
 2 MR. CAKE:
 3 A. Unlikely. I have no recollection of that.
 4 COFFEY, Q.C.:
 5 Q. Okay. And I use May, 2007 because that's when
 6 it became a matter of some public controversy.
 7 MR. CAKE:
 8 A. Understand -
 9 COFFEY, Q.C.:
 10 Q. May 15th.
 11 MR. CAKE:
 12 A. Yeah, understand.
 13 COFFEY, Q.C.:
 14 Q. Did you discuss it with her in May of 2007,
 15 the fact that this at all, I'll use the words,
 16 "kind of blown up" and was a matter of some
 17 public controversy?
 18 MR. CAKE:
 19 A. I can't put a precise month on it, but it
 20 would have been in terms of, you know, since
 21 the Commission's work was announced and, you
 22 know, the understanding that she had been
 23 involved in a briefing note and generally so
 24 in preparing for her testimony before the
 25 Commission.

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1 COFFEY, Q.C.:

2 Q. Now, sir, if we could, please, Exhibit P-0124?

3 I'm just going to--sir, this is a briefing

4 note, Department of Health and Community

5 Services. The title is "Testing of Breast

6 Cancer Patients at St. John's Hospitals." And

7 you'll see there's a distribution list here at

8 the top right-hand side?

9 MR. CAKE:

10 A. Yes, sir.

11 COFFEY, Q.C.:

12 Q. And, in fact, your name is there to the very--

13 yourself and Ms. MacDonald's to the very top

14 right?

15 MR. CAKE:

16 A. Correct, yeah.

17 COFFEY, Q.C.:

18 Q. J. Mullaly is whom?

19 MR. CAKE:

20 A. Julia Mullaly. And she was executive

21 director, I think, policy and planning a that

22 time.

23 COFFEY, Q.C.:

24 Q. And the issue here is framed as "Media

25 coverage regarding potential breast cancer

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1 diagnostic errors within" E-R-I-H-A, that

2 should be Eastern Health? Now, at this point

3 in time, that's October 5th, 2005, you were

4 the assistant secretary for economic policy?

5 MR. CAKE:

6 A. That's correct, yes.

7 COFFEY, Q.C.:

8 Q. So this briefing note would be primarily the

9 responsibility of Ms. MacDonald?

10 MR. CAKE:

11 A. That's correct.

12 COFFEY, Q.C.:

13 Q. At that time? If we look on the second page

14 of it, we'll see the date. And it says,

15 "Prepared by M. Hennessey, J. Abbott." That

16 would be Moira Hennessey?

17 MR. CAKE:

18 A. Yes, it would.

19 COFFEY, Q.C.:

20 Q. And John Abbott at the Department of Health.

21 And "Reviewed by B. Cooper," that would be?

22 MR. CAKE:

23 A. Bruce.

24 COFFEY, Q.C.:

25 Q. Bruce Cooper. And "S. MacDonald" would be

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1 Sheree MacDonald, Cabinet Secretariat. This

2 sort of a briefing note, would you have

3 reviewed this when you received it?

4 MR. CAKE:

5 A. The practice of the Cabinet Secretariat is

6 that all of the executive are copied on all

7 briefing notes as a matter of course. I don't

8 recall having read this at that time.

9 Frankly, it would be, luxury might be too

10 strong a word, but my focus would be on the

11 work with the departments for which I was

12 responsible.

13 COFFEY, Q.C.:

14 Q. And the Department of Health not being one of

15 those at that time?

16 MR. CAKE:

17 A. That's correct, yeah.

18 COFFEY, Q.C.:

19 Q. So are you telling the Commissioner that you

20 did not read it or it's more likely than not

21 you didn't read it?

22 MR. CAKE:

23 A. I would say it's more likely that I did not

24 read it.

25 COFFEY, Q.C.:

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1 Q. Now, this particular note, I'm just going to

2 ask you about, I'm going to go back in this

3 exhibit to page 4. And this is a Department

4 of Health and Community Services briefing note

5 of October 3rd, 2005. The issue is "Testing

6 of breast cancer patients at St. John's

7 hospitals." And then there's a background and

8 a current status. And it ends with "Prepared

9 by Moira Hennessey, Approved by John Abbott."

10 Now, in the main, the actual substantive text

11 in this is identical between the one we just

12 looked at and this one.

13 MR. CAKE:

14 A. Yes.

15 COFFEY, Q.C.:

16 Q. I'm just going to ask you about that idea. As

17 an assistant secretary how common is it to

18 simply take a departmental briefing note

19 prepared for the minister and simply, in

20 effect, add a couple of names, add a date and

21 add one line, a title and an issue, slightly

22 rephrasing the issue, but otherwise, in

23 effect, just copying and pasting, how common

24 would that be?

25 MR. CAKE:

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1 A. I can't speak to that directly, not -
 2 COFFEY, Q.C.:
 3 Q. Within, in your world, okay, in the -
 4 MR. CAKE:
 5 A. Well, yes, just to go on, I can't speak to it
 6 directly how common it would be, but it
 7 wouldn't strike me as uncommon that a note
 8 that was prepared for the information of a
 9 minister, that he might determine he would
 10 like the Cabinet Secretariat and the Premier
 11 to be aware of the same information and have
 12 it reformatted for that purpose.
 13 COFFEY, Q.C.:
 14 Q. Too far. There. Now, this particular one is
 15 titled "Issue, Background and Current Status."
 16 Is that the format that is normally followed
 17 in an issues briefing note?
 18 MR. CAKE:
 19 A. Yes, it is, sir. There should probably be an
 20 "Action Required" section at the tail end.
 21 COFFEY, Q.C.:
 22 Q. Which is what? I'm sorry, an action?
 23 MR. CAKE:
 24 A. Should be, normally we would look for a
 25 section on the tail end, "Action Required"

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1 which is to indicate whether it's simply for
 2 information or whether there is a particular
 3 purpose.
 4 COFFEY, Q.C.:
 5 Q. This one omits to have that. So, we do
 6 understand that on October 2nd, 2005 The
 7 Independent published a story about this
 8 matter. Would you have been aware of the
 9 story at the time, do you think?
 10 MR. CAKE:
 11 A. I don't think I would have paid attention to
 12 it, sir, at the time, simply because my
 13 responsibilities were with another seven or
 14 eight departments of government.
 15 COFFEY, Q.C.:
 16 Q. And I appreciate that it wouldn't have been
 17 your professional responsibility. But at the
 18 time there were reports about breast cancer
 19 testing and errors, potentially, or retesting.
 20 So you have no recollection of, in early
 21 October, hearing about that matter and
 22 relating it to July 19th?
 23 MR. CAKE:
 24 A. I have no specific memory of that.
 25 COFFEY, Q.C.:

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1 Q. Is there any process in place whereby
 2 assistant secretaries, the two of you get
 3 together routinely or regularly or sort of
 4 regularly and discuss ongoing matters?
 5 MR. CAKE:
 6 A. No per se, not per se. We would come
 7 together, you know, regularly in terms of the
 8 Cabinet briefings, that would be a regular
 9 forum. But we--there's not an established
 10 mechanism for, if you like, exchanging views
 11 or hearing views on matters that might be
 12 occurring in our respective departments.
 13 COFFEY, Q.C.:
 14 Q. Okay. And, sir, what about executive
 15 meetings, like meetings with Mr. Thompson,
 16 yourself and Ms. MacDonald and if there is a
 17 deputy clerk, the deputy clerk, is there any
 18 sort of scheduled meetings for those?
 19 MR. CAKE:
 20 A. I think it varies with the clerk. In my
 21 tenure there there's always been--there have
 22 been meetings. It's more frequently the agenda
 23 for those are to discuss, you know, matters or
 24 projects or issues arising either out of
 25 Cabinet discussions, Cabinet decisions or

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1 requests from the Premier's office. So, yes,
 2 there are, there are regular meetings. The
 3 interval can sometimes change.
 4 COFFEY, Q.C.:
 5 Q. Now, sir, you've told us that I believe on
 6 July 19th, 2005 there were two committee,
 7 Cabinet committee meetings, correct?
 8 MR. CAKE:
 9 A. That's correct.
 10 COFFEY, Q.C.:
 11 Q. And as well that there was a Cabinet retreat
 12 on July 25?
 13 MR. CAKE:
 14 A. That's correct, sir.
 15 COFFEY, Q.C.:
 16 Q. And were you involved in the preparations for
 17 that, the retreat?
 18 MR. CAKE:
 19 A. Yes, I would have been.
 20 COFFEY, Q.C.:
 21 Q. In the lead up to that, between July 19th and
 22 the 25th, did you have any reason to believe
 23 that the Cabinet was aware of the problem,
 24 apparently, that existed within Eastern
 25 Health?

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1 MR. CAKE:
 2 A. No, sir, there's no evidence to that effect.
 3 COFFEY, Q.C.:
 4 Q. Okay. At the time would that be something
 5 that might be brought to the Cabinet's
 6 attention, bearing in mind that they're all
 7 meeting the following Monday, on the 25th?
 8 MR. CAKE:
 9 A. The normal course for that occurring would be
 10 for there to be a Cabinet submission.
 11 COFFEY, Q.C.:
 12 Q. Okay.
 13 MR. CAKE:
 14 A. Requesting direction on a matter. That was
 15 not the case for this meeting.
 16 COFFEY, Q.C.:
 17 Q. Okay. And the Cabinet committee, though, the
 18 social policy committee, I take it, that met
 19 on the 19th would meet again probably on the
 20 26th?
 21 MR. CAKE:
 22 A. Correct.
 23 COFFEY, Q.C.:
 24 Q. And on the 2nd?
 25 MR. CAKE:

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1 A. Generally every Tuesday.
 2 COFFEY, Q.C.:
 3 Q. Every Tuesday?
 4 MR. CAKE:
 5 A. Every Tuesday.
 6 COFFEY, Q.C.:
 7 Q. What about bringing such a matter to the
 8 attention of the social policy committee of
 9 Cabinet, how would it get there?
 10 MR. CAKE:
 11 A. Again, it would only be on the agenda for the
 12 social policy committee of Cabinet if there
 13 were a Cabinet paper in the system seeking
 14 direction on an issue around that.
 15 COFFEY, Q.C.:
 16 Q. So that then on July 19th, by the end of the
 17 day, I take it you understood that--well,
 18 certainly, you, in Cabinet Secretariat, was
 19 aware of the matter?
 20 MR. CAKE:
 21 A. Correct.
 22 COFFEY, Q.C.:
 23 Q. Mr. Thompson was aware of the matter?
 24 MR. CAKE:
 25 A. That's correct.

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1 COFFEY, Q.C.:
 2 Q. Elizabeth Matthews was aware of the matter?
 3 MR. CAKE:
 4 A. It seems.
 5 COFFEY, Q.C.:
 6 Q. Yes, and you wouldn't have known, I take--or
 7 did you know whether or not Mr. Crawley knew
 8 about it?
 9 MR. CAKE:
 10 A. I wouldn't have known at the time.
 11 COFFEY, Q.C.:
 12 Q. Okay, and that day when you left work, would
 13 you have been under the impression at the time
 14 that the Premier would have been advised by
 15 that point in time?
 16 MR. CAKE:
 17 A. I would have had no idea, sir.
 18 COFFEY, Q.C.:
 19 Q. Okay. In the sense of if the clerk and the
 20 director of communications knew, and it was
 21 this sort of a matter, would you have any--
 22 would you assume that he had been told?
 23 Whether or not he'd been told is another
 24 issue, but would you assume that -
 25 MR. CAKE:

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1 A. No, I frankly wouldn't make any assumption
 2 around that.
 3 COFFEY, Q.C.:
 4 Q. If we could look, please, at Exhibit P-0417?
 5 Now sir, could you tell us, please, when you
 6 went to social policy, assistant secretary?
 7 MR. CAKE:
 8 A. Pardon me?
 9 COFFEY, Q.C.:
 10 Q. When did you go to social policy?
 11 MR. CAKE:
 12 A. March '06.
 13 COFFEY, Q.C.:
 14 Q. March '06. When you went there, what, if any,
 15 introduction did you have or initiation did
 16 you have?
 17 MR. CAKE:
 18 A. Well, I guess my initiation was the two years
 19 experience I had had on the economic policy
 20 side of the organization.
 21 COFFEY, Q.C.:
 22 Q. Was there any transition while you were
 23 brought up to speed, in terms of for those
 24 departments what the particular issues were in
 25 those, the new departments that you were

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1 taking on?
 2 MR. CAKE:
 3 A. I would have received some briefing from Ms.
 4 MacDonald.
 5 COFFEY, Q.C.:
 6 Q. And where did Ms. MacDonald go from there?
 7 MR. CAKE:
 8 A. She went Deputy Minister of Government
 9 Services.
 10 COFFEY, Q.C.:
 11 Q. Okay, and who replaced you?
 12 MR. CAKE:
 13 A. I believe that was Bill Parrott.
 14 COFFEY, Q.C.:
 15 Q. So in being briefed by Ms. MacDonald, was that
 16 a written briefing?
 17 MR. CAKE:
 18 A. There may have been notes.
 19 COFFEY, Q.C.:
 20 Q. Okay. Do you know if they still exist?
 21 MR. CAKE:
 22 A. I believe they probably do.
 23 COFFEY, Q.C.:
 24 Q. Do you know if the ER/PR, what we now know as
 25 the ER/PR matter involving Eastern Health, was

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1 in that briefing or referred to in it?
 2 MR. CAKE:
 3 A. I know that they were not.
 4 COFFEY, Q.C.:
 5 Q. I take it you've looked since, I take it?
 6 MR. CAKE:
 7 A. Yes.
 8 COFFEY, Q.C.:
 9 Q. Okay. So I take it then in taking over, you
 10 had some exposure, we can see from July even,
 11 substituting for Ms. MacDonald, to the
 12 departments she was responsible for. In
 13 taking over, you would have been briefed by
 14 her, probably in writing.
 15 MR. CAKE:
 16 A. Correct.
 17 COFFEY, Q.C.:
 18 Q. Orally perhaps as well?
 19 MR. CAKE:
 20 A. Perhaps, yeah.
 21 COFFEY, Q.C.:
 22 Q. And is there any place within Government that
 23 you could go at the time and see, you know,
 24 for all of my departments, the ones I'm now
 25 responsible for, what the particular issues

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1 are?
 2 MR. CAKE:
 3 A. I did, in fact--a couple of months after
 4 taking over that position, I did, in the fall
 5 of '06, have meetings with all deputy
 6 ministers.
 7 COFFEY, Q.C.:
 8 Q. So that would be six months later?
 9 MR. CAKE:
 10 A. Yes.
 11 COFFEY, Q.C.:
 12 Q. Okay. Between say March and July of '06, did
 13 you take any steps to be briefed by the
 14 ministers or deputy ministers?
 15 MR. CAKE:
 16 A. I don't recall any specific measures that I
 17 would have taken.
 18 COFFEY, Q.C.:
 19 Q. What about canvassing the Cabinet officers
 20 responsible for the various departments?
 21 MR. CAKE:
 22 A. I think the list of issues that Ms. MacDonald
 23 would have exposed me to would have covered
 24 that purpose.
 25 COFFEY, Q.C.:

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1 Q. And I take it though that list of issues did
 2 not include the Eastern Health's problems with
 3 the ER/PR matter?
 4 MR. CAKE:
 5 A. That's correct, sir.
 6 COFFEY, Q.C.:
 7 Q. Do you recall what issues from Health were on
 8 the list?
 9 MR. CAKE:
 10 A. Not offhand, but it was a lengthy list.
 11 COFFEY, Q.C.:
 12 Q. A lengthy list involving Health?
 13 MR. CAKE:
 14 A. Exactly, yes.
 15 COFFEY, Q.C.:
 16 Q. Department of Health and Community Services.
 17 But that lengthy list does not include the
 18 ER/PR breast cancer testing?
 19 MR. CAKE:
 20 A. That's correct, sir, yeah.
 21 COFFEY, Q.C.:
 22 Q. Knowing what you do now, you know, and
 23 reflecting upon it, would you have expected it
 24 to be there?
 25 MR. CAKE:

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1 A. I just have to think now. So the list would
 2 have been from in 2006. This issue arose, I
 3 guess, in the summer of '05, certainly be a
 4 candidate.
 5 COFFEY, Q.C.:
 6 Q. And although you've indicated you probably did
 7 not read the October 5th briefing note, it had
 8 been important enough to have a briefing note
 9 prepared for Cabinet Secretariat in October of
 10 '05. So -
 11 MR. CAKE:
 12 A. It had been important enough, yes.
 13 COFFEY, Q.C.:
 14 Q. And yet it didn't make this lengthy list of
 15 matters?
 16 MR. CAKE:
 17 A. That's correct.
 18 COFFEY, Q.C.:
 19 Q. Now looking at this particular exhibit, I'm
 20 going to show you page two of it, and there's
 21 a headline there, "good news/bad news" and a
 22 photograph of a lady named Myrtle Lewis. See
 23 that?
 24 MR. CAKE:
 25 A. Yes, I do.

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1 COFFEY, Q.C.:
 2 Q. And here on the side, someone's handwritten
 3 "Independent, July 30th '06"
 4 MR. CAKE:
 5 A. Um-hm.
 6 COFFEY, Q.C.:
 7 Q. And then there's part of a story and then
 8 another part of the story, okay. Do you have
 9 a print copy?
 10 MR. CAKE:
 11 A. I believe I do in my binder, because that's
 12 the story that I requested the briefing note--
 13 that's what prompted the request for the
 14 briefing note. It's here somewhere.
 15 COFFEY, Q.C.:
 16 Q. When you're ready, sir. Take your time. It
 17 would be easier for you to look at perhaps
 18 there. There you go.
 19 MR. CAKE:
 20 A. Okay.
 21 COFFEY, Q.C.:
 22 Q. Okay. And so this is July 30th 2006, you can
 23 see it up here in the top right-hand side of
 24 page four of the exhibit. That would have
 25 been a Sunday. How was it you came to read

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1 this and what happened?
 2 MR. CAKE:
 3 A. I think I happen to subscribe to The
 4 Independent, so I either read this at home on
 5 Sunday or in the office on Monday.
 6 COFFEY, Q.C.:
 7 Q. Okay.
 8 MR. CAKE:
 9 A. And as a result of that, I think that was--I
 10 thought it was a front-page story, but--okay,
 11 I'm reading your page four there. But at any
 12 rate, it certainly caught my attention and I
 13 went to check our system to see what
 14 information we did have on this issue, found
 15 that there had been a note, the October '05
 16 note that you recently alluded to, and felt
 17 that we should request an update in terms of
 18 what's happening with this testing, with these
 19 issues, how patients were affected, etcetera.
 20 COFFEY, Q.C.:
 21 Q. So what was it about the news story that
 22 caused you to go looking to see what was in
 23 your system?
 24 MR. CAKE:
 25 A. Well, I think it was a couple of things. I

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1 think it was, you know, the experience this
 2 particular woman had had, Ms. Lewis had had.
 3 The reference to the fact that, you know,
 4 there was retesting going on within Eastern
 5 Health. That there were potentially a large
 6 group of people that were affected by that,
 7 and that there was potential lawsuits
 8 associated with this as well.
 9 COFFEY, Q.C.:
 10 Q. And what, if any, significance do the
 11 lawsuits, the existence of law suits have?
 12 MR. CAKE:
 13 A. Well, the significance of lawsuits would
 14 simply be, you know, a lawsuit, potentially a
 15 substantial lawsuit affecting the province,
 16 that would, as a matter or course, be
 17 something that we'd be curious about.
 18 COFFEY, Q.C.:
 19 Q. Now when we look at page two of the exhibit,
 20 which is the one with the photograph here of
 21 Myrtle Lewis, the text to the left-hand side
 22 of it, reads, at the bottom of the text,
 23 "she's one of the women behind a class action
 24 suit filed in July against Eastern Health."
 25 So did you understand at the time that the law

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1 suit actually was against Eastern Health and
 2 not the Government itself?
 3 MR. CAKE:
 4 A. I'm not sure I fixated on that nuance, but
 5 clearly I could--I would have read that.
 6 COFFEY, Q.C.:
 7 Q. Did you have any understanding at the time
 8 that the defendant in this case carried or
 9 would probably carry insurance in relation to
 10 it?
 11 MR. CAKE:
 12 A. I don't think I would have been thinking in
 13 that level of detail.
 14 COFFEY, Q.C.:
 15 Q. So I take it you were thinking of it in terms
 16 of like this is a lawsuit involves the
 17 province or a provincial agency?
 18 MR. CAKE:
 19 A. That's correct.
 20 COFFEY, Q.C.:
 21 Q. And the effect of such a lawsuit or lawsuits
 22 might be a cost to the provincial treasury?
 23 MR. CAKE:
 24 A. That probably would have been part of my
 25 thinking, yes.

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1 COFFEY, Q.C.:
 2 Q. And in relation to that, I take it you would
 3 want to know or think that Cabinet
 4 Secretariat, the Premier's office might want
 5 to know what the potential exposure was, how
 6 many people are involved, what the nature of
 7 the involvement is? Would that be a fair -
 8 MR. CAKE:
 9 A. That would be part of it, but I think it was a
 10 broader concern, rather than just the lawsuit
 11 piece of it. It was, you know, where was this
 12 issue more generally? How many patients were
 13 in fact affected, in what ways? You know,
 14 where were we in terms of determining why it
 15 had occurred and measures to ensure that it
 16 didn't reoccur.
 17 COFFEY, Q.C.:
 18 Q. Sir, at the time, as you've pointed out, you
 19 were the social policy assistant secretary.
 20 I'm correct on that, right?
 21 MR. CAKE:
 22 A. That's correct.
 23 COFFEY, Q.C.:
 24 Q. But even in that context, I take it if there
 25 were economic, potential economic

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1 ramifications involving those departments,
 2 you'd be interested in that? Like Department
 3 of Health, I appreciate, is not the Department
 4 of Finance.
 5 MR. CAKE:
 6 A. Correct.
 7 COFFEY, Q.C.:
 8 Q. But Department of Health falls within social
 9 policy, but if it involves a matter involving
 10 potential costs to the province involving the
 11 Department of Health, the fact that it
 12 involves money wouldn't preclude it from being
 13 within your interest?
 14 MR. CAKE:
 15 A. That's correct, but that wouldn't have been
 16 the principal motivator, I don't think.
 17 COFFEY, Q.C.:
 18 Q. Okay. Now sir, if we could, you say you went
 19 and looked to see what the Cabinet Secretariat
 20 had?
 21 MR. CAKE:
 22 A. Yes, sir.
 23 COFFEY, Q.C.:
 24 Q. How did you do that?
 25 MR. CAKE:

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1 A. I did a search of our--I would have done a
 2 search of our registry of briefing notes.
 3 COFFEY, Q.C.:
 4 Q. And how does one do that?
 5 MR. CAKE:
 6 A. One does that, they are filed, I guess, by
 7 year, year and department. So there's two
 8 means by which one might do that. Just search
 9 all of the briefing notes from a department,
 10 such as the Department of Health and Community
 11 Services, or secondly, you can search by a key
 12 word. I think I--the more, I think I probably
 13 did the former, went into the Department of
 14 Health to see whether we had any notes on this
 15 topic.
 16 COFFEY, Q.C.:
 17 Q. I take it just scrolled down through a list of
 18 them?
 19 MR. CAKE:
 20 A. Correct.
 21 COFFEY, Q.C.:
 22 Q. That would be the -
 23 MR. CAKE:
 24 A. Yeah.
 25 COFFEY, Q.C.:

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1 Q. If we could look at, please, Exhibit P-0811?
 2 So this is an e-mail from yourself, July 31st
 3 2006, a Monday at 10:05 a.m., to Mr. Abbott,
 4 copied to Marilyn McCormack. The subject is a
 5 briefing note. "John, would you please have a
 6 briefing note prepared on the issue in the
 7 front page story in The Independent yesterday
 8 re: lawsuit being launched by breast cancer
 9 patients. FYI, the only note in our system on
 10 this matter is dated October 5/05. Thanks,
 11 Gary."
 12 So I take it by 10:05 that morning, you'd
 13 figured out that--you'd read the story in The
 14 Independent, searched Cabinet Secretariat's
 15 database and concluded "we have nothing except
 16 the one"?
 17 MR. CAKE:
 18 A. Yes, absolutely correct.
 19 COFFEY, Q.C.:
 20 Q. Sir, had you had any exposure, looking back on
 21 it now and thinking about it, as of that
 22 Monday or the Sunday when you read this story,
 23 now Monday, what, if anything, did you know
 24 about this matter?
 25 MR. CAKE:

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1 A. Well, I think my information would have been
 2 confined to what I was able--the October '05
 3 note.
 4 COFFEY, Q.C.:
 5 Q. So although you had been Cabinet--assistant
 6 secretary to Cabinet for social policy from
 7 March of '06, that would be March, April, May
 8 and June, and now really all July, to the best
 9 of your recollection, the matter had never
 10 come to your attention?
 11 MR. CAKE:
 12 A. That's correct, sir, yeah.
 13 COFFEY, Q.C.:
 14 Q. What would have had to have happened during
 15 that time for a matter such as this one to
 16 come to your attention or to be brought to
 17 your attention?
 18 MR. CAKE:
 19 A. Well generally, I mean, this is a type of
 20 matter that a department would have needed to
 21 have brought to our attention, either through
 22 a briefing note or a conversation or some sort
 23 of communication, or it would have needed to
 24 have been a matter that was a subject of a
 25 Cabinet submission.

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1 COFFEY, Q.C.:
 2 Q. Yeah, I gather there were no Cabinet
 3 submissions in the interim.
 4 MR. CAKE:
 5 A. That's correct.
 6 COFFEY, Q.C.:
 7 Q. So, you know, when you went looking, Mr. Cake,
 8 on July 31st, having seen this story in the
 9 newspaper the day before or that day, were you
 10 surprised that the only thing in your system
 11 was dated October 5th, 2005?
 12 MR. CAKE:
 13 A. I can't recall whether I was surprised at the
 14 time, you know, in retro--knowing what we now
 15 know, it seems as if that was a long period of
 16 time, but at the time I can't say whether I
 17 was surprised or not.
 18 COFFEY, Q.C.:
 19 Q. Sir, I gather this inquiry eventually resulted
 20 in the August 15th, 2006 briefing note, we
 21 know that, I gather.
 22 MR. CAKE:
 23 A. Yes.
 24 COFFEY, Q.C.:
 25 Q. Are you aware of--if you had not made this

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1 request on July 31st, did you have any reason
 2 to believe that any such briefing note would
 3 have been forthcoming?
 4 MR. CAKE:
 5 A. Do I believe there would have been one had we
 6 not requested it? I guess I had no, I have no
 7 reason one way or the other.
 8 COFFEY, Q.C.:
 9 Q. Well in terms of that, okay, I could--if
 10 necessary I can point you to a number of media
 11 stories after October 5th, 2005, including one
 12 in February of 2006 involving a lawsuit, okay.
 13 And there are a whole number of stories and
 14 media, electronic media coverage, there's no
 15 briefing note requested, nor provided, so in
 16 the circumstances now looking at it and I
 17 appreciate you did intervene that day and ask
 18 for one, okay, but the first four months into
 19 that job it hadn't come to your attention, no
 20 one had brought it to your attention and you
 21 hadn't realized it was going on, and you
 22 hadn't realized the Cabinet Secretariat really
 23 knew nothing current about it.
 24 MR. CAKE:
 25 A. That's correct.

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1 COFFEY, Q.C.:

2 Q. So you did intervene on July 31st and I'm

3 going to take you through that, but absent

4 your intervention, is there anything that you

5 can point to the Commissioner to which would

6 suggest that there would have been any such

7 briefing note prepared at all?

8 MR. CAKE:

9 A. No, there's not.

10 COFFEY, Q.C.:

11 Q. Now looking at this, you do frame this with

12 Mr. Abbott, you do say and I will ask you

13 first of all, did you know John Abbott?

14 MR. CAKE:

15 A. Yes, I did.

16 COFFEY, Q.C.:

17 Q. And in what context did you know Mr. Abbott?

18 MR. CAKE:

19 A. Well John had been in the service perhaps

20 longer than I, I had known him through other

21 occupations, we had both worked in the

22 Intergovernmental Affairs Secretariat for a

23 period of time. I had known him in his former

24 roles within the government.

25 COFFEY, Q.C.:

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1 Q. He had been in the civil service, like

2 yourself, over the years at various points.

3 MR. CAKE:

4 A. Correct.

5 COFFEY, Q.C.:

6 Q. And yourself continuously, but he had been in

7 and out and you knew him in that context?

8 MR. CAKE:

9 A. That's correct.

10 COFFEY, Q.C.:

11 Q. Now you've copied this to Ms. McCormack, why

12 did you do that?

13 MR. CAKE:

14 A. I must have had the understanding that day

15 that, because the regular Cabinet officer for

16 the Department of Health, Paula Burt, was on

17 holidays and we had agreed or I was intending

18 that, to ask Marilyn to cover the Department

19 of Health during Paula's vacation.

20 COFFEY, Q.C.:

21 Q. So would you have spoken to Ms. McCormack to

22 tell her about this or would the mere sending

23 of it alert her to what was required of her?

24 MR. CAKE:

25 A. I can't say whether I gave her heads up in

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1 advance. I think I probably read the story,

2 sent the e-mail, copied Marilyn and then, you

3 know, perhaps spoke to her after that.

4 COFFEY, Q.C.:

5 Q. And your expectation at the time was that the

6 briefing note would focus on what aspect of

7 the matter or aspects of the matter?

8 MR. CAKE:

9 A. I think I phrased this broadly, I didn't ask

10 them to focus on any particular issue because

11 it would have been my expectation that the

12 department would bring forward any information

13 which they thought would be, you know,

14 relevant and timely concerning the status of

15 this matter. This was really an opened door

16 for them to bring any aspects of the issue

17 forward.

18 COFFEY, Q.C.:

19 Q. Do you know if you spoke to Mr. Abbott that

20 day about this?

21 MR. CAKE:

22 A. I don't recall that I did.

23 COFFEY, Q.C.:

24 Q. If we can look, please, at exhibit P-0813?

25 Now this is an e-mail from Mr. Abbott to a

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1 lady by the name of Tara Furlong that same day

2 at 1:33 p.m. and he writes to her saying,

3 "Would you check with Eastern Health to see if

4 they have a more current briefing note/update

5 that we can use today, especially with respect

6 to status of legal claims. Thanks. P.S. This

7 is an urgent request." So it's in respect of

8 the matter of it being an urgent request. Is

9 there anything in your e-mail to Mr. Abbott in

10 P-0811, please, that suggests this is urgent?

11 MR. CAKE:

12 A. No, I had not suggested that.

13 COFFEY, Q.C.:

14 Q. That's why in the text you had not suggested

15 it, that's why I'm asking you do you think you

16 may have spoken to Mr. Abbott about it?

17 MR. CAKE:

18 A. I don't recall speaking and I could conjecture

19 that generally when we request notes on

20 matters that appear in the press, there's an

21 expectation that we'll receive those within a

22 couple of days because they're intended to be

23 timely information.

24 COFFEY, Q.C.:

25 Q. If we could look, please, at exhibit P-0815?

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1 Now this is an e-mail from Tansy Mundon to
 2 yourself, July 31st, 2006, 4:40 p.m., the
 3 subject is "Briefing note-ER/PR" and it says,
 4 "Gary, as per John's request, please find
 5 attached briefing note prepared by Eastern
 6 Health regarding ER/PR." And it's copied to
 7 John Abbott. We can go to the next page, page
 8 2 and it's a document entitled "Prepared by
 9 Heather Predham, Assistant Director of Quality
 10 and Risk Management, dated July 31st, 2006.
 11 Re: estrogen and progesterone receptor
 12 testing: update." And, there's just over a
 13 page of single spaced text that follows
 14 dealing with ductal carcinoma in situ, DCIS
 15 retro converters, category called "The
 16 Deceased" and a category called "Legal
 17 Activity" subheading "Hanlon claim and
 18 Doucette claim". And she opens it by saying
 19 "the total number of patients sent for
 20 retesting was 939. The majority of results
 21 have been returned, reviewed and the
 22 individual patients informed. Exceptions"--
 23 and the word "exceptions" is bolded--"to this
 24 are listed below" and the DCIS retro
 25 converters deceased are there and then the

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1 reference to the legal activity. But did you
 2 receive this version of Ms. Predham's memo?
 3 MR. CAKE:
 4 A. Yes, sir, this is the version I recall
 5 receiving.
 6 COFFEY, Q.C.:
 7 Q. And having received it that same day you
 8 requested a briefing note, what, if anything,
 9 did you do?
 10 MR. CAKE:
 11 A. I think the record will show I forwarded on to
 12 Marilyn McCormack with an indication that this
 13 note was going to require some work before
 14 we'd be comfortable with it going forward.
 15 COFFEY, Q.C.:
 16 Q. Okay. And why is that?
 17 MR. CAKE:
 18 A. Several reasons. First of all from a pure
 19 formatting perspective, it's a memo, not a
 20 briefing note, so it wouldn't meet sort of our
 21 requirements in terms of the standard
 22 categories in a briefing note. Secondly, I
 23 think it was probably a judgment that the
 24 information in here was limited and would need
 25 to be broadened. For example, there's no

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1 breakdown of the outcomes of the retesting for
 2 the 939 patients. No indication of why those
 3 problems may have occurred, no indication of
 4 what Eastern Health or the Department of
 5 Health was--what action they were taking to
 6 address the situation, so it had shortcomings,
 7 as we say.
 8 COFFEY, Q.C.:
 9 Q. And just again before we pass on to what you
 10 did with it, looking at P-0814 please? Now
 11 this is a series of e-mails, but the first of
 12 them is yours at 10:05 a.m. to Mr. John
 13 Abbott, you'll see that at the bottom of the
 14 page here, do you see that?
 15 MR. CAKE:
 16 A. Yes.
 17 COFFEY, Q.C.:
 18 Q. There's one here in the middle of the page,
 19 appears to be John Abbott's e-mail of 1:52
 20 p.m. and in the circumstances, it's probably
 21 to yourself saying "we are checking with
 22 Eastern Health to see if we can get an update
 23 from them today." Do you see that there?
 24 MR. CAKE:
 25 A. I see that.

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1 COFFEY, Q.C.:
 2 Q. Was that actually sent to you?
 3 MR. CAKE:
 4 A. It doesn't ring a bell, but it may well have
 5 been.
 6 COFFEY, Q.C.:
 7 Q. You wouldn't be surprised to be apprised
 8 midday from Mr. Abbott if he--he thought the
 9 request was urgent to get back to you at
 10 midday to tell you what the status was?
 11 MR. CAKE:
 12 A. No, that wouldn't be unusual, no.
 13 COFFEY, Q.C.:
 14 Q. If we could look, please, at exhibit P-1635?
 15 Now, Mr. Cake, the bottom of this, and we take
 16 up the kind of e-mail trail, as it were, was
 17 the e-mail down here at the bottom of the page
 18 from Ms. Mundon at 4:40 p.m. to yourself,
 19 saying "As per John's request, please see
 20 attached briefing note prepared by Eastern
 21 Health regarding ER/PR." And then at the top
 22 of the page here, by 4:50 p.m., you had sent
 23 an e-mail to Marilyn McCormack. The subject
 24 is "Briefing note, ER/PR" and attachment is
 25 "briefing note, July 31.doc" and the actual

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1 word "attachment" is there, saying "Marilyn,
 2 would you please review this for sending to
 3 8th floor. I don't think this is in standard
 4 format and if not, will require some work.
 5 Thanks" GC. So I take it you were being
 6 polite there, you knew it wasn't in standard
 7 format. But you only here refer to the
 8 format, correct?
 9 MR. CAKE:
 10 A. That's correct.
 11 COFFEY, Q.C.:
 12 Q. So do you recall then what happened in
 13 relation to having the lacuna, I suppose is
 14 the word, the omissions that you referred to,
 15 the detailed information filled in, what did
 16 you do to do that?
 17 MR. CAKE:
 18 A. I don't recall having done anything
 19 specifically, but I think Marilyn, upon
 20 receiving this, would have the same
 21 observations that this wasn't tell us a
 22 completed story as we would likely be looking
 23 for, so I would actually credit Marilyn with,
 24 the Cabinet officer with the department to
 25 broaden the information in the note.

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1 COFFEY, Q.C.:
 2 Q. So what you would have been looking for is the
 3 status of the report on really that included
 4 the reference to the status of the legal
 5 actions, where that's--what stage that is, how
 6 many there are, what stages they are, things
 7 like that, that's one thing you'd be looking
 8 for?
 9 MR. CAKE:
 10 A. That would be one thing, yes.
 11 COFFEY, Q.C.:
 12 Q. You'd be looking for the number of patients
 13 involved.
 14 MR. CAKE:
 15 A. Correct.
 16 COFFEY, Q.C.:
 17 Q. Where they were in terms of how many were
 18 retested, what the results were?
 19 MR. CAKE:
 20 A. Outcomes, yes.
 21 COFFEY, Q.C.:
 22 Q. Outcomes, you would have wanted to know why
 23 this all happened?
 24 MR. CAKE:
 25 A. Ideally, yes.

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1 COFFEY, Q.C.:
 2 Q. If the answer was there.
 3 MR. CAKE:
 4 A. If the department was aware of that, yes,
 5 absolutely.
 6 COFFEY, Q.C.:
 7 Q. Sure, because I take it for two reasons, one
 8 just simply to know and to be able to pass it
 9 on to the Premier's office because if you
 10 didn't--if that information wasn't contained
 11 in it, in the briefing note going ahead or
 12 forward to the Premier's office, did you
 13 anticipate that they'd ask what the status
 14 was, why this happened?
 15 MR. CAKE:
 16 A. Well I think it would be an obvious question,
 17 yes.
 18 COFFEY, Q.C.:
 19 Q. Sure. And the relevance of that was
 20 potentially twofold, one, well you'd just want
 21 to know anyway what happened as a manager or
 22 an overseer of the government, correct?
 23 MR. CAKE:
 24 A. Well I would have thought that was something
 25 that everyone in the House, you know, it would

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1 be a natural question why did this occur.
 2 COFFEY, Q.C.:
 3 Q. Yes, and number two, the answer could
 4 potentially have some relevance or
 5 significance to the extent of the legal
 6 liability?
 7 MR. CAKE:
 8 A. Yeah, I don't think I'd credit myself for
 9 thinking that far ahead, but you may be
 10 correct there.
 11 COFFEY, Q.C.:
 12 Q. And so if your e-mail here, and it doesn't
 13 actually spell out that more than reformatting
 14 is required, either, I gather you're telling
 15 the Commissioner either one of two things
 16 happened or both really, Ms. McCormack
 17 realized that there was more necessary and
 18 took it upon herself to go get more, or you
 19 spoke to her about needed it, or you spoke to
 20 her and she already knew.
 21 MR. CAKE:
 22 A. Either of those possibilities, sure.
 23 COFFEY, Q.C.:
 24 Q. And you anticipated at that time the briefing
 25 note would be available sort of when?

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1 MR. CAKE:
 2 A. Normally we would have expected that note
 3 within--well as soon as possible, but within
 4 two or three days.
 5 COFFEY, Q.C.:
 6 Q. Do you recall what happened then?
 7 MR. CAKE:
 8 A. I guess I became aware that Marilyn was
 9 dealing with the department, that Ms.
 10 Hennessey, who I think was her principle
 11 contact on this, was on the road. So, without
 12 knowing the intricate details, I became aware
 13 that this was something required some work by
 14 the department.
 15 COFFEY, Q.C.:
 16 Q. If we could, please, just looking at 1634
 17 please? This is that Tansy Mundon is
 18 forwarding what she at least had as of 4: 40
 19 p.m. from Eastern Health to yourself that day.
 20 Now sir, just looking at this briefing note,
 21 it refers to DCIS, you see that here, right
 22 there. You can go ahead -
 23 MR. CAKE:
 24 A. Yes.
 25 COFFEY, Q.C.:

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1 Q. Okay. Up to that point in time did you have
 2 any familiarity with what DCIS was?
 3 MR. CAKE:
 4 A. Absolutely none.
 5 COFFEY, Q.C.:
 6 Q. But there is an explanation here, I take it,
 7 of it in the first paragraph, isn't there?
 8 MR. CAKE:
 9 A. Yes.
 10 COFFEY, Q.C.:
 11 Q. And it goes on to talk in some length about
 12 those cases, doesn't it?
 13 MR. CAKE:
 14 A. Yes, it does.
 15 COFFEY, Q.C.:
 16 Q. And then did you have any familiarity with
 17 what's referred to here as retro converters?
 18 MR. CAKE:
 19 A. Absolutely none.
 20 COFFEY, Q.C.:
 21 Q. But there is an explanation here, isn't there,
 22 under that heading as to what retro converters
 23 are and how many cases there are?
 24 MR. CAKE:
 25 A. That's correct.

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1 COFFEY, Q.C.:
 2 Q. And what was being done, you look at the last
 3 paragraph on the first page, in relation to
 4 those patients, that there was going to be a
 5 meeting with them.
 6 MR. CAKE:
 7 A. Correct.
 8 COFFEY, Q.C.:
 9 Q. By representatives of Eastern Health and
 10 clinical chiefs. Looking at the next page,
 11 the third page of the exhibit, "the deceased",
 12 that category, there's--the total number of
 13 deceased are set out, are they not?
 14 MR. CAKE:
 15 A. Yes.
 16 COFFEY, Q.C.:
 17 Q. Okay. And as well in respect of that, I think
 18 the number 174 patients are identified as
 19 being deceased, the actual digits 174 are
 20 bolded here in this. And it goes on, at
 21 least, to describe here what was being done
 22 with the deceased's matters, doesn't it, what
 23 the status was and what had been done up to
 24 that point.
 25 MR. CAKE:

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1 A. Correct.
 2 COFFEY, Q.C.:
 3 Q. Now, in respect of the legal activity, the
 4 Hanlon claim is noted here. It describes here
 5 when the claim was served on Eastern Health in
 6 December 2005, does it not?
 7 MR. CAKE:
 8 A. Correct.
 9 COFFEY, Q.C.:
 10 Q. It says that Ms. Hanlon has subsequently
 11 passed away and it points out that the Eastern
 12 Health's defence has been filed and currently
 13 a list of pertinent documents is being
 14 prepared for submission to the court. In
 15 other words, it's before the courts.
 16 MR. CAKE:
 17 A. Correct.
 18 COFFEY, Q.C.:
 19 Q. So, you know when the Statement of Claim was
 20 served, you know the status of the Plaintiff,
 21 you know that the defence has been filed and
 22 that the lawyers are doing whatever they do,
 23 in terms of dealing with the issue, correct?
 24 MR. CAKE:
 25 A. Correct.

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1 COFFEY, Q.C.:

2 Q. The Doucette claim is described here as "the

3 Statement of Claim was recently filed with an

4 intention to proceed under the class action

5 legislation." So it tells you it's a

6 statement of claim recently filed and it

7 involves a class action. The author says "the

8 next step in the process is for the

9 plaintiff's lawyer," that's Ms. Doucette's

10 lawyer, "to file with the Court the parameters

11 in which he intends to proceed, and this is

12 part of the process in his application to the

13 Court to seek a class of patients to be

14 certified" (unintelligible) the then current

15 status of it.

16 Now sir, I review this for this purpose,

17 if this was simply reformatted, okay, it does

18 actually contain information concerning the

19 then existing legal actions, doesn't it?

20 MR. CAKE:

21 A. Yes, it does, yeah.

22 COFFEY, Q.C.:

23 Q. And when we finally get to the final version

24 on August 18th, there's not a whole lot more

25 there, is there, on the legal actions?

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1 MR. CAKE:

2 A. No, I think there's just a statement around,

3 you know, the potential for how many clients

4 might become part of the -

5 COFFEY, Q.C.:

6 Q. Class action.

7 MR. CAKE:

8 A. - class action, yeah.

9 COFFEY, Q.C.:

10 Q. That's a bit more fleshed out, isn't it, by

11 the 18th of August, but in terms of to inform

12 the Cabinet Secretariat and the Premier's

13 office about the then current state of affairs

14 as of early August 2006, this in itself,

15 reformatted, would have arguably done that at

16 the time, wouldn't it?

17 MR. CAKE:

18 A. Well, I don't think it would have done an

19 adequate job. It would have--you know, it

20 provides information on the status of those

21 two legal claims, but it doesn't provide the

22 broader picture of why this is an issue, how

23 many people are affected, what is being done

24 to determine the causes of the problems, what

25 is being done on a go-forward basis, so you

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1 know, even though it was--the headline may

2 have been around the lawsuit piece, I don't

3 think it was our intention simply to ask for

4 information on the legal status.

5 COFFEY, Q.C.:

6 Q. And in order to get some sense of even the

7 number of people who might join the class

8 action or might be eligible to join the class

9 action, you'd have to have some wider sense of

10 what was going on, wouldn't you?

11 MR. CAKE:

12 A. Well, precisely. It doesn't indicate, for the

13 939, what the results of the retesting was.

14 COFFEY, Q.C.:

15 Q. What happened then, sir, from your

16 perspective, in terms of your involvement?

17 MR. CAKE:

18 A. Well, basically, this was then Marilyn

19 McCormack's project or briefing note to work

20 on with the Department to get a more

21 comprehensive note put together and Marilyn

22 pursued over the course, I guess, of probably

23 the next two weeks or better. She would

24 likely have, you know, touched base with me on

25 a couple of occasions throughout that, and

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1 probably shared a draft with me at some point

2 in time, and all culminating in the final note

3 that was submitted for my review, I think on

4 the 17th of August.

5 COFFEY, Q.C.:

6 Q. And the purpose in submitting it to you was

7 what?

8 MR. CAKE:

9 A. I would need to approve the circulation to the

10 distribution list.

11 COFFEY, Q.C.:

12 Q. Did you receive a draft on the 17th?

13 MR. CAKE:

14 A. I don't recall specifically when I received a

15 draft, but I'm confident that I would have

16 seen a draft before the final draft that was

17 approved.

18 COFFEY, Q.C.:

19 Q. Okay. And you would have received these

20 drafts how, draft or drafts how, what format?

21 MR. CAKE:

22 A. Generally I'd receive that by way of a hard

23 copy, sometimes it would be e-mailed, but I

24 think in this instance, since there's no

25 record of e-mail, I would have received--

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1 Marilyn would have brought me in a hard copy.
 2 COFFEY, Q.C.:
 3 Q. Okay. Now, sir, what do you recall about
 4 this, tell the Commissioner now, from your
 5 memory or any documents you have, what
 6 happened?
 7 MR. CAKE:
 8 A. I'm sorry -
 9 COFFEY, Q.C.:
 10 Q. How did this unfold?
 11 MR. CAKE:
 12 A. This is a briefing note that Marilyn developed
 13 with the department and came to my desk for
 14 approval.
 15 COFFEY, Q.C.:
 16 Q. And what happened?
 17 MR. CAKE:
 18 A. Well, we eventually had a note that we were
 19 comfortable with, the department had approved
 20 and it got circulated as per procedure.
 21 COFFEY, Q.C.:
 22 Q. And did you have any input into the note?
 23 MR. CAKE:
 24 A. I would have had opportunity to review a
 25 draft. I'm understanding that I provide

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1 Marilyn some feedback around some questions.
 2 For example, I think the e-mail record here
 3 indicates, asking for additional information
 4 in terms of the legal case. So, yes, I would
 5 have had opportunity for input.
 6 COFFEY, Q.C.:
 7 Q. I'm sorry, you asked what?
 8 MR. CAKE:
 9 A. I had particularly asked a question, I
 10 believe, in one of the drafts, there was no
 11 information on the, you know, how the scope of
 12 the lawsuit--where that might go. And that
 13 seemed, to me, to be a natural question to
 14 ask, given that the new story had talked
 15 about, I think, up to a thousand patients
 16 being affected.
 17 COFFEY, Q.C.:
 18 Q. Did you ask that question in writing?
 19 MR. CAKE:
 20 A. No, I think I probably asked that question
 21 verbally.
 22 COFFEY, Q.C.:
 23 Q. Okay. And why would that be of interest to
 24 you?
 25 MR. CAKE:

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1 A. Seems to me that would just be a natural
 2 question. If you have a newspaper article
 3 quoting up to 1000 people affected, it would
 4 be a natural question to ask, you know, by the
 5 retesting, to ask how many of them be so
 6 aggrieved or so damaged that that might be an
 7 avenue they'd pursue.
 8 COFFEY, Q.C.:
 9 Q. Are you able to identify the actual copy of
 10 the note that you would have received on the
 11 17th?
 12 MR. CAKE:
 13 A. I can't say that I can, sir. If it wasn't--
 14 unless it was sent to me electronically, I
 15 wouldn't be able to say that, no.
 16 COFFEY, Q.C.:
 17 Q. And any hard copy that you would have
 18 received, what would you do with it?
 19 MR. CAKE:
 20 A. I would generally write any notes or questions
 21 that I have on it and return it to Marilyn, in
 22 this case.
 23 COFFEY, Q.C.:
 24 Q. Okay. Well, if we can just look at, say, one
 25 of the versions on 17th, P-0192, please? Now

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1 this sir, the actual first page is some e-
 2 mails between Moira Hennessey and Marilyn
 3 McCormack and Debbie Humphries, but look at
 4 the second page of this. I'm just going to
 5 run through it so you can--on page five of the
 6 exhibit you can see that date, August 17,
 7 2006. And this is a version of the briefing
 8 note that has a heading--let's take you
 9 through the headings. It's "title, issue,
 10 background, current status, (pathology
 11 reports)" and then there's tables of text and
 12 numbers and then there's "current status
 13 (legal activity)" and then there's "impacts of
 14 treatment with Tamoxifen" and then there are
 15 "reasons for the erroneous results and steps
 16 taken to prevent reoccurrence" and "action
 17 required" and "text prepared by/approved by"
 18 and "reviewed by". Now sir, this one, if we
 19 can look please at Exhibit--just look at the
 20 final version, get some sense of this--P-0125,
 21 please, page 31. This is, as you can see with
 22 that distribution list on the top right hand
 23 side is the final version of that note. At
 24 least final in the sense of the one that was
 25 distributed in Cabinet Secretariat, Premier's

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1 office. And here you'll see under the heading
 2 "current status (legal activity)" -
 3 MR. CAKE:
 4 A. Um-hm.
 5 COFFEY, Q.C.:
 6 Q. - there's been inserted a summary. And we
 7 looked at the other one, there was no summary.
 8 MR. CAKE:
 9 A. I see.
 10 COFFEY, Q.C.:
 11 Q. And we can continue on with that, "impacts of
 12 treatment with Tamoxifen is included" that
 13 heading is there. So, apparently one
 14 insertion anyway between the document as one
 15 version of it existed on August 17, 2006 in
 16 Exhibit P-0192 doesn't have the summary text.
 17 MR. CAKE:
 18 A. I see.
 19 COFFEY, Q.C.:
 20 Q. Okay. But the final version or the
 21 distributed version on August 18 does have
 22 heading "summary" and text under it. If we
 23 could bring up please, Exhibit P-1448. Again,
 24 a couple of e-mails on August 18, 2006, the
 25 one, the first in time is at 10:59 a.m. It's

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1 from Marilyn McCormack to Moira Hennessey.
 2 And this is the one, "the text attached is the
 3 FINAL"-- the word final is in caps and bold--
 4 "copy of the above note briefing note. If you
 5 approve of same"--and in the third line it
 6 says "Gary also wanted to know how many were
 7 likely to initiate legal action and according
 8 to Heather, any or all of the 939 women or
 9 their families could so". So, I take it, is
 10 that your reference to, earlier to the a
 11 textual reference to you asking a question.
 12 MR. CAKE:
 13 A. Yes, I guess, yeah.
 14 COFFEY, Q.C.:
 15 Q. Okay.
 16 THE COMMISSIONER:
 17 Q. Mr. Coffey, wherever you can find a convenient
 18 spot, we'll take an afternoon break.
 19 COFFEY, Q.C.:
 20 Q. Okay, thank you, Commissioner. So, I gather
 21 then, Mr. Cake, that you wanted to know how
 22 many patients are really affected by this in a
 23 substantive way.
 24 MR. CAKE:
 25 A. By the retesting, yes, that would be a natural

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1 question that I would have.
 2 COFFEY, Q.C.:
 3 Q. In fact, this frames it in terms of "Gary also
 4 wanted to know how many were likely to
 5 initiate legal action". So, this suggests
 6 that your actual focus or at least Marilyn
 7 McCormack's interpretation of your actual
 8 focus was you wanted to know how many are
 9 going to sue us.
 10 MR. CAKE:
 11 A. Well, I wouldn't conclude that. It might be
 12 that the version that we had at this point in
 13 time did not have this point, but did the
 14 break out of how the patients were affected.
 15 COFFEY, Q.C.:
 16 Q. If we could, please, look back at P-0192 and
 17 this is the one without the summary, summary
 18 in the sense of it doesn't have a heading
 19 "summary".
 20 MR. CAKE:
 21 A. I see.
 22 COFFEY, Q.C.:
 23 Q. Now just here, sir, I take you to--I'm sorry,
 24 page--here we are, page three of the exhibit
 25 has a portion of the table on it, and I'm

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1 going to take you down to the fourth entry,
 2 which reads "patient ER/PR status changed from
 3 negative to positive and there are treatment
 4 recommendations." See that?
 5 MR. CAKE:
 6 A. Yes.
 7 COFFEY, Q.C.:
 8 Q. The number is 109, so that's the category I
 9 just read to you, the number is 109, and then
 10 in the comments section it says "includes
 11 patients who have been impacted by the delay
 12 in receiving Tamoxifen and patients whose
 13 results have not changed significantly but the
 14 clinical definition of positive and negative
 15 has changed since time of diagnosis." See
 16 that there?
 17 MR. CAKE:
 18 A. I understand, yeah.
 19 COFFEY, Q.C.:
 20 Q. Okay. So reading that, and you would have
 21 read it, presumably, when it came to you, you
 22 would read the whole of it before commenting
 23 upon it?
 24 MR. CAKE:
 25 A. I'm sorry?

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1 COFFEY, Q.C.:

2 Q. You would read the whole of this before

3 commenting upon it?

4 MR. CAKE:

5 A. I would read the whole of whatever draft, yes,

6 yeah.

7 COFFEY, Q.C.:

8 Q. Well, here, looking at that, would you agree

9 that reading that you'd be able--that one

10 could infer that look, there are 109 people,

11 patients, whose ER/PR status has changed from

12 negative to positive, converted, to use a

13 phrase, a word that's being used, and there

14 are treatment recommendations. Their

15 treatment has changed. That would be your

16 understanding of that?

17 MR. CAKE:

18 A. I'm reading that, yes, yeah.

19 COFFEY, Q.C.:

20 Q. Okay. So why then would one want to know more

21 than that?

22 MR. CAKE:

23 A. Again, my inquiry was simply that it would be

24 a naturally occurring question of somebody

25 reading a briefing note that is spawned by a

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1 story that includes reference to a lawsuit,

2 there should be some indication in the note to

3 the extent it's known, how many of those

4 patients may be participating in a lawsuit.

5 COFFEY, Q.C.:

6 Q. Okay.

7 MR. CAKE:

8 A. There was no--nothing more than that, what I

9 considered a routine question.

10 COFFEY, Q.C.:

11 Q. So the idea, what I'm getting at is this, is

12 that having read that, it would have been

13 apparent to you, "look, 109 people have had

14 their results change and their treatment

15 change."

16 MR. CAKE:

17 A. That's the way I would interpret that, yeah.

18 COFFEY, Q.C.:

19 Q. But from that, that would--from your

20 perspective, that wouldn't be necessarily

21 enough to cause them to sue?

22 MR. CAKE:

23 A. I wouldn't know.

24 COFFEY, Q.C.:

25 Q. You wouldn't know, okay, so -

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1 MR. CAKE:

2 A. I wouldn't know, no.

3 COFFEY, Q.C.:

4 Q. And I'm just trying to get, again, some sense.

5 So from your perspective, what you wanted was

6 "I see all the numbers, I see all the

7 comments, the categories, but I want somewhere

8 in this document some number summing up or

9 particularly identifying how many are likely

10 to sue."

11 MR. CAKE:

12 A. I guess I was suggesting if there was some

13 notional figures, as to how large the lawsuit

14 class action suit may be, that it would be

15 reasonable to include that.

16 COFFEY, Q.C.:

17 Q. Thank you, Commissioner. The break, thank

18 you.

19 THE COMMISSIONER:

20 Q. All right then, we'll take 15 minutes.

21 (RECESS)

22 THE COMMISSIONER:

23 Q. Please be seated. Mr. Coffey.

24 COFFEY, Q.C.:

25 Q. Thank you, Commissioner. Exhibit P-0125,

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1 please, page 26? Now this is an e-mail from

2 Ms. McCormack to Ms. Hennessey on August 18th

3 2006 at 10:59 a.m. The subject is "briefing

4 note for the Premier on ER/PR receptor tests."

5 This is the reference to--includes the

6 reference I referred you to earlier about in

7 the third line "Gary also wanted to know how

8 many women were--how many were likely to

9 initiate legal action" and it concludes with,

10 "if you are," that is you, Marilyn McCormack--

11 I'm sorry, you, Moira Hennessey, "are okay

12 with this note, Gary has approved it and it

13 will go as is. Please advise as soon as

14 possible." And if we could look, please, at

15 page--I'll just--it's easier for me to--that's

16 a version of this briefing note. This one, if

17 I can go back to page 29 of the exhibit, has

18 the summary and text and it says "the legal

19 action initiated by Ms. Myrtle Lewis is a

20 result of a misdiagnosis and is not linked to

21 the problems described in this note with the

22 ER/PR receptor tests, which had to be

23 repeated." See that? And there's also above

24 that, in the section above it, two asterisks

25 and a reference to "recent media reports

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1 identified Myrtle Lewis has joined other
 2 women," so that actually spells out and
 3 fleshes out the story on Ms. Lewis.
 4 Now under the summary it continues,
 5 "Eastern Health advises 22 women were greatly
 6 impacted by the change in status of the ER/PR
 7 receptor tests. These women had changes in
 8 the progress of their disease from the initial
 9 confirmation of the disease and the beginning
 10 of their treatment to the retesting done at
 11 Mount Sinai." It continues on, "however, all
 12 of the 939 patients or families of those who
 13 have died whose test results were reviewed
 14 could potentially," and the "could
 15 potentially" is bolded "become applicants in a
 16 class action law suit. The basis of their
 17 claims may differ depending on the criteria
 18 established. The lawyer initiating the suite"
 19 it says here, "has included in his claim for
 20 damages not only the problem with the lab
 21 where test results were inaccurate, but also
 22 the stress suffered by those who were told in
 23 advance the testing was being repeated and the
 24 time they were required to wait before
 25 information was available to them on their

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1 individual cases. Currently, legal counsel
 2 for Eastern Health is reviewing the legal
 3 position for Eastern Health."
 4 Now sir, that section was apparently
 5 added between the 17th and 18th of August, or
 6 on the 18th itself, early on the 18th. And
 7 this, at least we understand, is the covering
 8 e-mail, this is at page 26, at least is
 9 described--26 of the exhibit, I apologize--is
 10 described by Marilyn McCormack as the final
 11 copy, "and if you are okay with this, Gary has
 12 approved of it." So you apparently, according
 13 to her, had approved of it.
 14 MR. CAKE:
 15 A. Okay.
 16 COFFEY, Q.C.:
 17 Q. Now looking at the summary section which I've
 18 just read out to you, would that have
 19 satisfied your concern to particularly
 20 identify and highlight the potential numbers
 21 of people who might join a lawsuit?
 22 MR. CAKE:
 23 A. Just to clarify, there was no particular
 24 concern around the lawsuit. That is merely
 25 the story that prompted the request for a

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1 briefing note on, you know, the overall status
 2 of this issue with Eastern Health. Whether
 3 that text would have, you know, in the end of
 4 the day, that text was relevant to that and I
 5 was fine with it.
 6 COFFEY, Q.C.:
 7 Q. Well, when I say that, I say that because,
 8 sir, looking at page 26, at least Ms.
 9 McCormack at least, in corresponding with Ms.
 10 Hennessey that morning, states, and I quote,
 11 "Gary also wanted to know how many were likely
 12 to initiate legal action."
 13 MR. CAKE:
 14 A. Yes, that was one particular question that I
 15 thought the note should address.
 16 COFFEY, Q.C.:
 17 Q. So what I'm asking you is, is in light of that
 18 request by yourself for information, does the
 19 summary and the text under the summary, the
 20 text under it, here at page 29 and 30 of this
 21 exhibit, would that answer the question as to
 22 you want to know how many were likely to
 23 initiate legal action, would that provide
 24 sufficient information?
 25 MR. CAKE:

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1 A. Yes. With the paragraph on page four that,
 2 you know, any and all of the 939 could be
 3 party.
 4 COFFEY, Q.C.:
 5 Q. That's part of the same section, the "however,
 6 any and all."
 7 MR. CAKE:
 8 A. Yes.
 9 COFFEY, Q.C.:
 10 Q. That is part of the same summary section.
 11 Okay, so now here, looking back at the first
 12 sentence of the summary, well, the second
 13 paragraph, first sentence, "Eastern Health
 14 advises 22 women were greatly impacted by the
 15 change in status of the ER/PR receptor tests."
 16 What would you have understood or what did you
 17 understand--not would you have, what did you
 18 understand by that?
 19 MR. CAKE:
 20 A. I don't recall having any particular
 21 understanding or fixation on this paragraph.
 22 It seems to be suggesting that 22 of the 939
 23 or of those that at least had a change from
 24 negative to positive were more particularly
 25 impacted, but other than that -

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1 COFFEY, Q.C.:

2 Q. Yes, these 22 though are--more than those who

3 just had a change in their ER/PR status, it

4 goes on to say here "these women had changes

5 in the progress of their disease from the

6 initial confirmation of the disease and the

7 beginning of their treatment to the retesting

8 done at Mount Sinai." So what did you

9 understand, in particular, those--what

10 category were those 22 women in? I appreciate

11 the retest results changed for them, but what

12 else happened?

13 MR. CAKE:

14 A. Well, it seems that their disease, if I'm

15 understanding this, their disease worsened or

16 progressed further along during the period of

17 the retesting.

18 COFFEY, Q.C.:

19 Q. Or in between the time of their initial

20 treatment and the retesting results, I take

21 it.

22 MR. CAKE:

23 A. Correct, yes.

24 COFFEY, Q.C.:

25 Q. Okay, and sir, if we could look, please, at--

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1 well, we're going to go to page 31 of this

2 same exhibit. This is the one that actually

3 gets distributed. You see that?

4 MR. CAKE:

5 A. Yes, sir.

6 COFFEY, Q.C.:

7 Q. This is the briefing note that gets

8 distributed, and we go to page 33 of the

9 exhibit, the actual briefing note as

10 distributed, we look under summary, it says

11 "Eastern Health advises 22 women were impacted

12 by the change in status of the ER/PR receptor

13 tests. These women had changes in the

14 progress of their disease from the initial

15 confirmation of the disease and the beginning

16 of their treatment to the retesting done at

17 Mount Sinai." Now sir, did you notice the

18 omission of the word "greatly"?

19 MR. CAKE:

20 A. No, I did not, sir.

21 COFFEY, Q.C.:

22 Q. Can you tell the Commissioner why you didn't

23 notice it?

24 MR. CAKE:

25 A. Well, this is a lengthy note, almost four

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1 pages. If there were minor--if there were

2 edits done, it's just not something that I

3 recall ever having brought my--drawn my

4 attention to.

5 COFFEY, Q.C.:

6 Q. Well, I'm going to ask you, did anyone draw

7 your attention to the fact that we are

8 omitting or the "greatly" is being omitted?

9 MR. CAKE:

10 A. I don't have any recollection of that.

11 COFFEY, Q.C.:

12 Q. This is not--would you agree that that's not a

13 minor edit in the context here?

14 MR. CAKE:

15 A. I would agree.

16 COFFEY, Q.C.:

17 Q. And the actual text of the summary apparently

18 was prepared that that portion of this

19 briefing note was apparently prepared as a

20 result of your asking for information as to

21 how many patients were likely to initiate

22 legal action?

23 MR. CAKE:

24 A. I see it, okay.

25 COFFEY, Q.C.:

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1 Q. And -

2 COMMISSIONER:

3 Q. Can we clarify whether this witness even saw

4 it again?

5 COFFEY, Q.C.:

6 Q. Well, the--good point, Commissioner.

7 COMMISSIONER:

8 Q. Because as I -

9 COFFEY, Q.C.:

10 Q. If we could, please -

11 COMMISSIONER:

12 Q. Just because as I recall the e-mail from Ms.

13 McCormack indicated that prior to this he'd

14 okayed it.

15 COFFEY, Q.C.:

16 Q. Yes, and I appreciate that. Well, if we look

17 at page 31, this is the final version.

18 COMMISSIONER:

19 Q. Um-hm.

20 COFFEY, Q.C.:

21 Q. There's a distribution list here.

22 MR. CAKE:

23 A. Understand, yeah.

24 COFFEY, Q.C.:

25 Q. Yes. Would then final distributed one as

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1 stamped with the registry stamp on page 34 of
 2 the exhibit, the Executive Council Registry
 3 stamp, this would have been distributed to
 4 you, won't it?
 5 MR. CAKE:
 6 A. Correct, yeah, the final version.
 7 COFFEY, Q.C.:
 8 Q. The actual final one without the word
 9 "greatly" in it?
 10 MR. CAKE:
 11 A. I understand, yeah.
 12 COFFEY, Q.C.:
 13 Q. Would you have reread it at the time, do you
 14 think? Which is, I think, perhaps the point
 15 the Commissioner is making. You had approved
 16 of it, you know, at least the e-mail traffic
 17 suggests that you had approved of it going
 18 ahead. And we understand that the version
 19 that you approved would have had the word
 20 "greatly" in it, okay.
 21 MR. CAKE:
 22 A. I see.
 23 COFFEY, Q.C.:
 24 Q. Okay, that's what we--again, based upon the
 25 records as best we can reconstruct them.

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1 MR. CAKE:
 2 A. Okay.
 3 COFFEY, Q.C.:
 4 Q. What I'm asking you is, and the Commissioner's
 5 point is is that it then gets distributed, you
 6 know, stamped and put in people's mail slots
 7 or however in that -
 8 MR. CAKE:
 9 A. I understand, yeah.
 10 COFFEY, Q.C.:
 11 Q. Would you then have reread it, do you think?
 12 MR. CAKE:
 13 A. I may or may not have. More likely not. I
 14 would have, you know, approved what I
 15 understood the final version that was approved
 16 by the Department of Health. This would have
 17 just, you know, appeared in my--we have a
 18 particular box for briefing notes that have
 19 gone to the 8th Floor and they would likely
 20 sit there unless and until there was any
 21 follow-up inquiries around it.
 22 COFFEY, Q.C.:
 23 Q. Do you recall whether there were any?
 24 MR. CAKE:
 25 A. I recall that there were not any.

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1 COFFEY, Q.C.:
 2 Q. Okay.
 3 MR. CAKE:
 4 A. Yeah.
 5 COFFEY, Q.C.:
 6 Q. Now, on this point, looking at page 34, which
 7 is up on the screen here, of the exhibit,
 8 under the "Reasons for the Erroneous Results
 9 and Steps Taken to Prevent Reoccurrence",
 10 okay.
 11 MR. CAKE:
 12 A. Yes, sir.
 13 COFFEY, Q.C.:
 14 Q. The test, that heading and the text there is
 15 in the August 17th version of this, as well,
 16 okay, that doesn't really, I gather, really
 17 change. And it reads, "Eastern Health has
 18 engaged external consultants to review the
 19 procedures of the laboratory. When all
 20 reports are received, they will be reviewed
 21 and the recommendations will be implemented.
 22 The goal is to have the laboratory accredited.
 23 Until these processes are completed, all
 24 samples will continue to be retested at Mount
 25 Sinai." What was your understanding at the

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1 time as to the reasons for the erroneous
 2 results and steps taken to prevent
 3 reoccurrence and the status of that whole
 4 inquiry, what was your understanding?
 5 MR. CAKE:
 6 A. I don't think I would have had any
 7 understanding as to the reasons for the
 8 results. Again, this is the first briefing
 9 note we would have received on this matter
 10 since I went to social policy. We would have
 11 had no communications prior to this, so I
 12 really had no other information relating to
 13 why the problems occurred.
 14 COFFEY, Q.C.:
 15 Q. Did you look back at the October 5th, 2005
 16 briefing note?
 17 MR. CAKE:
 18 A. I would have looked at that when I originally
 19 requested an update.
 20 COFFEY, Q.C.:
 21 Q. Yes.
 22 MR. CAKE:
 23 A. I don't know that I would have studied it, but
 24 I would have looked back to see what
 25 information we did have.

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1 COFFEY, Q.C.:

2 Q. If we could bring up, please, Exhibit P-0124?

3 At page 6, which is that briefing note, you

4 see the distribution list?

5 MR. CAKE:

6 A. Um-hm.

7 COFFEY, Q.C.:

8 Q. I appreciate you've told us that it's more

9 likely than not you wouldn't have read it the

10 first time round, in October of '05. But

11 certainly on July 31st, '06 you would have

12 read it?

13 MR. CAKE:

14 A. I think that's fair.

15 COFFEY, Q.C.:

16 Q. And here when we look at the second page of

17 this, the last, second-last bullet says, "An

18 external peer review by the chief pathologist

19 of the British Columbia Cancer Institute and

20 the chief technologists from Mount Sinai

21 Hospital was conducted September 15-22, 2005

22 to review current practices and procedures

23 within the laboratory service. Debriefing was

24 held after each review and a full report from

25 each is expected within the next few weeks."

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1 Now, sir, bearing in mind that's there in the

2 October 5 briefing note. And then when we

3 look, we go back, please, to Exhibit P-0125,

4 at the text under the "Reasons for the

5 Erroneous Results", did you make any

6 connection between these external reviewers

7 and now which the October 5th briefing note

8 was suggesting the results would be in, the

9 reports would be in by the end of October of

10 '05 and now we're halfway through August of

11 '06 and you're being told by the Department of

12 Heath that "When all"--"External consultants

13 are engaged to review the procedures. When

14 all reports are received, they will be

15 reviewed." Did you make any connection

16 between this, these external reviewers and the

17 earlier ones?

18 MR. CAKE:

19 A. I would not at the time have made that

20 connection.

21 COFFEY, Q.C.:

22 Q. Now, when you received this from Ms. McCormack

23 in August of 2006, and as you've pointed out

24 earlier, one of the natural questions here is

25 why did this happen, what happened and why?

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1 MR. CAKE:

2 A. Yes.

3 COFFEY, Q.C.:

4 Q. Obvious one. This briefing note as you just

5 pointed out then, has no such answers to those

6 questions?

7 MR. CAKE:

8 A. No. This briefing note suggests that

9 determination is still in progress.

10 COFFEY, Q.C.:

11 Q. Did you make any inquires of anyone as to why

12 that was so more than a year after it all

13 started?

14 MR. CAKE:

15 A. No, sir, I did not.

16 COFFEY, Q.C.:

17 Q. Did you make any inquiries of anyone as to

18 when the results of those inquiries might be

19 available?

20 MR. CAKE:

21 A. No, sir, I did not, no. Any, I guess of those

22 questions, if they were posed, would have been

23 posed by Ms. McCormack.

24 COFFEY, Q.C.:

25 Q. Yeah, and I appreciate that. But she's giving

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1 this to you and you're going to pass this on

2 to the people on that distribution list. So

3 you would have anticipated, wouldn't you, that

4 perhaps one or more people on the distribution

5 list might ask me that, and yet, you didn't

6 ask of Ms. McCormack, like, Marilyn, what's

7 the status of all this, what's taken so long?

8 MR. CAKE:

9 A. No, that's correct, no, that's not a question

10 I had identified at the time.

11 COFFEY, Q.C.:

12 Q. Did you have any expectation at the time or

13 any thought at the time, do you think, as to

14 when that information might be forthcoming?

15 MR. CAKE:

16 A. No idea, sir, no.

17 COFFEY, Q.C.:

18 Q. Now, here, there is on this page, that's page

19 34, a reference to--a statement, "This note is

20 provided for information purposes only.

21 Should the Premier require further detail,

22 officials from Eastern Health, as well as

23 their legal counsel, will be available for an

24 in-person briefing." You see that?

25 MR. CAKE:

1 A. Yes, I do.
 2 COFFEY, Q.C.:
 3 Q. Under the "Action Required". Do you know who
 4 inserted that?
 5 MR. CAKE:
 6 A. No, sir, not specifically, no.
 7 COFFEY, Q.C.:
 8 Q. What sort of further detail at the time did
 9 you think might be requested here?
 10 MR. CAKE:
 11 A. Well, I don't know, difficult to anticipate
 12 that. But I guess the way I would read this
 13 is what the department was indicating was that
 14 if any further detail concerning the outcomes
 15 of the testing, the measures being taken to
 16 determine the reasons for the problems in the
 17 testing, the measures being taken to correct
 18 the problems, any of those additional
 19 information, you know, the department with
 20 Eastern Health would be available to provide a
 21 briefing on that.
 22 COFFEY, Q.C.:
 23 Q. And if you thought that perhaps the department
 24 and Eastern Health might be available to
 25 provide briefing on it, did it strike you as

1 example, in Exhibit P-0125, page 26 says, "BN
 2 for Premier on ER/PR receptor tests." But
 3 here you've, looking at P-1636, at least
 4 you've styled this Premier's briefing note re
 5 ER/PR receptor tests, suggesting that you, in
 6 fact, typed out the subject matter again
 7 yourself?
 8 MR. CAKE:
 9 A. Okay.
 10 COFFEY, Q.C.:
 11 Q. And you've responded, you've been told here
 12 Moira approved the note, "Two typos which I
 13 corrected. I will give to Marilyn to forward
 14 if you were okay with that. Marilyn." And you
 15 respond, "Yes, please do. GC." Now, did you
 16 know what the typos were?
 17 MR. CAKE:
 18 A. No, I didn't, sir.
 19 COFFEY, Q.C.:
 20 Q. Would you have cared what the typos were?
 21 MR. CAKE:
 22 A. I don't think so.
 23 COFFEY, Q.C.:
 24 Q. Was there anyone else interested in this
 25 briefing note higher up in the hierarchy in

1 perhaps odd that such information was not
 2 already, whatever it was, it was not already
 3 included here?
 4 MR. CAKE:
 5 A. Well, certainly begs that question. So I
 6 don't know what that additional detail might
 7 have been at that time, but, you know, perhaps
 8 it was a courtesy to, you know, to let the
 9 Premier know that should he want more detail
 10 about any of the information provided in this
 11 note or on this matter more generally, that
 12 officials would make themselves available.
 13 COFFEY, Q.C.:
 14 Q. If we could, please, Exhibit P-1636? Now,
 15 sir, this is an e-mail from yourself, August
 16 18th, 2006 at 12:10 p.m. to Ms. McCormack,
 17 "Premier's briefing note re ER/PR receptor
 18 tests." See that?
 19 MR. CAKE:
 20 A. Yes, sir.
 21 COFFEY, Q.C.:
 22 Q. And I just note, for example, the heading here
 23 and the subject matter here is different than
 24 the one that Ms. McCormack was using with Ms.
 25 Hennessey, slightly different. She, for

1 terms of requesting where it was, certain
 2 information be included in it?
 3 MR. CAKE:
 4 A. No, there wasn't. I initiated the request and
 5 there were no inquiries during the course the
 6 note was being prepared, so, no, there was no
 7 one, if you like, waiting on it or asking of
 8 it, no.
 9 COFFEY, Q.C.:
 10 Q. The patient identified in The Independent
 11 story was Myrtle Lewis. Did you know Ms.
 12 Lewis?
 13 MR. CAKE:
 14 A. No, sir.
 15 COFFEY, Q.C.:
 16 Q. Now, this particular briefing note, when did
 17 it come up again? I take it you've done your
 18 job, it's August 18th, it's filed into the
 19 system. When did it next come to your
 20 attention?
 21 MR. CAKE:
 22 A. Well, frankly, there was no attention to it.
 23 The next I heard of it was, I think, in May of
 24 '07 when, you know, I understand that it came
 25 up in a Cabinet meeting.

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1 COFFEY, Q.C.:

2 Q. Okay. And how did that come to your attention

3 and what involvement did you have then?

4 MR. CAKE:

5 A. I had no involvement, but somewhere along the

6 way I came to learn that Minister, forgive me

7 -

8 COFFEY, Q.C.:

9 Q. Wiseman?

10 MR. CAKE:

11 A. No. The minister who was prevailing--Osborne.

12 COFFEY, Q.C.:

13 Q. Osborne, okay.

14 MR. CAKE:

15 A. Yes, yeah, I came to learn that Minister

16 Osborne had indicated that he had not seen the

17 note previous.

18 COFFEY, Q.C.:

19 Q. Okay. You learned that, do you recall who you

20 learned that from?

21 MR. CAKE:

22 A. I likely learned that from the deputy clerk.

23 COFFEY, Q.C.:

24 Q. That mean Ms. Barnes?

25 MR. CAKE:

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1 A. Yes.

2 COFFEY, Q.C.:

3 Q. And what, if anything was said about it at the

4 time?

5 MR. CAKE:

6 A. Well again simply that the Minister had

7 indicated that he hadn't seen the note.

8 COFFEY, Q.C.:

9 Q. Well, okay, fair enough, but were you asked

10 did you know if he had seen the note or -

11 MR. CAKE:

12 A. No.

13 COFFEY, Q.C.:

14 Q. Were you asked what you knew about all of this

15 or anything like that?

16 MR. CAKE:

17 A. No, sir, no.

18 COFFEY, Q.C.:

19 Q. Okay, so you were just simply advised that

20 there was kind of -

21 MR. CAKE:

22 A. Just an information point, yes.

23 COFFEY, Q.C.:

24 Q. Have you discussed the note since, other than

25 with myself, Ms. Chaytor or Mr. Pritchard--I

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1 don't want to know what you discussed with

2 your lawyer? It's been a long week.

3 THE COMMISSIONER:

4 Q. Long, long week.

5 MR. CAKE:

6 A. No, sir, other than in the preparations for

7 the inquiry.

8 COFFEY, Q.C.:

9 Q. Was that with any--so in preparation for the

10 Inquiry, I don't want to know what you and Mr.

11 Pritchard and you discussed, but have you

12 discussed it with anybody else from the

13 government?

14 MR. CAKE:

15 A. Not specifically other than I've just been

16 generally aware that this particular note has

17 been a matter of much interest here at the

18 Inquiry.

19 COFFEY, Q.C.:

20 Q. Okay, but have you discussed it with somebody?

21 MR. CAKE:

22 A. I can't pinpoint, there had probably been

23 discussion with Sandra or the deputy clerk,

24 you know, this is a single product that we

25 prepared and it's attracted a lot of

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1 attention.

2 COFFEY, Q.C.:

3 Q. Had you discussed it with Mr. Thompson?

4 MR. CAKE:

5 A. Again, I think probably that the same, in

6 terms of preparing for the Inquiry, it's come

7 up that this has been a matter of interest.

8 COFFEY, Q.C.:

9 Q. Do you recall what has been said about it,

10 from your perspective? What have you told

11 anybody about it, other than Mr. Pritchard?

12 MR. CAKE:

13 A. There hasn't been any focused discussions,

14 I've, you know, indicated--if anything, I've

15 indicated that this is a note where we

16 requested in response to an article in The

17 Independent and, you know, we feel that--or I

18 feel personally that while it's not a perfect

19 note, it's built significantly on the initial

20 memo that we received from the department that

21 it provided more complete information than

22 what we started with on July 31st.

23 COFFEY, Q.C.:

24 Q. Well it's got a lot more information than the

25 July 31st one, doesn't it?

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1 MR. CAKE:
 2 A. That's correct.
 3 COFFEY, Q.C.:
 4 Q. Has there been discussion about the tense
 5 used, present tense, further tense, rather
 6 than past tense about those external reviews?
 7 MR. CAKE:
 8 A. No, only that I've been aware it's been a
 9 question here at the Inquiry.
 10 COFFEY, Q.C.:
 11 Q. If you had been told at the time, as the
 12 assistant secretary, okay, told in writing on
 13 August 17th and 18th of 2006, that those
 14 reports are done and in, would you have made
 15 any inquiries?
 16 MR. CAKE:
 17 A. Absolutely.
 18 COFFEY, Q.C.:
 19 Q. As to what was in them and what the status of
 20 the whole matter was, I take it.
 21 MR. CAKE:
 22 A. Well I guess my initial inquiry would have
 23 been why is there incorrect information in the
 24 note.
 25 COFFEY, Q.C.:

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1 Q. Oh yeah, I appreciate that, but if the note
 2 had read at the time that the reports are in,
 3 have been in, have been in for months, okay,
 4 would you have gone looking for the reports do
 5 you think?
 6 MR. CAKE:
 7 A. Whether I would have gone looking for the
 8 notes personally, I can't say. I think my
 9 initial response would have been, well then
 10 okay, the note needs to indicate they are in
 11 and something about, you know, perhaps any
 12 recommendations arising from those reports.
 13 COFFEY, Q.C.:
 14 Q. And if the reports contained any conclusions
 15 about the reasons, to use the actual phrase,
 16 reasons for the erroneous results, the actual
 17 heading. I take it if you knew the reports
 18 existed and had existed for some period of
 19 time, would you have asked do those reports
 20 address the reasons for the erroneous results?
 21 MR. CAKE:
 22 A. I think it's reasonable that we would have
 23 asked.
 24 COFFEY, Q.C.:
 25 Q. And why didn't you ask?

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1 MR. CAKE:
 2 A. Well the note was very clear that the reports
 3 had not yet been received.
 4 COFFEY, Q.C.:
 5 Q. Okay. If we could, please, exhibit P-0185. I
 6 did ask you about Mr. Thompson. Did you
 7 discuss the matter of this briefing note with
 8 Marilyn McCormack since the Inquiry was
 9 established?
 10 MR. CAKE:
 11 A. Only in so I think I indicated when I met with
 12 yourself and Sandra in March or whatever, that
 13 I'd contact her to see, just compare notes on
 14 how we'd work together on this file.
 15 COFFEY, Q.C.:
 16 Q. Sir, now you, as of March, 2006, were
 17 assistant secretary for social policy, were so
 18 in August of 2006, I take it?
 19 MR. CAKE:
 20 A. Correct.
 21 COFFEY, Q.C.:
 22 Q. Were so in December of 2006?
 23 MR. CAKE:
 24 A. Correct.
 25 COFFEY, Q.C.:

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1 Q. And are so today?
 2 MR. CAKE:
 3 A. That's absolutely correct, yes.
 4 COFFEY, Q.C.:
 5 Q. Okay, and on July 30th, 31st of 2006, you were
 6 alert enough to notice that Independent story
 7 involving Mrs. Lewis?
 8 MR. CAKE:
 9 A. Correct.
 10 COFFEY, Q.C.:
 11 Q. Now here on exhibit P-0185, this is just a
 12 summary but the heading is "ER/PR coverage,
 13 CBC TV, Monday, December 11th, 2006." There's
 14 an excerpt from a statement by Chris O'Neil-
 15 Yates talking about ER/PR and in fact, talking
 16 about how "Eastern Health Corporation says it
 17 will resume breast cancer tests at its lab in
 18 St. John's next year" and it goes on from
 19 there. It does note that here, in the middle
 20 of the second paragraph, it attributes to her
 21 the comment "Because of a class action
 22 lawsuit, Eastern Health will not say how many
 23 of those samples had a false result"--that's
 24 out of the 939 that had to be retested at
 25 Mount Sinai in Toronto. It also quotes her as

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1 saying, "The corporation also won't say how
 2 many of these patients are part of the
 3 retesting or how many people who passed away
 4 had the initial false test." And it also
 5 attributes to her the comment "Eastern Health
 6 says its putting quality assurance measures in
 7 place to restore public confidence before it
 8 resumes this test and says it doesn't know how
 9 the false results happened." So that's one
 10 report of December 11th, 2006. There's a
 11 report reproduced here, I gather probably a
 12 transcript of an NTV, December 11th, 2006
 13 story involving a Glen Carter, a Carolyn
 14 Stokes, Dr. Denic and if we just go on to the
 15 next page, Ms. Stokes, Dr. Denic, Carolyn
 16 Stokes, Dr. Denic and Carolyn Stokes. And if
 17 we could, please, exhibit P-0187. I'm going
 18 to show you a number of exhibits now, sir.
 19 This is a Telegram article, December 13th,
 20 '06. The heading is "Treatments change after
 21 cancer files reviewed." And it says, "see
 22 more at page A4"--I don't know if this was the
 23 cover page, but it anyway refers to page 4
 24 inside, if we can just go to the next--it's a
 25 fairly lengthy article and a photograph

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1 related to this matter. We note here it says,
 2 it's by Deana Stokes Sullivan, "Treatment
 3 changes have been recommended for 117 Eastern
 4 Health Authority patients arising from a
 5 review and retesting of all breast tumor
 6 samples that were initially tested at the
 7 Health Sciences Centre between 1997 and 2005.
 8 However, because of a pending class action
 9 lawsuit, Eastern Health officials won't say
 10 how many samples have converted in the latest
 11 round of testing from negative to positive for
 12 estrogen and progesterone receptors." If we
 13 go on to the next page of the exhibit, which
 14 is further into the story in the Telegram,
 15 toward the bottom of the first column, they
 16 have a--they refer to Dr. Howell. "Howell
 17 said it's difficult to assign blame when in
 18 addition to new technology being available for
 19 hormone testing, the definition of what
 20 constitutes a positive lab result has also
 21 changed in recent years." He talks about
 22 changes from 30 to 10 then and it ends with a
 23 comment, "It's not yet certain when estrogen
 24 progesterone testing will resume at the Health
 25 Sciences Centre, but Howell said Eastern

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1 Health wants to ensure that all patients will
 2 receive the best treatments possible."
 3 Newspaper article. If we could, please, look
 4 at exhibit P-0186, this is a transcript of a
 5 CBC Radio item of Wednesday, December 13th,
 6 2006 at 8:45 a.m. It's an interview involving
 7 a Jeff Gilhooly, a Mark Quinn and a Dr. Oscar
 8 Howell. And you will notice here Dr. Howell
 9 is quoted as having said "What happened?
 10 There isn't any one event that we have been
 11 able to identify or any one person that made a
 12 mistake that we can say there it is, just go
 13 in there and fix that and this will be taken
 14 care of." And then Gilhooly asks or says,
 15 "Mark, what are the results of the review that
 16 Eastern Health carried out?" Mr. Quinn
 17 responds, "Well Eastern Health is only
 18 speaking publicly now about the results,
 19 officials say they have to be very careful
 20 because, as you know, as we reported in the
 21 past, they are facing possibly a class action
 22 suit in this matter. It hasn't been
 23 certified, but it's in the works. They are
 24 looking to have it certified." And further
 25 on, Mr. Gilhooly asked the question, "Do we

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1 know how many tests in total were wrong?" And
 2 Mr. Quinn responds, "No and Eastern Health
 3 just isn't saying that." And then further on,
 4 Mr. Gilhooly says, "What reaction is this
 5 getting from the Canadian Cancer Society?"
 6 Mr. Quinn responds, "Its members say they
 7 still have questions. I spoke with Peter
 8 Dawe"--and then they attribute the following
 9 to Mr. Dawe, "What we're not seeing still is a
 10 full explanation of the numbers of people that
 11 were affected overall and some idea of what
 12 actually went wrong with the process. Knowing
 13 how many people actually ended up with the
 14 different treatment because of the issue,
 15 tells you about the impact of what that issue
 16 had on a number of people. I guess what it
 17 doesn't tell you about is the actual scope of
 18 what went wrong." Now, sir, and I could go on
 19 at--some further. Did you know on December
 20 11th, 2006 that Eastern Health was holding a
 21 media technical briefing?
 22 MR. CAKE:
 23 A. No, sir, I did not.
 24 COFFEY, Q.C.:
 25 Q. Bearing in mind your responsibilities as

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1 assistant secretary on December 11th, 12th,
 2 13th, 14th, 15th, 2006, would you have paid
 3 attention to those media stories?
 4 MR. CAKE:
 5 A. I don't believe I noticed these media stories
 6 at all, I have to say.
 7 COFFEY, Q.C.:
 8 Q. Is there anyone in Cabinet Secretariat whose
 9 job it is to ensure that it is brought to your
 10 attention?
 11 MR. CAKE:
 12 A. It's generally the responsibility of the
 13 Cabinet officer to monitor media relating to
 14 his or her departments.
 15 COFFEY, Q.C.:
 16 Q. And who was that at the time?
 17 MR. CAKE:
 18 A. At that time it would have been Paula Burt.
 19 COFFEY, Q.C.:
 20 Q. I'm sorry?
 21 MR. CAKE:
 22 A. Paula Burt.
 23 COFFEY, Q.C.:
 24 Q. Is she still there?
 25 MR. CAKE:

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1 A. Yes, she is.
 2 COFFEY, Q.C.:
 3 Q. Have you ever asked her why she did not bring
 4 it to your attention at the time?
 5 MR. CAKE:
 6 A. I've asked Paula whether this is an issue that
 7 she has been monitoring or anything in the
 8 media that caught her attention and the
 9 indication has been no, it hasn't.
 10 COFFEY, Q.C.:
 11 Q. So since this all became very controversial
 12 beginning around May 15th, 2007, you've had a
 13 conversation with her about this?
 14 MR. CAKE:
 15 A. Yes.
 16 COFFEY, Q.C.:
 17 Q. And you've asked her why was the whole matter
 18 in December of '06 not brought to your
 19 attention?
 20 MR. CAKE:
 21 A. I haven't asked her that question
 22 particularly, but I've asked her about, you
 23 know, whether she's had conversations with the
 24 department on this issue and the answer is no,
 25 so generally it hasn't been a file that we've

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1 been active on. It has not been a file that
 2 the department has engaged us on in any
 3 fashion.
 4 COFFEY, Q.C.:
 5 Q. And I appreciate not the department, I'm not
 6 asking about the department right now, I'm
 7 asking about her and her monitoring. Have you
 8 asked her whether she monitored this in
 9 December of '06?
 10 MR. CAKE:
 11 A. I have not asked her that specific question,
 12 no.
 13 COFFEY, Q.C.:
 14 Q. Can you tell the Commissioner why not?
 15 MR. CAKE:
 16 A. It hasn't occurred to me, quite frankly.
 17 COFFEY, Q.C.:
 18 Q. Are you able to tell the Commissioner why the
 19 July 30th story caught your eye or attention
 20 and yet this coverage and--there's a certain
 21 amount of it in December.
 22 MR. CAKE:
 23 A. Well, you know, that story caught my
 24 attention, it was a front-page story, whatever
 25 the case may be, as this one that I did

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1 observe. This one, frankly, is not one that
 2 caught my eye.
 3 COFFEY, Q.C.:
 4 Q. Now, sir, if we could, if we could look,
 5 please, at exhibit P-0197? This is an e-mail
 6 of December 12th, 2006 at 12:34 p.m. from
 7 Tansy Mundon to Elizabeth Matthews and Andrea
 8 Nolan and she writes, the subject is "Briefing
 9 note for Premier on ER/PR." She writes,
 10 "Elizabeth/Andrea for the Premier's
 11 information, this issue is in the media today.
 12 Thanks." Tansy. And this is a question and
 13 answer briefing note, Department of Health and
 14 Community Services, the title is "ER/PR
 15 testing St. John's" and this has some detail
 16 in it, I won't say complete detail by a long
 17 shot, but some detail. And just to give you
 18 some sense of it, it's three pages long,
 19 drafted by Beverley Griffiths, approved by
 20 Moira Hennessey, dated December 12th, 2006.
 21 Now, as the assistant Cabinet Secretariat,
 22 were you aware that apparently briefing notes
 23 were being forwarded by directors of
 24 communications from departments to the
 25 director of communication for the Premier, for

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1 the Premier's attention?
 2 MR. CAKE:
 3 A. No, sir, I was not.
 4 COFFEY, Q.C.:
 5 Q. So you weren't aware that that was going on?
 6 MR. CAKE:
 7 A. No, sir.
 8 COFFEY, Q.C.:
 9 Q. Not only this briefing note, but just period,
 10 you weren't aware that that was going on?
 11 MR. CAKE:
 12 A. That's not something we'd be party to.
 13 COFFEY, Q.C.:
 14 Q. Did this come to your -
 15 THE COMMISSIONER:
 16 Q. Does that mean that you didn't know it was
 17 going on or just that you wouldn't know that
 18 this particular briefing note was transmitted?
 19 MR. CAKE:
 20 A. This particular one for sure, I have an
 21 understanding that the Premier's office
 22 receives some briefing notes for the purposes
 23 of preparing for the House of Assembly, but
 24 how that works, how it's determined, what
 25 those notes would be, et cetera, is not

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1 something that I'd be aware of, Commissioner.
 2 COFFEY, Q.C.:
 3 Q. So, Mr. Cake, by December of '06, you were
 4 further four months into your job as being
 5 responsible for social policy, further than
 6 August, weren't you?
 7 MR. CAKE:
 8 A. Correct.
 9 COFFEY, Q.C.:
 10 Q. This particular matter being dealt with by
 11 Eastern Health and the Department of Health in
 12 December of '06, did fall within social
 13 policy, did it not?
 14 MR. CAKE:
 15 A. Certainly the Department of Health is a social
 16 policy department.
 17 COFFEY, Q.C.:
 18 Q. And it fell under the Department of Health.
 19 MR. CAKE:
 20 A. Correct.
 21 COFFEY, Q.C.:
 22 Q. So then it fell within social policy, didn't
 23 it?
 24 MR. CAKE:
 25 A. Yes, but the qualifier I would make, if it's

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1 not an issue that's coming before Cabinet,
 2 then we wouldn't necessarily have an
 3 engagement in what that department is doing on
 4 that file.
 5 COFFEY, Q.C.:
 6 Q. And I appreciate you wouldn't necessarily have
 7 it, but here, certainly in the summer of '06,
 8 you had seen fit to intervene and to seek a
 9 briefing note. So I take it then you're
 10 telling the Commissioner that in December of
 11 '06, despite being the assistant secretary for
 12 social policy, this media briefing and the
 13 media coverage came and went without any
 14 advertence by yourself to it, any attention,
 15 any knowledge by yourself, any awareness?
 16 MR. CAKE:
 17 A. That's correct, yeah.
 18 COFFEY, Q.C.:
 19 Q. Is it the sort of thing, do you think, the
 20 sort of subject matter that it would be
 21 important for the Premier's office to be
 22 apprised of?
 23 MR. CAKE:
 24 A. Again, it depends on where the issue is, you
 25 know, if it's a matter that's within the

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1 jurisdiction and responsibility and authority
 2 of the minister to be making decisions on,
 3 would be the minister's judgment call as to
 4 whether it something to bring to the Premier's
 5 attention.
 6 COFFEY, Q.C.:
 7 Q. And I understand that, but that wasn't so in
 8 July 31st when you sent your e-mail looking
 9 for a briefing note, was it? Minister Osborne
 10 wasn't doing it at that point.
 11 MR. CAKE:
 12 A. It didn't alter the fact that it's ultimately
 13 the minister's decision on what he brings
 14 forward, but no, in that case, we felt that
 15 particular press story warranted a briefing
 16 note. The department could have said, you
 17 know, could have disagreed with that. It
 18 didn't on that occasion.
 19 COFFEY, Q.C.:
 20 Q. So am I correct then from the Cabinet
 21 Secretariat's perspective, it's their view
 22 that unless it happens to occur to us to ask,
 23 because we don't really monitor, you didn't
 24 monitor in December of '06, unless it occurs
 25 to us to ask, it's left entirely to the

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1 departments themselves as to whether or not to
 2 bring a matter to the attention of the Cabinet
 3 Secretariat and Premier's office.
 4 MR. CAKE:
 5 A. That's correct. If the matter is a matter
 6 that is, again, within the responsibility and
 7 authorities of the minister under the
 8 legislation, so on and so forth, to act on,
 9 and unless we specifically seek out the status
 10 of an issue, it wouldn't come forward.
 11 COFFEY, Q.C.:
 12 Q. And that's so despite the fact that there
 13 could be a lot of public controversy about it
 14 in the media?
 15 MR. CAKE:
 16 A. Well, one would think normally if there's a
 17 lot of public controversy, that's something
 18 that would spark a department, perhaps, to
 19 bring an information note forward. It seems in
 20 this case that did not happen. However, I
 21 just would like to add that a briefing note
 22 coming through Cabinet Secretariat is just one
 23 communication channel that ministers have
 24 available to them, so, you know, that's not to
 25 preclude other, you know -

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1 COFFEY, Q.C.:
 2 Q. What other ones are there to your knowledge?
 3 MR. CAKE:
 4 A. Well, certainly a minister can speak directly
 5 to the Premier.
 6 COFFEY, Q.C.:
 7 Q. Do you have any knowledge that had happened
 8 here?
 9 MR. CAKE:
 10 A. No, I don't, sir.
 11 COFFEY, Q.C.:
 12 Q. No. So what then happened in May of '07, May
 13 15th, in particular, '07? You're still
 14 assistant secretary.
 15 COMMISSIONER:
 16 Q. Are you ask the witness -
 17 COFFEY, Q.C.:
 18 Q. Yes, what happened in terms of his
 19 involvement, yeah, what happened?
 20 COMMISSIONER:
 21 Q. - what his involvement was? What, if any, was
 22 your involvement in the May 15 or around that
 23 time?
 24 MR. CAKE:
 25 A. None at all.

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1 COFFEY, Q.C.:
 2 Q. Okay, so the media, the CBC that day
 3 apparently carried coverage of this issue
 4 about information in an affidavit, are you
 5 aware of that?
 6 MR. CAKE:
 7 A. I'm not aware of the specifics of it, but I'm
 8 aware of the story, yes, that a story emerged
 9 around that time.
 10 COFFEY, Q.C.:
 11 Q. And did you get involved in it at all?
 12 MR. CAKE:
 13 A. No.
 14 COFFEY, Q.C.:
 15 Q. In the May 15th, 16th, 17th to 18th, you know,
 16 the days after?
 17 MR. CAKE:
 18 A. No, sir, I did not.
 19 COFFEY, Q.C.:
 20 Q. Who within Cabinet Secretariat dealt with it?
 21 MR. CAKE:
 22 A. If there was any involvement at Cabinet
 23 Secretariat, it would likely have occurred
 24 through any briefings or conversation that
 25 occurred in Cabinet itself.

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1 COFFEY, Q.C.:
 2 Q. See, the Cabinet, you're kind of the organizer
 3 for the Cabinet committee dealing with social
 4 policy in May of '07?
 5 MR. CAKE:
 6 A. Yes.
 7 COFFEY, Q.C.:
 8 Q. This involved the Department of Health, which
 9 is social policy?
 10 MR. CAKE:
 11 A. That's correct.
 12 COFFEY, Q.C.:
 13 Q. So were you involved in the Cabinet committee
 14 matters involving it or the Cabinet itself?
 15 MR. CAKE:
 16 A. There was no discussion in the social policy
 17 committee on this matter.
 18 COFFEY, Q.C.:
 19 Q. Well, within Cabinet itself, were you involved
 20 in that?
 21 MR. CAKE:
 22 A. No, sir, I was not.
 23 COFFEY, Q.C.:
 24 Q. You weren't asked to become involved?
 25 MR. CAKE:

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1 A. No, sir.
 2 COFFEY, Q.C.:
 3 Q. Did anyone ever ask you how this got by us in
 4 December of '06, that fact that Eastern Health
 5 explicitly refused to give certain figures to
 6 the media?
 7 MR. CAKE:
 8 A. No, sir, no.
 9 COFFEY, Q.C.:
 10 Q. No one's ever asked you that?
 11 MR. CAKE:
 12 A. No.
 13 COFFEY, Q.C.:
 14 Q. The point being that, Mr. Cake, you are the,
 15 you know, kind of saying to you, Gary, look,
 16 you are the assistant director in December,
 17 didn't you realize this, no one has never
 18 actually asked you that?
 19 MR. CAKE:
 20 A. No, that's correct.
 21 COFFEY, Q.C.:
 22 Q. Thank you, Commissioner.
 23 COMMISSIONER:
 24 Q. Okay.
 25 COFFEY, Q.C.:

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1 Q. Thank you, very much, Mr. Cake.
 2 MR. CAKE:
 3 A. Thank you.
 4 COMMISSIONER:
 5 Q. Mr. Simmons?
 6 MR. SIMMONS:
 7 Q. I have no questions, thank you, Commissioner.
 8 COMMISSIONER:
 9 Q. Ms. Hennebury?
 10 MS. HENNEBURY:
 11 Q. No questions.
 12 COMMISSIONER:
 13 Q. Mr. Pritchard? I'm sorry, I want to call you
 14 Pritchard, but it's Pritchett, correct?
 15 MR. PRITCHETT:
 16 Q. Correct.
 17 COMMISSIONER:
 18 Q. Ms. Newbury?
 19 MS. NEWBURY:
 20 Q. No questions.
 21 COMMISSIONER:
 22 Q. Ms. Russell?
 23 MS. RUSSELL:
 24 Q. No questions.
 25 COMMISSIONER:

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1 Q. Mr. Pike?
 2 MR. PIKE:
 3 Q. No questions.
 4 COMMISSIONER:
 5 Q. Mr. Pritchard?
 6 MR. GARY CAKE, EXAMINATION BY MR. ROLF PRITCHARD
 7 MR. PRITCHARD:
 8 Q. Thank you, Commissioner. Good afternoon, Mr.
 9 Cake. Mr. Cake, just so that I'm clear and
 10 we're all clear, Cabinet Secretariat, you're
 11 not a little government within the government,
 12 it's not your job to supervise what goes on in
 13 all of the departments, is that correct?
 14 MR. CAKE:
 15 A. Absolutely not.
 16 MR. PRITCHARD:
 17 Q. And in particular when I say your job, I'm
 18 referring to Cabinet Secretariat. The job of
 19 Cabinet Secretariat is to facilitate the
 20 decision making process of the Cabinet, is
 21 that correct?
 22 MR. CAKE:
 23 A. That's precisely the case, yes.
 24 MR. PRITCHARD:
 25 Q. And in particular it's not your job to

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1 supervise the departments like the Department
 2 of Health and Community Services, is that
 3 correct?
 4 MR. CAKE:
 5 A. We have no authority as officials in Cabinet
 6 Secretariat to direct any department official
 7 to do anything.
 8 MR. PRITCHARD:
 9 Q. Right. So generally then I think what your
 10 evidence has been is if a department comes to
 11 you with something, that's when you may
 12 facilitate moving that up, but generally you
 13 don't go looking for stuff, although
 14 occasionally you do reach out and look for a
 15 note as you did in July of '06, is that
 16 correct?
 17 MR. CAKE:
 18 A. That is correct, yeah.
 19 MR. PRITCHARD:
 20 Q. So in that particular instance you happen to
 21 see the article in the paper and it got you
 22 thinking about it?
 23 MR. CAKE:
 24 A. That's correct, yes.
 25 MR. PRITCHARD:

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1 Q. All right. And in that particular instance,
 2 now, you mentioned that there were a variety
 3 of things that got you interested in that
 4 article, one was the lawsuit and the potential
 5 exposure. And in response to a question you
 6 said that the money, possible lawsuit was not
 7 your principal motive in asking for that note.
 8 What was your principal motive?
 9 MR. CAKE:
 10 A. The principal motive was to inquiry as to, you
 11 know, what was the current state of
 12 information and assessment around the problems
 13 that apparently occurred at Eastern Health,
 14 was to get a broad overview of where that
 15 issue stood, what information the department
 16 would like to bring forward for Cabinet
 17 Secretariat and for the Premier.
 18 MR. PRITCHARD:
 19 Q. Okay. And would that particular note, we've
 20 all had a chance to see different versions of
 21 it throughout the day with you and with other
 22 witnesses and we're all aware that there was a
 23 chart of data in that note. And that data
 24 that's in the note, Mr. Coffey referred you to
 25 a particular field in that note which had the

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1 number 109, but there are obviously other
 2 numbers there. In the course of whatever
 3 review you did of that note, did you have
 4 occasion to examine those numbers and
 5 manipulate them, you know, anything like that?
 6 MR. CAKE:
 7 A. No, not at all.
 8 MR. PRITCHARD:
 9 Q. All right, and did anyone say to you "Mr.
 10 Cake, this is why these numbers are
 11 significant" and do manipulations for you or
 12 anything like that?
 13 MR. CAKE:
 14 A. No, sir.
 15 MR. PRITCHARD:
 16 Q. Thank you, Mr. Cake. Those are all my
 17 questions.
 18 MR. CAKE:
 19 A. Thank you.
 20 THE COMMISSIONER:
 21 Q. Anything arising?
 22 COFFEY, Q.C.:
 23 Q. No.
 24 MR. GARY CAKE, EXAMINATION BY MADAME COMMISSIONER
 25 THE COMMISSIONER:

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1 Q. Mr. Cake, in answer to the questions just put
 2 to you by Mr. Pritchard, you were sort of
 3 painting this picture of the Cabinet
 4 Secretariat as a place through which
 5 departments communicate to the Premier and to
 6 the Cabinet.
 7 MR. CAKE:
 8 A. That's correct, Commissioner, yes.
 9 THE COMMISSIONER:
 10 Q. Am I over simplifying?
 11 MR. CAKE:
 12 A. Pardon me?
 13 THE COMMISSIONER:
 14 Q. Am I over simplifying that?
 15 MR. CAKE:
 16 A. No, that's fine.
 17 THE COMMISSIONER:
 18 Q. Okay, and you did acknowledge that maybe from
 19 time to time you might go look to a department
 20 as to whether or not they want to provide more
 21 information?
 22 MR. CAKE:
 23 A. Correct.
 24 THE COMMISSIONER:
 25 Q. But that essentially your role was one of

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1 receiving information?
 2 MR. CAKE:
 3 A. Well, just to elaborate a little.
 4 THE COMMISSIONER:
 5 Q. Okay.
 6 MR. CAKE:
 7 A. Our core mandate is to assist departments with
 8 matters that require a decision by the full
 9 Cabinet. We advise departments on that. We
 10 assess, analyze their Cabinet papers. We
 11 provide analytic and secretariat services to
 12 the committees of Cabinet and ultimately to
 13 the Cabinet as a whole. So that's our core
 14 business and that's, I guess, where we are
 15 particularly proactive, if you like, in
 16 assisting departments.
 17 Coincident to that, there are other
 18 issues that departments will sometimes seek
 19 guidance on, and we're happy to provide that
 20 advice and that service, and there are
 21 occasions when there are matters that come to
 22 our attention which we think, you know, the
 23 department would be well advised to bring
 24 information forward on.
 25 THE COMMISSIONER:

1 Q. Okay. So that's the latter point which
 2 interested me because somehow I hadn't had the
 3 feeling that Cabinet Secretariat was quite the
 4 kind of hit and miss place that your
 5 description of it would be in the sense of
 6 where you would be active. I understand, I
 7 believe, the role you play when a department
 8 wishes information to flow upward, as it was.

9 MR. CAKE:

10 A. Um-hm.

11 THE COMMISSIONER:

12 Q. To either give Cabinet information or the
 13 Premier information or to seek advice or
 14 direction from Cabinet on a particular
 15 subject. But in describing the way that
 16 action was taken on this one note that, as you
 17 point out, we've spent a lot of time looking
 18 at, and indeed with the witness before you.
 19 So the last couple of days, we've had a lot of
 20 time with that particular note.

21 MR. CAKE:

22 A. Yeah.

23 THE COMMISSIONER:

24 Q. And your description of how that came to be
 25 was really based on the fact that you read The

1 time.
 2 This, for whatever reason, I think Mr.
 3 Abbott spoke to it, is not an issue that the
 4 Department of Health and Community Services
 5 felt is a matter that warranted Cabinet
 6 Secretariat intervention during the period
 7 where much of this occurred.

8 THE COMMISSIONER:

9 Q. But The Independent story caused you to have
 10 that particular briefing note done?

11 MR. CAKE:

12 A. Yes.

13 THE COMMISSIONER:

14 Q. I think that's--it's all very consistent,
 15 except as to why The Independent story caused
 16 you to do that, because as I understand what
 17 you've said today, it wasn't on anybody's list
 18 from Health during that period of time anyway.
 19 So it was kind of what, your gut reaction when
 20 you saw the particular story? Your view that
 21 all of a sudden it was more important? What
 22 was it about it that really caused you to take
 23 action, as opposed to sort of say "that's
 24 interesting. I maybe can anticipate Health
 25 sending us a briefing note in the next little

1 Independent either Sunday or Monday. Now I'm
 2 assuming that if you had been busy on Sunday
 3 and hadn't read The Independent, that would
 4 have never occurred.

5 MR. CAKE:

6 A. That may not have occurred, if the Department
 7 itself hadn't volunteered to bring forward a
 8 note. If I can elaborate just a little, we do
 9 meet--I meet regularly, usually in the fall of
 10 the year, with every deputy whose departments
 11 I'm responsible for. I inquire about what are
 12 their significant issues that either will
 13 require Cabinet direction or will--you know,
 14 what are the significant issues that they
 15 anticipate having on their agenda for the
 16 coming six months. So that is something I've
 17 done in the case of the Department of Health,
 18 and my predecessor has done. In none of those
 19 instances has the Department indicated that
 20 this is a matter that they view as a priority
 21 and they wish to engage Cabinet Secretariat
 22 on. So it's not a hit and miss. We focus on
 23 the matters that, you know, the department
 24 identifies and we identify through discussion
 25 as requiring attention in the coming period of

1 while," particularly since Health really
 2 wasn't in your radar at the time?

3 MR. CAKE:

4 A. Well, in October of '06, it would have been on
 5 my radar. It would have been part of my
 6 responsibilities. But it was simply, yes,
 7 this seemed to be--it was a, you know, a
 8 headline story in The Independent and you
 9 know, it talked about a serious matter, a
 10 serious health matter, and felt that it would
 11 be appropriate to ask the Department for an
 12 overview of where this issue stood. The
 13 Department could have--might have come back
 14 and we might have--they might have said "we
 15 don't really feel this is a matter that
 16 warrants a briefing note right now, warrants
 17 the Premier's attention." Then we would have
 18 had that discussion.

19 But you know, I guess part of our role
 20 that we take on is that if we feel there are
 21 public issues that the Premier might
 22 reasonably be expected to be aware of or
 23 questioned on, that we'll go out and
 24 proactively seek that, seek that note.

25 THE COMMISSIONER:

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1 Q. So it's based on your assessment as to whether
2 or not this might be something the Premier
3 would be looking for information on?

4 MR. CAKE:

5 A. Yes.

6 THE COMMISSIONER:

7 Q. And can I take it then if you had been aware
8 of the stories in December, for example, are
9 you in a position to say whether or not you
10 would have gone to look for another briefing
11 note or by that time, would you have filed
12 that in the back burner, as it were?

13 MR. CAKE:

14 A. I think there's a good chance we would have
15 sought a note or we would have contacted the
16 Department and had a discussion around, you
17 know, around the particulars that were being
18 discussed at that time.

19 THE COMMISSIONER:

20 Q. All right, thank you. I guess we can then
21 adjourn until Monday, 9:30. Thank you very
22 much.

23 MR. CAKE:

24 A. Thank you, Commissioner.

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1 CERTIFICATE

2 I, Judy Moss, hereby certify that the foregoing is
3 a true and correct transcript in the matter of the
4 Commission of Inquiry on Hormone Receptor Testing,
5 heard on the 13th day of June, A.D., 2008 before
6 the Honourable Justice Margaret A. Cameron,
7 Commissioner, at the Commission of Inquiry, St.
8 John's, Newfoundland and Labrador and was
9 transcribed by me to the best of my ability by
10 means of a sound apparatus.

11 Dated at St. John's, Newfoundland and Labrador
12 this 13th day of June, A.D., 2008

13 Judy Moss

Inquiry on Hormone Receptor Testing

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