

NEWFOUNDLAND AND LABRADOR
OFFICE OF THE INFORMATION AND PRIVACY
COMMISSIONER

REPORT A-2008-011

House of Assembly

Summary:

The Applicant applied under the *Access to Information and Protection of Privacy Act* (the “ATIPPA”) for access to records containing the constituency allowance claims and supporting documentation for a Member of the House of Assembly (the “House”). The House disclosed the records but refused to release the names of two individuals found in the records, claiming that the names constituted personal information and were, therefore, excepted from disclosure by section 30(1) of the ATIPPA. The House, despite having already released the records to the Applicant, argued for the first time in its written submission that the records containing the information at issue were exempt from the ATIPPA on the basis of section 5(1)(c) and by section 2(p)(vi) because the records were constituency records of a Member of the House of Assembly and were the records of a constituency office. The Commissioner determined that the records were not constituency records nor were they the records of a constituency office but were records of the House of Assembly, and, as such were subject to an access request under the ATIPPA. The Commissioner also found that both of the names constituted personal information within the meaning of section 2(o). The Commissioner further concluded that one of the names should be disclosed as it was exempt from the operation of section 30(1) by paragraph (1) of section 30(2) because the disclosure of that name would reveal a detail of a discretionary benefit of a financial nature granted to a third party by a public body. The Commissioner determined that the other name was not covered by the exemption set out in paragraph (1) of section 30(2) and, as a result, the House was obligated by section 30(1) to refuse disclosure of that other name. The Commissioner recommended that the House disclose to the Applicant the name exempted from the operation of section 30(1) by paragraph (1) of section 30(2).

Statutes Cited: *Access to Information and Protection of Privacy Act*, S.N.L. 2002, c. A – 1.1, as am, ss. 2(l), 2(o), 2(p)(v), 2(p)(vi), 2(t), 5(1)(c), 5(1)(d), 7(1), 8(1), 30(1), and 30(2)(l); *House of Assembly Accountability, Integrity and Administration Act*, S.N.L. 2007, c. H-10.1; *Members’ Resources and Allowance Rules*, SNL 2000 c. H-10.1 Schedule; *Freedom of Information and Protection of Privacy Act*, S.A. 1994, c.F-18.5; *Freedom of Information and Protection of Privacy Act*, S.P.E.I. 2002, c. F15.01.

Authorities Cited: Alberta OIPC Order 2001-020; Prince Edward Island OIPC Order No. 03-003.

Other Resources Cited:

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Members’ Handbook, House of Assembly, Newfoundland and Labrador. (October, 2007). Available online at:

<http://www.assembly.nl.ca/pdf/MembersHandbook.pdf>

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<http://www.assembly.nl.ca/pdf/MembersResourcesandAllowancesRulesManual.pdf>

I BACKGROUND

- [1] Under authority of the *Access to Information and Protection of Privacy Act* (the “*ATIPPA*”) the Applicant submitted an access to information request dated 12 October 2007 to the House of Assembly (the “House”), wherein he sought disclosure of records as follows:

All constituency allowance claims and supporting documentation filed by or on behalf of MHA [Name of MHA] for the fiscal year 2006-07.

- [2] The House by correspondence dated 7 December 2007 notified the Applicant that it was granting his access request in part but was denying access to certain information on the basis that it contained personal information. The House claimed that information containing the addresses and banking information of the named Member of the House of Assembly (the “Member”), and the personal names of two individuals appearing on documentation in the records constituted personal information and disclosure was prohibited pursuant to section 30(1) of the *ATIPPA*.
- [3] In a Request for Review dated 11 December 2007 and received in this Office on 12 December 2007 the Applicant asked for a review of the decision of the House to deny access to the personal names. The Applicant indicated in his Request for Review that he was not contesting the decision of the House to redact the personal information of the Member.
- [4] Attempts to resolve this Request for Review by informal means were not successful and by letters dated 10 January 2008 both the Applicant and the House were advised that the Request for Review had been referred for formal investigation pursuant to section 46(2) of the *ATIPPA*. As part of the formal investigation process, both parties were given the opportunity to provide written submissions to this Office pursuant to section 47.
- [5] The responsive record in relation to the Applicant’s access request consists of 188 pages. On page 77 of the responsive record there is a one-page receipt dated 18 October 2006 addressed to: “To whom it may concern.” The receipt certifies that a particular individual

received the amount of fifty dollars from the Member. The receipt is signed by another individual. The House has released this receipt to the Applicant but has denied access to both the name of the recipient and the name appearing as the signature on the receipt. On page 75 of the responsive record there is a copy of a one-page document entitled “Members Constituency Expense Claim” which was submitted by the Member to the House for expenses incurred by the Member during the period 18 October 2006 to 23 October 2006. The expense claim was signed by the Member on 25 October 2006 and contains a notation whereby the Member claims reimbursement for the amount of fifty dollars for a “donation” to the individual who was named as the recipient in the receipt dated 18 October 2006. The name of the person who signed the receipt dated 18 October 2006 does not appear on this expense claim form. The expense claim form found on page 75 has been released to the Applicant but with the name of the recipient of the fifty dollar donation severed.

- [6] Therefore, the information at issue in this Request for Review consists of the name of the recipient of the fifty dollar donation as it appears on the receipt dated 18 October 2006 and also on the expense claim form dated 25 October 2007, and the name of the person appearing in the signature on the receipt.

II APPLICANT’S SUBMISSION

- [7] The Applicant has not provided a written submission to my Office, but his position is clearly outlined in his Request for Review form as follows:

The House of Assembly responded to my request on 7 December 2007, providing me with access to most of the documentation I asked for, with some Section 30 exemptions.

I am appealing one of those Section 30 exemptions.

Please note that I am not contesting the decision to redact [the Member’s] personal address and financial information.

But the name of the person/business that received money for an apparent donation from [the Member's] constituency account should be made public.

This contention is supported by Section 30(2) of the ATIPPA, which notes that the Section 30(1) exemption does not apply when "the disclosure reveals details of a discretionary benefit of a financial nature granted to a third party by a public body . . ."

Donations are discretionary benefits of a financial nature granted to a third party by a public body. Information on donations, therefore, should not be exempt, and should be made public.

III PUBLIC BODY'S SUBMISSION

[8] The formal submission of the House is set out in correspondence dated 22 January 2008 and contains the following passage:

The issue pertains to the nondisclosure of two names which appear on a receipt given to [the Member] on October 18, 2006.

One of these names appears on a connected House of Assembly expense claim form. The receipt does not identify the reason for its issuance but the expense claim indicates that it was a donation. Together these 2 documents indicate that a \$50 donation was made by [the Member] to a constituent and a receipt for this amount was given by [another] person . . . These names were redacted from the documents and the reason given for this redaction was that the information was personal information that could not be released under subsection 30(1) of the Access to Information and Protection of Privacy Act (ATIPPA).

In the absence of further information the House of Assembly can only assume that the donation was made to a constituent from the MHA's constituency allowance for some philanthropic purpose. Before the calling of the October 2007 election, such donations were common among MHA's and have been shown to include, in part, the purchase of funeral arrangements for bereaved constituent families, the donation of payment assistance for school trips of constituents and donations to community groups. Unless the transaction was a business or an organization providing supplies or services rather than a constituent, the personal information has been redacted.

[9] The House points out in its submission that use of the word “shall” in section 30(1) of the *ATIPPA* means that it is a mandatory exception. The House indicates that section 2(o)(i) defines personal information to include an individual’s name and, therefore, the redactions of the two names was clearly in accordance with the provisions of the *ATIPPA*. The House continues its submission by commenting on the purpose of section 30(2) of the *ATIPPA*:

However, subsection 30(2) of the ATIPPA provides for exceptions to the prohibition found in subsection 30(1). It is the opinion of the House of Assembly Access to Information and Protection of Privacy Coordinating Office that none of these exceptions apply and consequently subsection 30(1) applies and the names should remain redacted.

[10] The House notes the Applicant’s reliance on the exemption set out in section 30(2)(1), which provides that the prohibition in section 30(1) does not apply where the disclosure reveals details of a discretionary benefit of a financial nature granted to a third party by a public body, and makes the following comment:

If the donation is seen as a discretionary benefit granted to a third party, subparagraph (ii) [of section 30(2)(1)] . . . is clearly not applicable and while we do not know the specific reason for the donation, under subparagraph (i), the name would further be excluded.

The House of Assembly Access to Information and Protection of Privacy Coordinating Office further believes that even if the donation were seen as a discretionary benefit of a financial nature that donation was not granted by the public body. [The Member] was an MHA carrying [sic] a constituency role for which, at the time, the public body allocated funds to MHA’s which were used by them for the purpose of constituency donations.

The definition of “public body” includes the House of Assembly and its statutory offices but does not make reference to MHA’s as public bodies. Further, there is an explicit exclusion from the ATIPPA of records of a constituency office of an MHA. While the donation record was receipted through the HOA as a public body, it is in fact a part of a constituency record.

The ATIPPA, which did not apply to the House of Assembly until October 9, 2007, contemplates a system whereby government agencies (i.e. public bodies) grant money to individuals who apply for funding through government or other agency programs or where businesses, individuals or other groups deal with these government agencies to provide supplies, services, advice, employment, etc. paid for out of public funds. It did not contemplate that MHA’s having an

allocated allowance would be using that allowance to make donations to individuals on a basis that might be highly personal. If the House of Assembly Access to Information and Protection of Privacy Coordinating Office is to release the names of private individuals found on receipts and expense forms, where those names clearly do not relate to employment or a supply of services or goods but are donations to individuals for personal reasons, there will be a breach of the privacy of those individuals. This is particularly true as such information might reveal the impecuniousness, health, or other needs of a constituent requiring assistance from his or her MHA.

IV DISCUSSION

[11] The submissions of the parties raise three issues:

1. whether the records containing the information at issue are subject to the *ATIPPA*,
2. whether the donation was made by a public body, and
3. whether the personal names appearing on the receipt and the expense claim form constitute personal information and are, as such, excepted from disclosure by section 30(1) of the *ATIPPA*.

1. Are the records at issue subject to the *ATIPPA*?

[12] The House in its written submission makes the following comments on pages 2 and 3:

*. . . [The Member] was an MHA carrying [sic] a constituency role for which, at the time, the public body allocated funds to MHAs which were used by them for the purpose of donations. . . . Further, there is an explicit exclusion from the *ATIPPA* of records of a constituency office of an MHA. While the donation record was receipted through the HOA as a public body, it is in fact a part of a constituency record.*

As such, the House suggests that the donation was not made by the House, but by the Member carrying out his “constituency role.” Hence, the records relating to the donation are not the records of the House of Assembly but are rather a “constituency

record” or “records of a constituency office” and, therefore, excluded from the operation of the *ATIPPA*.

[13] There are two provisions in the *ATIPPA* that relate to the exclusion of constituency records from the operation of the *ATIPPA*: section 5(1) and section 2(p). Section 5 provides in part:

5. (1) This Act applies to all records in the custody of or under the control of a public body but does not apply to

. . .

(c) a personal or constituency record of a member of the House of Assembly, that is in the possession or control of the member;

(d) a personal or constituency record of a minister; . . .

The *ATIPPA* enacts in section 2(p) that the House of Assembly is a public body but provides that a constituency office is not a public body:

2. (p) "public body" means

(v) the House of Assembly and statutory offices, as defined in the House of Assembly Accountability, Integrity and Administration Act,

but does not include,

(vi) the constituency office of a member of the House of Assembly wherever located,

[14] I will discuss paragraph (vi) of section 2(p) and paragraphs (c) and (d) of section 5(1) to decide the meaning of the terms “constituency record” and “constituency office” and thereby determine whether the records at issue are exempt from the application of the *ATIPPA*.

(a) “Constituency Record” and “Constituency Office”

[15] The starting point for my discussion will be an analysis of a document entitled *Rebuilding Confidence: Report of the Review Commission on Constituency Allowances and Related Matters* by the Honourable J. Derek Green. In this Report (the “*Green Report*”), the Chief Justice of the Supreme Court of Newfoundland and Labrador Trial Division discussed extensively the history and background of constituency allowances made available to members of the House of Assembly and made recommendations for an administrative framework to govern such allowances. As part of his recommendations regarding constituency allowances and other matters, Chief Justice Green proposed in Schedule I of his Report a draft bill entitled the *House of Assembly Accountability, Integrity and Administration Act* and prepared in Schedule II of the Report a draft set of rules entitled *Members’ Resources and Allowances Rules*.

[16] The bill proposed by the Chief Justice was subsequently enacted by the legislature as the *House of Assembly Accountability, Integrity, and Administration Act*, S.N.L. 2007, c. H-10.1 (the “*Accountability Act*”) and the draft set of rules are now in force as a regulation made under the *Accountability Act* with the title *Members’ Resources and Allowances Rules* (the “*Rules*”).

[17] Following the coming into force of the *Accountability Act* and the *Rules*, the House of Assembly published two documents to assist members of the House of Assembly: a *Members’ Handbook* (the “*Handbook*”) and a *Members’ Resources and Allowances Rules Manual* (the “*Manual*”).

[18] The introduction to the *Manual* outlines the purpose of both the *Manual* and the *Handbook* as follows:

This Members’ Resources and Allowances Rules Manual has been developed to assist the Members of the House of Assembly with the schedule of Rules adopted under the House of Assembly Accountability, Integrity and Administration Act. As a result of the changes from the Act and the recommendations of the Review Commission on Constituency Allowances and

Related Matters lead by Chief Justice Green, the House of Assembly staff, under the leadership of Speaker Harvey Hodder, has developed two separate guides for Members: (1) a *Members' Handbook* and (2) a *Members' Resources and Allowances Rules Manual*.

These two volumes provide information respecting a range of issues affecting Members of the House of Assembly and attempt to present this information in a readily accessible manner and structure. The explanations contained in the Handbook and Manual, however, are summaries only and reference must be made to the appropriate statutes and policies for definitive authority.

[19] Accordingly, it is these five documents (the *Green Report*, the *Accountability Act*, the *Rules*, the *Handbook*, and the *Manual*) which have provided me with guidance as to the meaning of the terms “constituency record” and “constituency office.”

[20] The *Green Report* contains a discussion of access to information in relation to the House of Assembly at pages 5-12 to 5-21:

Access to Information and the House of Assembly

A fundamental part of achieving transparency in government is the provision of access to information on a timely basis to persons who might have use for it or might have an interest in monitoring and reporting on the activities of officials and politicians.

In principle, the right to access to information should apply not only to the executive branch of government, which implements the law but also to the legislative branch which makes it. “Those who insist on others being open should be open themselves. This is the essence of transparency.”

The terms of reference require me to give consideration to “opportunities to achieve accountability and transparency,” but “without undermining the autonomy of the legislature and its elected members.” In my view, adherence to a general principle of transparency and accountability in the legislative branch is not fundamentally inconsistent with the autonomy of the legislature.

While the notion of legislative autonomy requires the legislature to be treated and dealt with separately from the executive and to organize and operate its affairs free from improper influence by the executive, it does not justify the legislative branch adopting a “bunker” mentality that ignores fundamental principles of accountability in government. It may, however, justify the adoption of a different or modified regime to take account of the special peculiarities of the legislative branch.

This province's Access to Information and Protection of Privacy Act presently does not apply to the House of Assembly. The Act places access obligations on "public bodies," but the definition of "public body" does not include the House and specifically excludes the office of an MHA or "an officer" of the House. Thus, records maintained in the offices of the House of Assembly administration are completely outside the bite of the Act. Furthermore, to emphasize the point, the Act excludes "records created by or for an officer of the House of Assembly in [sic] exercise of that role," thereby excluding House records even if maintained and stored in another part of the government service.

In my view, the time has come for the adoption in this province of an access to information regime and a concomitant publication scheme that is applicable to the House of Assembly and, in particular, one that will provide for public accessibility to information concerning Members' allowances.

Until now, the structure of the existing system respecting the setting of Members' salary levels and the setting and administration of allowances lent itself to secrecy and suspicion. The events that occurred in 2000 that removed the ability of the Auditor General to perform a legislative audit and eliminated any means of ensuring documentary justification for allowance claims, as well as the consignment to the IEC of the power to adjust salaries behind closed doors without leaving a proper paper trail that would enable complete after-the-fact examination, effectively made the IEC and the House administration a fiefdom onto itself without any proper checks and balances. In the name of legislative independence, the IEC and the House administration have hidden behind the inapplicability of the access requirements that apply to the executive branch, resulting in a "dark zone" in government into which the public cannot peer. The public concern that has been created over the alleged improper administration of constituency allowances has led to a severe lack of confidence in our political institutions.

One of the antidotes to this lack of confidence and suspicion is to shine light into the darkness by giving access to information so that members of the public can reassure themselves that public funds are being spent properly and that decisions are being made in a responsible manner. Indeed, if an access regime had been in place over the past several years, it is arguable that investigative media could have used such legislation to review Members' allowances and spending patterns and thereby brought allowance issues to light well before the issues of 2006 were identified.

To advocate application of an access regime to the House is, in my view, consistent with emerging trends in this area. It is a best practice. The time is right.

Clearly, there are special considerations applicable to the legislative branch that may impact on the appropriateness of making certain types of material publicly available either by way of an access application or by prior publication. I agree with the analysis of the federal Task Force, referred to earlier, that parliamentary privileges must be protected. This recognizes a legitimate aspect of the autonomy of the legislature and ensures its effective functioning.

As well, the personal records of a Member and the political records of his or her constituency office should also be inaccessible. Such records would relate to political strategies and decisions and to dealings with individual constituents. Those are matters where the reasonable expectation of confidentiality is high.

[Emphasis added]

[21] Having discussed access to information in relation to the House of Assembly, Chief Justice Green made Recommendations 6 and 7 on pages 5-18 and 5-21, respectively:

Recommendation No. 6

- (1) Subject to limitations designed to respect the different functioning of the legislative branch, Parts I, II and III of the Access to Information and Protection of Privacy Act should be amended to provide for its application to the House of Assembly administration, including financial information about Members' salaries and expenditures on allowances, and to the offices of the Citizens' Representative, the Child and Youth Advocate, the Chief Electoral Officer, the Information and Privacy Commissioner and the Commissioner of Members' Interests; and*
- (2) It should be a legislated requirement that the House of Assembly be subject to a publication regime where basic information concerning the finances of the House, especially information about expenditures in relation to Members' allowances, is made publicly available as a matter of course.*

Recommendation No. 7

- (1) The application of the ATIPP Act to the House of Assembly administration should be excluded in relation to:*
 - (a) information protected by parliamentary privilege;*
 - (b) records of political parties and caucuses; and*

(c) personal, political and constituency records of individual MHAs.

- (2) *The application of the ATIPP Act to statutory offices should be excluded in relation to records connected with investigatory functions or otherwise expressly required by law to be kept confidential; and*
- (3) *The ATIPP Act should not be extended to the Office of the Auditor General but the appropriateness of requiring access to information should be examined as part of a general legislative review of the Auditor General Act.*

[Emphasis added]

[22] In accordance with Recommendations 6 and 7, Chief Justice Green included in section 67(2) of his draft of the *Accountability Act* a proposed amendment to section 2(p) of the *ATIPPA* such that the definition of “public body” would include “the House of Assembly” but would not include “the constituency office of a member of the House of Assembly wherever located.” In addition, Chief Justice Green proposed in section 67(3) a further amendment of the *ATIPPA* such that section 5(c) would exclude from the *ATIPPA* “a personal or constituency record of a member of the House of Assembly that is in the possession or control of the member.” Both these proposed amendments to the *ATIPPA* have now been enacted by the legislature.

[23] The comments of Chief Justice Green (and his proposed amendments to the *ATIPPA*) not only point out the importance of having the financial administration records of the House of Assembly subject to the *ATIPPA*, but also provide insight into the meaning of the terms “constituency record” and “constituency office.” The Chief Justice indicates that the political records of a constituency office should be inaccessible because “[s]uch records would relate to political strategies and decisions and to dealings with individual constituents.” In my view, these comments are an indication that a “constituency office” handles the political matters of a member and a “constituency record” details how a political matter was dealt with. In other words, a “constituency record” deals with the member’s conduct of “constituency business.”

[24] There is a discussion of the term “constituency business” at pages 10-20 to 10-21 of the *Green Report*, where Chief Justice Green stated:

(ii) *Constituency Business*

I noted earlier that one of the problems with the existing regime - as well as with the recommendations of the Morgan Commission - was that there was very little guidance given as to what types of expenditures should be reimbursable or not. All that was provided was the general statement that the constituency allowance was to be used for "payment of expenditures incurred in the performance of constituency business" without defining what constituency business entailed.

Notwithstanding the difficulties associated with the problem of definition, I believe it is important to attempt to define the parameters of legitimate constituency business. It is important not only because it may help resolve uncertainties in some cases, but also because it will underline the fact that all expenditures, at bottom, must be legitimately related to the work of the MHA for the constituency. I recognize, of course, that no general definition will be sufficient in itself to resolve all questions of legitimacy of expenditure. There will always be some subtle nuances of activities in the penumbra of the definition that may be difficult to categorize one way or the other. There is a role, therefore, for also providing specific examples of activities that would, in normal circumstances, fall both within and outside the line. Nevertheless, the rules should be expressed to emphasize that the fundamental justification for any expenditure is service of constituents.

[25] Chief Justice Green then made the following recommendation in relation to constituency business at page 10-23:

Recommendation No. 67

(1) The rules respecting allowances for Members of the House of Assembly should provide that allowances may only be used exclusively and necessarily in relation to "constituency business," which should be defined as: any activity directly connected with a Member's responsibilities in relation to the ordinary and proper representation of electors and their families and other residents in the constituency; and

(2) The rules should also provide that a claim against an allowance should not be made if it relates to:

(a) partisan political activities;

(b) a personal benefit to a Member or an associated person of a Member; or

(c) a matter that calls into question the integrity of the Member or brings the House of Assembly into disrepute.

[Emphasis added]

[26] The Chief Justice has defined constituency business as the “representation of electors.” In my view, the representation of electors is a political activity. I note that there is a recommendation that there should be no claim against the constituency allowance if it relates to “partisan political activity,” that is, activity that promotes a particular party. There is no prohibition against making a claim in relation to political activity because that is what constituency work involves - political representation of constituents. The prohibition is against political activity which is partisan, that is, political activity that is in support of a particular party.

[27] The definition of “constituency business” recommended in the *Green Report* was adopted in the *Rules* in both sections 2(f) and 28(b) as follows:

“constituency business” means an activity directly connected with a member’s responsibilities as a member in relation to the ordinary and proper representation of electors and their families and other residents in the constituency, but does not include partisan political activities;

[28] Consequently, “constituency business” relates to the member’s “representation of electors.” The *Handbook* provides an indication of the type of matters a member would be involved in while providing “representation of electors.” It states on pages 1-1 to 1-2:

1.1 ROLES

Members of the House of Assembly are elected to represent one of 48 districts, often called constituencies, in the Province of Newfoundland and Labrador.

Members of the House of Assembly (often referred to as MHA or Member) help create laws, act as spokespersons for their constituents and help to solve problems. Regardless of whom constituents voted for, a MHA must represent everyone in his/her constituency

The Member fulfils a number of roles, as outlined below:

3. Member and Individual Constituents

Members are often contacted by their constituents who seek their support in resolving issues involving various levels of government departments/agencies. Often, the constituent may not be aware of where to go or who to talk with to resolve the issue. The Member, or his/her staff, is often aware of the appropriate government department, agency, or Minister who can assist. The Member can also be a source of information for his/her constituents and assist them in finding facts and necessary documentation.

4. Member and the Constituency

A Member maintains contact with constituents in person, by phone or by mail, to find out what they think about current issues. Members travel to their constituencies frequently and may have an office there where individual constituents/groups can meet with them to discuss problems and present viewpoints on issues of importance to the individual or the district. Members are often asked to open public buildings, make speeches, and attend local events, such as performances/celebrations, sports events, cultural activities and to give recognition to achievements of their constituents.

[29] To provide further insight into what amounts to “constituency business” and to a “constituency record” I will discuss the fact that members are provided with a “constituency assistant.” Members of the House of Assembly are entitled to have a constituency assistant to support them in representing their constituents and carrying out constituency business. Section 26 of the *Rules* provides as follows:

26. (1) A member is entitled to engage the services of one constituency assistant.

(2) The salaries and benefits for constituency assistants shall be set by directive of the commission and, unless otherwise contrary to law or a directive of the commission, the member may set the terms and conditions of employment.

(3) An employment contract of a constituency assistant shall be between the constituency assistant and "Her Majesty the Queen in Right of the Province of Newfoundland and Labrador, represented here by the Honourable the Speaker of the House of Assembly".

(4) Expenses related to constituency assistant salaries and benefits shall be paid directly to constituency employees by the office of the speaker.

[30] The *Handbook* discusses the employment of constituency assistants on page 4-1 to 4-2:

4.3 POLITICAL SUPPORT STAFF – CONSTITUENCY ASSISTANTS

Each Member of the House of Assembly is entitled to hire one contractual employee, termed Constituency Assistant, to support the Member in his or her duties. (Other political support staff are hired to assist the entire party caucus, rather than individual Members, on matters such as research and communications.) Cabinet Ministers are also entitled to hire an Executive Assistant in addition to a Constituency Assistant.

A Member may recruit and select a Constituency Assistant through a process which ensures that necessary qualifications and skill levels are met. Ordinarily, a Member will require an assistant with good office management and computer skills, knowledge of the electoral district, effective communication skills and good interpersonal skills. The House of Assembly Service is not ordinarily involved in the selection of Constituency Assistants, but can provide advice if requested.

A Political Support Staff Employment Agreement is entered into between the Speaker (rather than the Member) and the Constituency Assistant

[31] Thus, members are entitled to hire a constituency assistant to support them in their important political role of “representation of electors.” The salary and expenses of the constituency assistant are paid for by the House of Assembly under the terms of a contract entered into between the constituency assistant and the Speaker of the House of Assembly. This indicates to me that the cost of doing constituency business, that is, the representation of electors, is an expense that is borne by the House of Assembly. In other words, members and constituency assistants conduct constituency business, but the cost of doing such business is assumed by the House of Assembly.

[32] The cost of maintaining a member’s constituency office is also covered by the House of Assembly. The *Manual* at page 6-3 provides that the “[m]ember’s Constituency Assistant will work from the Member’s Constituency Office” and sets out a number of possible locations for a constituency office on page 6-8:

Location of Constituency Office – Options:

1. *Constituency Office in the Confederation Building.*
2. *Constituency Office in a Government owned Building (not the Confederation Building) within the District.*
3. *Constituency Office in the District in leased space from outside party.*
4. *Constituency Office in a Member’s residence.*
5. *Constituency Office in the building or department where a Minister, Parliamentary Secretary or Assistant is located.*
6. *In lieu of a Constituency Office in a specific location, short-term rental of meeting rooms in one or more locations in the District (up to a maximum of \$7,000 (\$6,140, net of HST) per fiscal year.*

[33] Regardless of where the constituency office is located, members of the House of Assembly are entitled to a constituency office accommodation allowance pursuant to section 18 of the *Rules*:

18. (1) A member may seek reimbursement or have payment made on his or her behalf, for the provision of office expenses in order to conduct his or her constituency business.

(2) The maximum allowance available to a member for each category of office expenses is as follows:

(a) constituency office accommodation allowance, \$7,000; and

(b) office operations and supplies allowance, \$15,000.

[34] Having reviewed the *Green Report*, the *Accountability Act*, the *Rules*, the *Handbook*, and the *Manual*, I have reached the following conclusions. A “constituency record” is a record that relates to a member of the House of Assembly carrying out constituency business, that is, an activity directly connected with a member’s responsibilities in relation to the ordinary and proper representation of electors and their families and other residents of a constituency. Constituency records are the political records of a constituency office, that is, those records that relate to political strategies and decisions and to dealings with individual constituents. A

constituency office is an office where a member of the House of Assembly and the member's constituent assistant (who is a political support staff person) conduct constituency business.

[35] Having arrived at definitions of “constituency record” and “constituency office,” I must now determine whether the records at issue relate to the Member's conduct of constituency business and are, therefore, constituency records or whether the records at issue are records relating to the cost of conducting constituency business and are, as such, records of the House of Assembly. In order to make that determination, it is necessary for me to discuss the constituency allowance, from which a member can seek reimbursement for the cost of doing constituency business.

(b) Constituency Allowance

[36] It is common ground between the parties that the two records at issue in this case relate to funds dispensed from the Member's constituency allowance. The Applicant stated in his Request for Review that “. . . the name of the person/business that received money for an apparent donation from [the Member's] constituency account should be made public.” In its written submission, the House made the following comment: “In the absence of further information the House of Assembly can only assume that the donation was made to a constituent from the MHA's constituency allowance for some philanthropic purpose.” Accordingly, it is necessary to discuss briefly the constituency allowance made available to members of the House of Assembly.

[37] The *Green Report* sets out a definition of an allowance on page 10-2:

By “allowances” is meant allocations from the public treasury of money to, or for the use of, MHAs, other than by way of compensation, severance and pension benefits, to enable them to carry out their duties by defraying expenses they necessarily and reasonably incur as a result of performing their public functions. Unlike other payments of public money, such as salaries, MHAs are not entitled to the payment of allowances on the basis that they have been earned; rather, they may only expect payment of an allowance if they are able to justify payment by proving that there is a need to reimburse them or make

payments on their behalf because expenditures must be, or have been made related to their work.

[38] The *Green Report* discusses the constituency allowance regime as it operated prior to Chief Justice Green's recommendations and the recent changes to that regime. It states at pages 10-9 to 10-10:

(ii) Accountable Constituency Allowance

Each MHA is also entitled to an accountable constituency allowance that varies in amount according to constituency. . . .

The purpose of the constituency allowance is described this way in the IEC's annual reports (in language taken from the Morgan report):

Each Member is entitled to an accountable constituency allowance. This allowance is for the payment of expenditures incurred in the performance of constituency business and may cover such items as office rental, equipment, supplies, secretarial and other support services, information material such as newspapers, advertising, purchase of flags, pins, etc., Christmas cards and other such items that may be approved by the Commission of Internal Economy.

This is the only written guideline governing the general scope of expenditure, aside from travel and associated accommodation, that can be made and reimbursed from a Member's constituency allowance. It is predicated on the expenditure being made in relation to "constituency business."

There have also been cases of claimed expenditure which, on the face of it, call for explanations as to why they would be regarded as having been incurred "in the performance of constituency business."

. . . One of the difficulties with the existing regime is that the absence of detailed and clear guidelines as to what should be regarded as "constituency business" . . .

[39] In the present case, the Member made a fifty dollar donation to a constituent and sought reimbursement for this amount from his constituency allowance under the old regime. This past practice by Members of making such donations and seeking reimbursement for them was the subject of much comment in the *Green Report* and in particular at pages 10-47 to 10-50:

Donations

Substantial amounts of public money have been spent by many MHAs from their constituency allowances by way of donations to individual constituents or groups. These expenditures come about in a variety of circumstances. I have noted in Chapter 9 that the job of a politician in this province appears to involve the dispensation of largesse in the community. In the run of a year, an MHA may be expected to provide hospitality, including rounds of drinks, at community events; to contribute with cash donations to sponsorship of individuals or groups, especially cultural or sports groups, who are competing away; to provide financial assistance to constituents who need food, clothing or supplies or who need help traveling to a major centre for medical treatment; to buy raffle tickets at community events; and to buy items for sale at community events as a means of supporting those activities.

Oftentimes, especially with cash donations to community groups, the donations are made at the end of the fiscal year by MHAs who had money left in their constituency allowance account and felt that this was an appropriate way to spend the remaining funds.

A substantial number of MHAs argued that the nature of political life in Newfoundland and Labrador is such that it is necessary that such expenditures be condoned. In fact, some said that their lives as elected members would be intolerable if those expenditures were not permitted. They talked in terms of the tremendous pressure placed on politicians to make donations and give financial support within the community. They said it was expected of the politician and that if he or she did not “play the game” there would be consequences at the polls. They also argued that such expenditures, judiciously applied, made an important contribution to the community. How could an MHA, it was said, turn down a request for food or medicine for an impoverished constituent? They pointed out that government social programs were often inadequate and citizens sometimes “fell through the cracks.” The MHA was in the best position to know who the deserving ones were and to take steps to fill the void. The point was also made by some opposition Members that the ability of an opposition MHA to provide “social service” types of donations was especially important because there was a perception that government Members, especially if they were also Ministers, had an easier time accessing government programs for their constituents. The ability of opposition Members to make discretionary donations was one way in which this perceived imbalance could be righted.

Notwithstanding these arguments, I believe these practices belong to another age. It is an age we should leave. . . .

First and foremost, the practice of making financial contributions and spending in this way supports the unacceptable notion that the politician's success is tied to buying support with favours. Such things, especially the buying of drinks, tickets and other items at events, has overtones of the old practice of treating - providing food, drink or entertainment for the purpose of influencing a decision to vote or not to vote. As I wrote in Chapter 9, it demeans the role of the elected representative and reinforces the view that the standards of the politician are not grounded in principle. In fact, I would go further. The old practice of treating was usually undertaken using the politician's own funds or his or her campaign funds. To the extent that the current practice involves the use of public funds, it is doubly objectionable.

[40] Having made these comments on donations in the *Green Report*, Chief Justice Green made the following recommendation:

Recommendation No. 76

- (1) Members of the House of Assembly should be prohibited from making donations and other gratuitous payments to or on behalf of individuals, charities, community groups or agencies using their constituency allowance or other public money;*
- (2) A Member should be prohibited from making donations or gratuitous payments out of his or her own funds unless:*
 - (a) the donation is expressed to be made in his or her personal capacity without any reference to the fact that he or she is a member of the House;*
 - (b) if there is to be a public acknowledgement of the donation or payment attributing it to the Member, the Member stipulates that there is to be no reference in the acknowledgement that he or she is an MHA or a member of a political party;*
- (3) Upon adoption of a rule dealing with prohibitions on donations and other gratuitous payments, the Speaker should forthwith cause notification to be published to the residents of the province informing them of the restrictions placed on Members in this regard.*

[41] In accordance with the recommendation of Chief Justice Green, section 46 of the *Rules* sets out the regulation regarding reimbursement of expenses related to constituency work:

46. (1) *A member is entitled to be reimbursed for his or her constituency expenses necessarily incurred by that member to carry out his or her constituency business.*

...

(3) *The following expenses necessarily incurred by a member to carry out his or her constituency business may be reimbursed:*

- (a) *meals or the bulk purchase of food, non-alcoholic beverages and other supplies for meetings with constituents or other members of the public in relation to constituency business, and meals and non-alcoholic beverages on other constituency-related occasions;*
- (b) *memberships in community or other organizations;*
- (c) *equipment not provided by the House;*
- (d) *magazine, newspaper and journal subscriptions;*
- (e) *travel, accommodations, meals and registration fees for conferences and training courses for the member or constituency assistant if approved by the speaker;*
- (f) *expenses associated with attending at meetings and hearings involving advocacy on behalf of a constituent; and*
- (g) *other categories of items as directed by the commission.*

(4) *The following types of expenses shall not be reimbursed:*

- (a) *the acquisition, creation or distribution of anything that uses or includes a word, initial, or device that identifies a political party;*
- (b) *artwork including paintings, prints, sculptures, carvings and crafts;*
- (c) *alcoholic beverages, either individually or in bulk;*
- (d) *sponsorship of individuals or groups;*
- (e) *donations;*
- (f) *raffle tickets;*
- (g) *hospitality, except for meetings referred to in paragraph (3)(a);*

- (h) gifts;
- (i) items, services or activities of a personal nature, including clothing and laundry expenses;
- (j) travel costs for constituents;
- (k) travel costs for spouses or dependants;
- (l) financial assistance for constituents; and
- (m) those other items directed by the commission.

[42] The present procedure and principles to be followed when members seek reimbursement from their constituency allowance for expenses incurred while conducting constituency business are set out in section 5(1) of the *Rules*:

5. (1) All claims and invoices submitted by or on behalf of a member or to provide resources to a member and all payments and reimbursements made under these rules shall

- (a) be submitted and made in accordance with the purpose and intent of the Act and these rules;*
- (b) be submitted by or on behalf of a member and made only if and in a manner that does not call into question the integrity of the member and the House;*
- (c) be documented and supported in accordance with sound financial management principles;*
- (d) not relate to partisan political activities; and*
- (e) shall not relate to a personal benefit to a member or an associated person of a member.*

[43] The *Manual* provides the details of how a member submits a claim for reimbursement, and states on page 5-8:

*Members must attach all original invoices or receipts plus a proof of payment to the **Member Expense Claim** form in order for payment to be made.*

[Emphasis in original]

[44] I have found the comments of Chief Justice Green regarding the previous constituency allowance regime and his recommendations for reform of that regime useful in my consideration as to whether the records at issue are constituency records. I am mindful of the fact that under the present regime the giving of a donation would not be considered constituency business and today there would be no reimbursement for such a donation from a member's constituency allowance. However, prior to 9 October 2007 (the date on which the *Rules* came into force) a member could receive reimbursement for such a donation and that is exactly what was done by the Member in the present case. The Member made a fifty dollar donation and in order to be reimbursed for that amount from his constituency allowance he required a receipt. This receipt was then attached to the expense claim form and submitted to the House of Assembly for reimbursement from the Member's constituency allowance. (This procedure is much the same as that required of a member under the present regime except, of course, there is now no reimbursement for donations).

[45] Having examined the history of the system of constituency allowances and the present regime in place for reimbursement from constituency allowances, I have come to the conclusion that the records at issue are not constituency records but rather records of the House of Assembly. They are records used by the Member to receive reimbursement for expenses incurred while conducting what was at that time considered constituency business. Had the Member not sought reimbursement, but simply retained the receipt in his files, the receipt would have been a constituency record. However, the Member submitted the receipt to the House of Assembly for reimbursement from the Member's constituency allowance. That act transformed the receipt into a record in the custody of the House of Assembly.

[46] Having reached this conclusion, it is my view that the records are not exempt from the application of the *ATIPPA*. My view is one shared by the House of Assembly itself. In its *Handbook* there is the following comment at page 4-5:

The access provisions of the ATTIPA (Parts I, II, III) apply to the House of Assembly, its Members and Statutory Offices as of 9 October 2007. . . .

Generally, the access provisions of ATIPPA will apply to all operational records of the House of Assembly Service and Statutory Offices. Members' records that will be subject to ATIPPA will include, for example, financial records filed with the Corporate and Member Services Division for reimbursement. Routine disclosure of these types of records (e.g., on the website) does not exempt them from access requests. The ATIPPA will apply to records that both pre- and post-date 9 October 2007.

[Emphasis added]

[47] In my opinion, the receipt and the expense claim form filed by the Member in the present case are financial records filed with the House of Assembly for the purpose of reimbursement and are, therefore, records in the custody of a public body. As such, the records are subject to the *ATIPPA*. Furthermore, it is also my view that it does not matter that these documents were filed prior to 9 October 2007 (the date when the House of Assembly became a public body under the *ATIPPA*) because as the House states in its *Handbook*: “[t]he *ATIPPA* will apply to records that both pre- and post-date 9 October 2007.” This is in accordance with section 7 of the *ATIPPA* which provides that an applicant has “a right of access to a record in the custody or under the control of a public body.” At the time the Applicant made his request to the House on 12 October 2007, the records at issue were in the custody of the House of Assembly which at the time was a public body pursuant to paragraph (v) of section 2(p) of the *ATIPPA*.

[48] I note that the *Handbook* does state on page 4-6 that “a personal or constituency record of a member of the House of Assembly, that is in the possession or control of the member” is exempt from the *ATIPPA*. I have already reached the conclusion that the records at issue are not constituency records, but are records of the House of Assembly. This conclusion is consistent with the comments of the House on page 4-5 of the *Handbook*.

[49] However, even if the records at issue were constituency records within the meaning of section 5(1)(c), they would still be subject to the requirement set out in the phrase in that section which states “in the possession or control of the member.” This phrase indicates that only those constituency records that are actually in the possession or control of a member are exempted from the application of the *ATIPPA*. In my view, the records at issue in the present case are not in the possession or control of the Member, but rather are in the possession and control of the House of Assembly. Therefore, had I determined that the records at issue were constituency records, I would have had to find that these particular constituency records are not exempt from the *ATIPPA* because they do not meet the requirement of being “in the possession or control of the member,” having been submitted to the House as an expense claim.

[50] Although it has not been argued by the House, I must comment on paragraph (d) of section 5(1) which exempts from the application of the *ATIPPA* “a personal or constituency record of a minister.” The term “minister” is defined in section 2(1) as meaning “a member of the executive council appointed under the *Executive Council Act*,” that is, a member of the Cabinet. Although the House has not provided any evidence that the Member involved in this case is a cabinet minister, I will state that given my finding that the records at issue are not constituency records, section 5(1)(d) does not in any event apply to exempt the records from the application of the *ATIPPA*.

[51] As indicated earlier, paragraph (vi) of section 2(p) provides that a public body does not include “the constituency office of a member of the House of Assembly wherever located.” It is my view that this paragraph was enacted to exempt a constituency office from the operation of sections 7 and 8 of the *ATIPPA*, such that an applicant is not entitled to make an application to a constituency office for access to a record that is in the custody of or under the control of the constituency office. It is the constituency office that is exempted from the operation of the *ATIPPA* by paragraph (vi) of section 2(p), not a constituency record. A record relating to a claim for expenses incurred while conducting constituency business (such as the records relating to the donation in the present case) could be in the custody of the constituency office

or in the custody of the House of Assembly. In the former case, an applicant cannot have access to the record. In the latter case, the record is accessible under the *ATIPPA* because the record is in the custody of a public body. It is not the record that is exempted by paragraph (vi) of section 2(p), but rather the location of the record. In the case before me, the records relating to the donation were quite appropriately in the custody of the House of Assembly and, therefore, subject to an access request.

[52] I note here that the House has not denied access to the records relating to the donation, only to certain information in those records. The House has raised the applicability of paragraph (vi) of section 2(p) and section 5(1)(c) for the first time in its written submission; it did not raise them when it initially denied the applicant access to the information at issue. It is difficult for me to accept the positions put forward by the House when it states that “there is an explicit exclusion from the *ATIPPA* of a constituency office of an MHA” and that “[w]hile the donation was receipted through the HOA as a public body, it is in fact a part of a constituency record.” If the House was of the view that the records at issue were exempted from the application of the *ATIPPA*, either as records of a constituency office or as a constituency record of a member of the House of Assembly, then it could have chosen not to release those records to the Applicant.

[53] In summary, it is my finding that the records at issue in this Review are not constituency records, nor are they records in the custody of a constituency office. The records at issue are in the custody of the House of Assembly, which is a public body under the provisions of the *ATIPPA*. The records are in the custody of the House of Assembly because the Member submitted them to the House seeking reimbursement from his constituency allowance for expenses incurred in conducting, what at the time was, constituency business. As such, the records at issue are subject to an access request under the provisions of the *ATIPPA*.

2. Was the donation made by a public body?

[54] The House in its written submission makes the following comments on pages 2 to 3:

The House of Assembly Access to Information and Protection of Privacy Coordinating Office further believes that even if the donation were seen as a discretionary benefit of a financial nature that donation was not granted by the public body. [The Member] was an MHA carrying [sic] a constituency role for which, at the time, the public body allocated funds to MHAs which were used by them for the purpose of constituency donations.

The definition of "public body" includes the House of Assembly and its statutory offices but does not make reference to MHAs as public bodies.

[55] This statement by the House suggests that while the House of Assembly is a public body, the individual members of the House of Assembly are not public bodies and therefore the donation was not made by a public body. This position put forward by the House in its submission obligates me to examine sections 7(1) and 8(1) of the *ATIPPA*. Section 8(1) sets out the procedure for making an access request to a public body:

8. (1) A person may access a record by making a request to the public body that the person believes has custody or control of the record.

Section 7(1) of the *ATIPPA* sets out which records are accessible under an access request:

7. (1) A person who makes a request under section 8 has a right of access to a record in the custody or under the control of a public body, including a record containing personal information about the applicant.

[56] Section 2(p) defines public body in part as follows:

2. (p) "public body" means

...

(v) the House of Assembly and statutory offices, as defined in the House of Assembly Accountability, Integrity and Administration Act,

[57] Therefore, by reading the definition of public body in section 2(p) with sections 7(1) and 8(1) it is clear to me that the House of Assembly is a public body from which an applicant can request access to records that are in its custody or under its control.

[58] As indicated in paragraph (v) of section 2(p) of the *ATIPPA*, the term “House of Assembly” is defined in the *House of Assembly Accountability, Integrity and Administration Act*. Section 4 of that *Act* sets out the composition of the House of Assembly as follows:

4. The House of Assembly consists of those persons elected in accordance with the Elections Act, 1991 as members to represent the districts set out in section 5 of the House of Assembly Act.

[59] Thus, while the Member when he made the donation was not himself a public body, he was one of the members comprising the House of Assembly, which is a public body. I cannot accept the position offered by the House in its submission when it states that the donation was not made by the House of Assembly. The funds from which the donation was made were allocated by the House of Assembly and the Member made his claim for reimbursement for the amount of the donation to the House of Assembly. The House of Assembly is a constitutional and statutory entity. It cannot act itself. It can only do so through the actions of the members, officers, and staff of the House of Assembly. Thus, I find that when the Member made the donation he was acting for the House of Assembly. As such, the donation was made by the House of Assembly, which is a public body under the provisions of the *ATIPPA*.

3. Do the personal names constitute personal information such that they are excepted from disclosure by section 30(1) of the *ATIPPA*?

[60] The House has denied access to the personal names found in the receipt and the expense claim form on the basis that they constitute personal information and are, as a result, excepted from disclosure by section 30(1) of the *ATIPPA*. The Applicant, on the other hand, takes the position that the fifty dollar donation represents “a discretionary benefit of a financial nature granted to a third party by a public body.” Therefore, the Applicant submits, paragraph (1) of section 30(2) is applicable and the names should be released because they provide a detail of that discretionary benefit.

[61] The definition of “personal information” is given in section 2(o) of the *ATIPPA*, which provides in part:

2. (o) "personal information" means recorded information about an identifiable individual, including

(i) the individual's name, address or telephone number,

[62] The *ATIPPA* provides for a mandatory exception in relation to the disclosure of personal information in section 30(1):

30. (1) The head of a public body shall refuse to disclose personal information to an applicant.

[63] Section 30(2) sets out a number of situations where, although the information is personal information, the mandatory exception in section 30(1) is not applicable. It provides in part:

30. (2) Subsection (1) does not apply where

...

(l) *the disclosure reveals details of a discretionary benefit of a financial nature granted to a third party by a public body, not including*

(i) *personal information that is supplied in support of the application for the benefit, or*

(ii) *personal information that relates to eligibility for income and employment support under the Income and Employment Support Act or to the determination of assistance levels.*

[64] My reading of section 2(o) persuades me that the personal names at issue constitute personal information. I must now decide whether they should be excepted from disclosure pursuant to section 30(1) or whether the disclosure of the names would reveal the "details of a discretionary benefit of a financial nature granted to a third party by a public body" such that paragraph (1) of section 30(2) operates to allow the disclosure of the names.

[65] I have already determined that the House of Assembly is a public body and that the donation in question was made by the House of Assembly. The meaning of the term “third party” is provided in section 2(t) as follows:

2. (t) *“third party”, in relation to a request for access to a record or for correction of personal information, means a person, group of persons or organization other than*

(i) the person who made the request, or

(ii) a public body.

[66] Therefore, it is clear that the recipient of the donation, not being the Applicant or a public body, is a “third party” within the meaning of paragraph (1) of section 30(2).

[67] I must now determine if the donation given by the Member represents a “discretionary benefit” as set out in paragraph (1) of section 30(2). The term “discretionary benefit” was discussed by the Alberta Information and Privacy Commissioner in Order 2001-020. The Commissioner, in commenting on the term as found in Alberta’s *Freedom of Information and Protection of Privacy Act*, stated at paragraphs 17 to 19:

[para. 17.] “Discretionary benefits” is not a defined term in the Act. I have not previously considered the meaning of this phrase in section 16(2)(e).

[para. 18.] In Order 98-014, I said that a “benefit” means, among other things, a favorable or helpful factor or circumstance, or an advantage. The Dictionary of Canadian Law (2nd Edition) defines benefit as: “3. Compensation or an indemnity paid in money, financial assistance or services.” Both definitions suggest that a “benefit” can run the gamut from the purely discretionary (that, is, gratuitous) to being required by law.

[para. 19.] In Orders 98-014 and 98-018, I considered the general meaning of the word “discretionary.” I found that, in the simplest terms, “discretionary” means that a decision-maker has a choice as to whether, or how, to exercise a power.

[68] I adopt the definitions of “benefit” and “discretionary” given by the Alberta Commissioner. Applying these definitions to the facts of the case before me, I have no

hesitation in finding that the fifty dollar donation is a benefit granted to the named recipient. In addition, it is, in my view, obvious that the fifty dollar donation was a benefit of a “financial nature” within the meaning of paragraph (1) of section 30(2). Furthermore, I find that the benefit was discretionary because the Member had a choice as to whether or not to make the donation. As was stated by the House in its submission: “[The Member] was an MHA carrying [sic] a constituency role for which, at the time, the public body allocated funds to MHAs which were used by them for the purpose of constituency donations.” It was the Member who exercised the discretion on behalf of the House as to whether and to whom the donation was to be made.

[69] Consequently, I have determined that the fifty dollar donation given by the House to the named recipient is a discretionary benefit of a financial nature granted to a third party by a public body. However, in order for paragraph (1) of section 30(2) to operate, the disclosure (in the case before me, releasing the names at issue) must reveal the “details of a discretionary benefit.” Therefore, I must determine whether the names on the receipt and the expense claim form constitute a detail of the discretionary benefit granted by the House of Assembly to a third party.

[70] The meaning of the word “detail” is given in the *Concise Oxford English Dictionary*, Tenth Edition, Revised, as “a small individual feature, fact or item.” It is my view that one of the individual facts relating to the discretionary benefit granted by the House of Assembly to a third party would be the name of the third party to whom the benefit was granted. As such, I find that the name of the recipient of the donation is a detail that should be revealed. However, in my opinion, the name of the person who signed the receipt acknowledging the donation does not constitute a fact relating to the discretionary benefit. The signature containing the name is simply a confirmation that the benefit was bestowed; it is not a detail of the benefit itself. Therefore, the name of the person signing the receipt constitutes personal information and is not covered by the exemption to section 30(1) set out in paragraph (1) of section 30(2) of the *ATIPPA*.

[71] The House has submitted that “while we do not know the specific reason for the donation, under subparagraph (i), the name would further be excluded.” Subparagraph (i) of paragraph (1) of section 30(2) provides that the exemption set out in this paragraph does not include “personal information that is supplied in support of the application for the benefit.” It is my view that there is no evidence that subparagraph (i) is applicable to the facts of the case before me. There is no evidence that the recipient of the donation made any application in support of the discretionary benefit. In fact, I do not know whether the recipient (or some other individual) approached the Member and asked for the donation or whether the Member decided on his own initiative and for his own reasons to make the fifty dollar donation to the recipient. Therefore, without evidence that the name of the recipient was personal information that was supplied in support of the application for the benefit, I am not able to find that subparagraph (i) of paragraph (1) is applicable.

[72] The House has expressed a further concern that to release the names of private individuals found on receipts and expense claim forms in relation to donations made to individuals for personal reasons would amount to a breach of the privacy of those individuals. The House further points out that “[t]his is particularly true as such information might reveal the impecuniousness, health, or other needs of a constituent requiring assistance from his or her MHA.” In relation to this concern, I will indicate that there is no information contained on the receipt or the expense claim form that shows why the donation was made. There is no information that would reveal any financial, medical or other need of the recipient of the donation. If such information were present in this case or in any case under review, then I would have to determine whether such information constitutes personal information and whether any of the exemptions in section 30(2) are applicable. In particular, I would have to decide whether such information constitutes a detail of a discretionary benefit such that paragraph (1) of section 30(2) would be operative. However, in the case before me, the only determinations I have to make are whether the names constitute personal information and whether paragraph (1) is applicable. Having found that paragraph (1) is applicable to the name of the recipient of the donation in the present case, I will leave for future reviews, when the issues are actually before me, whether information regarding an individual’s monetary, health, or other status is covered by the exemption set out in paragraph (1).

[73] In relation to the submission by the House that the release of the names would amount to an invasion of privacy, I wish to indicate that the *ATIPPA* provides a balance between making public bodies more accountable and protecting the personal privacy of individuals. In that regard, the comments of the Prince Edward Island Information and Privacy Commissioner in Order No. 03-003 are quite appropriate. In that Order, the Commissioner had to determine whether complimentary passes for provincial golf courses given by the Department of Tourism amounted to a discretionary benefit under a provision of the *Freedom of Information and Protection of Privacy Act* and whether the names of the individuals who received the passes should be disclosed. The Commissioner made the following comments at page 9 and at pages 11-12:

I agree with the Public Body that a golf pass does not relate to a commercial or professional activity under section 15(4)(g)(i). The ordinary meaning of either of these phrases does not encompass a complimentary golf pass. However, I do find that it is a discretionary benefit, which is a factor I will consider in my analysis of section 15(3). . . .

As I have pointed out in previous orders, an underlying principle of the Act is the transparency and accountability of our provincial government. Disclosure of discretionary benefits given out by public bodies is certainly a part of such accountability. The Legislature, in its wisdom, recognized this when it deemed that the disclosure of certain discretionary benefits are automatically deemed not to be an unreasonable invasion of personal privacy under section 15(4).

In order to come to an informed decision about whether to disclose the names of recipients of this discretionary benefit, subsection 15(3) requires that the personal privacy of the individuals must be balanced against the duty of accountability of government. The fact that names were released in previous years is evidence that government recognized some duty of accountability relating to this particular discretionary benefit.

[Emphasis added]

[74] In Order 03-003, the Prince Edward Island Commissioner stated her conclusion at page 13:

For this reason, and based on the section 15(3) analysis above, I conclude that, on balance, disclosure of the individual names of golf pass recipients is not an unreasonable invasion of a third party's personal privacy. The Public Body's

duty of accountability outweighs what, if any, personal privacy is affected by the disclosure. The Applicant is entitled to the individual names.

[Emphasis added]

[75] I agree with the rationale of the Prince Edward Island Commissioner and state that, in my view, disclosure of the details of a discretionary benefit granted by a public body is part of the process of making that public body more accountable. Furthermore, in certain situations a public body's duty of accountability outweighs the need to protect personal privacy. Our legislature has decided by enacting paragraph (1) of section 30(2) that the personal information of an individual cannot be withheld if its "disclosure reveals details of a discretionary benefit of a financial nature granted to a third party by a public body."

[76] Thus, while the name of the recipient of the donation as it appears on the receipt and on the expense claim form constitutes personal information, the disclosure of the name reveals a detail of a discretionary benefit of a financial nature granted to a third party by a public body. As such, paragraph (1) of section 30(2) operates and section 30(1) does not apply to prohibit the disclosure of the name.

V CONCLUSION

[77] I have determined that the records (the receipt and expense claim form) containing the information at issue are not constituency records, nor are they records of a constituency office. The records are in the custody of the House of Assembly, which is a public body as defined in the *ATIPPA*, and, therefore, subject to an access request under the provisions of the *ATIPPA*.

[78] I have concluded that when the Member made the donation he was acting for the House of Assembly and, hence, the donation was made by a public body.

[79] I have determined that the name of the recipient of the fifty dollar donation appearing on the receipt and the Member's expense claim form constitutes personal information within the

meaning of section 2(o). I have decided that the name of that recipient is not excepted from disclosure by section 30(1) because the disclosure of that name reveals a detail of a discretionary benefit of a financial nature granted to a third party by a public body pursuant to paragraph (1) of section 30(2) of the *ATIPPA*.

[80] I have reached the conclusion that the name of the person who signed the receipt constitutes personal information and that the disclosure of this person's name would not reveal the details of a discretionary benefit of a financial nature granted to a third party by a public body. Thus, the exemption set out in paragraph (1) of section 30(2) is not applicable and the House was obligated to refuse disclosure of this name pursuant to section 30(1) of the *ATIPPA*.

VI RECOMMENDATIONS

[81] Under the authority of section 49(1) of the *ATIPPA*, I hereby recommend that the House of Assembly release to the Applicant the name of the recipient of the fifty dollar donation as that name appears on the receipt dated 18 October 2006 (found on page 77 of the responsive record) and on the expense claim form signed by the Member on 25 October 2006 (found on page 75 of the responsive record).

[82] Under authority of section 50 of the *ATIPPA* I direct the head of the House of Assembly to write to this Office and to the Applicant within 15 days after receiving this Report to indicate the House of Assembly's final decision with respect to this Report.

[83] Please note that within 30 days of receiving a decision of the House of Assembly under section 50, the Applicant may appeal that decision to the Supreme Court of Newfoundland and Labrador Trial Division in accordance with section 60 of the *ATIPPA*.

[84] Dated at St. John's, in the Province of Newfoundland and Labrador, this 4th day of July, 2008.

E. P. Ring
Information and Privacy Commissioner
Newfoundland and Labrador