OFFICE OF THE INFORMATION AND PRIVACY COMMISSIONER

NEWFOUNDLAND AND LABRADOR

Report A-2014-006

March 5, 2014

Department of Justice

Summary: The Applicant requested from the Department of Justice (the "Department") his complete file held by the Department. The Department provided partial access to the records requested, severing certain information under the exceptions to disclosure set out in sections 20, 21, 23, 27, and 30. During both the informal resolution process and the formal investigation stage, the Department released certain information previously withheld and ceased relying on section 27 (disclosure harmful to business interests of a third party) completely. The Commissioner found that the Department had fulfilled its duty to assist under section 9. The Commissioner determined that the Department had properly withheld information under section 21 (legal advice). The Commissioner held that the Department had properly denied access to certain information under section 20 (policy advice or recommendations) but that in one instance section 20 was not appropriately applied. In relation to the Department's denial of access in reliance on section 23 (disclosure harmful to intergovernmental relations or negotiations), the Commissioner made a finding that this denial was not proper. Further, the Commissioner ruled that certain information had been improperly withheld in reliance on section 30 (disclosure of personal information). The Commissioner recommended release of all information that had been improperly withheld by the Department.

Statutes Cited: *Access to Information and Protection of Privacy Act*, S.N.L. 2002, c. A–1.1, as amended, sections 2(o), 9, 20, 21, 23, and 30.

Authorities Cited: Newfoundland and Labrador OIPC Reports 2007-007, A-2009-002, A-2009-007, A-2009-011, A-2010-002, A-2010-004, A-2012-006, A-2013-002, and A-2013-015; Ontario OIPC Orders M-444, PO-2582 and PO-3073; Nova Scotia Freedom of Information and Protection of Privacy Review Officer Report FI-07-72; *Solosky v. The Queen,* [1980] 1 S.C.R. 821.

Other Sources: *Bill 29: An Act to Amend the Access to Information and Protection of Privacy Act (2012).* First Session, 47th General Assembly. Royal Assent June 27, 2012. Available on Newfoundland and Labrador House of Assembly website: http://www.assembly.nl.ca/business/bills/bill1229.htm.

I BACKGROUND

[1] Pursuant to the *Access to Information and Protection of Privacy Act* (the "*ATIPPA*") the Applicant submitted an access to information request on December 14, 2010 to the Department of Justice ("the Department"). The request sought disclosure of records as follows:

> *A complete copy of my file including but not limited to the following. For the purpose of this request, the Newfoundland and Labrador Department of Justice include* [sic] *Support Enforcement and Legal Aid as well as any other part of your department I may not be aware of.*
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> - *All correspondence between your department and the Department of Justice Canada, Passport Canada and any other federal or provincial department or agency. For clarity I will state this includes what was received as well as sent.*
> - *Minutes of meetings, letters, emails and telephone logs etc where my name is mentioned or my case referenced in any way.*
> - *Searches done to determine my address, including federal databases.*
> - *Copies of all correspondence sent to me by SEP including emails and the Notice of Intent regarding the passport revocation.*
> - *Directives issued to your staff that mentions my name or where my case is referenced including how to deal with my requests and if there was any attempt to restrict the information sent to me.*
> - *Any change in departmental policy or disciplinary action as it relates to my case.*
> - *All information relating to Legal Aid, e.g. written correspondence, emails, telephone logs, minutes of meetings and instructions they may have received to terminate the email exchange with me.*
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> *I realize the above is a little repetitious but I wanted to insure there is no misunderstanding of what I am asking for. Just to clarify, I am requesting copies of all correspondence, be it written, electronic or otherwise, with federal or provincial departments, agencies or with companies or individuals, that bears my name or references my case with your department. As always, the identity of third parties can be withheld under the Protection of Privacy Act.*

[2] I note here that the Applicant in his access request asked for information "relating to Legal Aid". The Applicant subsequently made an additional access request to the Newfoundland and Labrador Legal Aid Commission, which is not dealt with in this Report.

[3] The Department extended the time for responding to the request pursuant to section 16 of the *ATIPPA* and responded to the request on February 14, 2011 by granting partial access and severing certain information under section 20 (policy advice or recommendations), section 21 (legal advice), section 23 (disclosure harmful to intergovernmental relations or negotiations), section 27 (disclosure

harmful to business interests of a third party), and section 30 (disclosure of personal information) of the *ATIPPA*.

[4] In a Request for Review dated March 1, 2011 and received in this Office on that date, the Applicant asked for a review of the decisions made by the Department.

[5] During the informal resolution process the Department agreed to release additional records to the Applicant. Efforts by an Analyst from this Office to facilitate an informal resolution were unsuccessful and by letters dated July 23, 2012 the parties were advised that the Request for Review had been referred for formal investigation as per section 46(2) of the *ATIPPA*. As part of the formal investigation process and in accordance with section 47 of the *ATIPPA*, both parties were given the opportunity to provide written submissions to this Office.

II PUBLIC BODY'S SUBMISSION

[6] The Department's submission is set out in correspondence dated September 7, 2012.

[7] In its submission, the Department commented on the duty to assist set out in section 9:

> *The Department of Justice submits that it has exceeded its duty to assist under section 9 of ATIPPA with respect to the applicant. As evidenced by the attached correspondence, the Justice ATIPP Coordinator communicated with the applicant on several occasions regarding the specifics of the request. For example,* [Name of Access and Privacy Coordinator] *who was ATIPP Coordinator at the time, contacted* [the Applicant] *on December 15, 2010 to confirm the exact records requested.*
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> *The Department of Justice has provided the applicant with all responsive records in its custody and control. However, as your office and the applicant are aware, initially some employees mistakenly believed that the Office of the Chief Information Officer (OCIO) was responsible for retrieving electronic records responsive to the request. As a result some of the records were not provided to the applicant in the initial release package. This was not due to an inadequate search, but rather a misunderstanding, and was subsequently rectified. When these additional records were retrieved the ATIPP Coordinator provided them to the applicant as soon as possible.*

[8] In its submission the Department indicated that upon further review it would no longer be relying on section 27 to deny access to any information in the responsive record and would no longer be relying on section 21 in certain instances. In addition, the Department stated that it would release certain information that had been previously withheld under section 30. This additional information was provided to the Applicant by the Department.

[9] The Department pointed out in its submission that during the informal resolution process it agreed to release particular information that had been previously withheld under sections 21, 23, and 27.

[10] The Department stated that in relation to the remaining withheld information "it maintains appropriate use of the exceptions under *ATIPPA*" including section 20, section 21, section 23 and section 30.

III APPLICANT'S SUBMISSION

[11] The Applicant's submission is set out in correspondence dated September 10, 2012, in which the Applicant outlines a series of allegations regarding the conduct of the Department, both in relation to his access request and regarding the Applicant's continuing differences with the Department. In the Introduction section of his submission the Applicant states:

> *Since February of 2011, I have copied your office on hundreds of emails. It is beyond the scope of this email to address all the issues addressed in those emails; however I trust you are aware of what has transpired. Also based on my experience with the Newfoundland and Labrador Department of Justice, I do not believe they will address the outstanding issues. They have in fact had 18 months to do that.*
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> *I can in fact demonstrate that I have been deliberately provided with false information.*
> . . .
> *You are no doubt aware that I made serious allegations against* [a Departmental Employee] *that involved concealment. The information I have received to date, demonstrates conclusively that there was in fact concealment.* [The Departmental Employee] *and others under his authority were responsible for sending the records . . . for redaction.*
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> *. . . Furthermore it was stated that a database wasn't checked, and I have reason to believe this statement was untrue.*

> *Something that you should be very cognizant of is that this is not simply an ATIPP access request. There are very real potential legal consequences for the Government of Newfoundland and Labrador. You have to therefore determine if the position of the Newfoundland and Labrador Department of Justice is because of the ATIPP Act or because of legal implications i.e., liability.*

[12] The Applicant continues his submission by commenting on the information that was redacted by the Department:

> *There were numerous records severed under various sections of the ATIPP Act. For instance, regarding S.30 records, I have absolutely no interest in the identity of third parties; however I believe that I am entitled to the information contained in the records. Very serious sanctions were taken against me as a result of the information contained in these records, and I have a right to determine if the information was accurate and truthful. Furthermore, I need the information in order to demonstrate that actions taken against me were illegal.*
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> *. . . The Newfoundland and Labrador Department of Justice is in fact denying me any information that demonstrates that the department is legally liable.*

[13] The Applicant commented on records that he believes were not provided to him by stating:

> *It is my belief that the Newfoundland and Labrador Department of Justice will not provide the documents in question because on November 19, 1999, Justice deliberately provided false information to the* [public body in another Province].

[14] The Applicant provided with his submission copies of two documents disclosed to him by the Department. The Applicant refers to these documents as "altered documents" and states:

> *The altered documents in the attachment are highly critical and the question is if these documents were acted upon? Was the handwritten information factual or false? On the File Closure Worksheet, does the crossed out information apply to the entire document or just the information on the form to the left? When were these documents altered? Who altered the documents? Why were the records altered? . . .*

[15] The Applicant in his submission referred to specific information and then made the following comment:

> *. . . It is my position that Justice is deliberately providing me with information that is known to be false. I in fact have the correct documents. They were provided under an access request to the* [public body in another Province] *under the Freedom of Information and Protection of Privacy Act.*

[16] The Applicant alleges in his submission that the Department has made a false statement regarding certain missing information:

> *After the initial release package was provided in February of 2011, I contacted* [the Departmental Employee] *and indicated that I believed there was information missing. The information would prove to be critical and it is inconceivable that it was missed.* [The Departmental Employee] *and the individual responsible for copying the information for redaction, were both very familiar with my case. They had in fact just taken action against me in 2010 that the missing information related to.*
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> *On March 8, 2011,* [the Departmental Access and Privacy Coordinator] *emailed me and stated the following:* "[Applicant]*, Please be advised that the Support Enforcement Division has forwarded additional material to the ATIPP Office for review. Some of this material was not provided in the package sent to you as there was a misunderstanding that the Office of the Chief Information Office would retrieve this information. The remaining material was contained on a server that was not searched during the original gathering of records. The department apologizes for this omission and for any inconvenience it may have caused you." This information would have originated with* [the Departmental Employee] *and I believe it was false. It is my understanding that there is a database that was decommissioned in 2001 or early 2002, the SEP database that is currently used, and the database shared with Justice Canada. . . .*

[17] The Applicant as a conclusion to his submission indicated:

> *As I stated in the beginning, it was inappropriate for* [the Departmental Employee] *and others under his authority to be involved in my ATIPP access request without supervision. These individuals had a vested interest in what information I received. The aforementioned issues all involve* [the Departmental Employee].

IV DISCUSSION

[18] The following are the issues to be discussed:

(1) Did the Department of Justice comply with section 9 of the *ATIPPA* (duty to assist applicant)?

(2) Does section 20 (policy advice or recommendations) apply to any of the information withheld by the Department?

(3) Does section 21 (legal advice) apply to any of the information withheld by the Department?

(4) Does section 23 (disclosure harmful to intergovernmental relations or negotiations) apply to any of the information withheld by the Department?

(5) Does section 30 (disclosure of personal information) apply to any of the information withheld by the Department?

(1) Did the Department comply with section 9 of the *ATIPPA* (duty to assist applicant)?

[19] The duty to assist applicants is set out in section 9 of the *ATIPPA* as follows:

> *9. The head of a public body shall make every reasonable effort to assist an applicant in making a request and to respond without delay to an applicant in an open, accurate and complete manner.*

[20] The duty to assist has been discussed in numerous reports from this Office. This duty was summarized in Report A-2009-011 at paragraph 80:

> *[80] The duty to assist, then, may be understood as having three separate components. First, the public body must assist an applicant in the early stages of making a request. Second, it must conduct a reasonable search for the requested records. Third, it must respond to the applicant in an open, accurate and complete manner. . . .*

[21] In Report A-2013-002, I indicated what is meant by a reasonable search at paragraph 11, as follows:

> *[11] A reasonable search, as also defined in Ontario Order M-909 and accepted in past Reports from this Office, is one conducted "by knowledgeable staff in locations where the records might reasonably be located." . . .*

[22] I discussed the standard to be met by a public body when conducting a search in Report A-2013-002 at paragraph 10:

> [10] . . . *It has been widely accepted by this Office and other Commissioners across the country that the standard against which the duty to assist is measured is reasonableness, not perfection, and the public body bears the burden of proving that the duty to assist has been fulfilled. However, it may be the case that on any specific issue, the burden of proof of a particular proposition may rest with the party that is asserting it. In Ontario Order M-909, the Inquiry Officer commented that:*
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>> *Although an appellant will rarely be in a position to indicate precisely which records have not been identified in an institution's response to a request, the appellant must, nevertheless, provide a reasonable basis for concluding that such records may, in fact, exist.*

[23] The first component of the duty to assist dealing with the requirement that a public body assist an applicant in the early stages of making a request was discussed in Report 2007-007 at paragraph 9:

> *[9] The ATIPPA Policy and Procedures Manual, produced by the Access to Information and Protection of Privacy Coordinating Office with the Provincial Department of Justice (the "Manual") provides a useful summary of section 9. At section 3.3 the Manual states in part that*
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> > *The duty to assist the applicant is an important, underlying provision of the Act. It is a statutory duty throughout the request process, but it is critical during the applicant's initial contact with the public body. The public body, through its Access and Privacy Coordinator, should attempt to develop a working relationship with the applicant in order to better understand the applicant's wishes or needs, and to ensure that he or she understands the process.*

[24] The Department points out in its submission that there is correspondence that demonstrates that its Access and Privacy Coordinator communicated with the Applicant on several occasions.

[25] A review of the correspondence between the Department's Access and Privacy Coordinator (as well as other Departmental employees) and the Applicant indicates that there were numerous e-mails exchanged dealing with clarification of the records being requested and the Applicant's position that there were records with which he was not provided. I also note that the Department agreed to waive the $5.00 application fee for the access request. In addition, at the Applicant's request, the Department sent the Applicant one particular record prior to the release of the bulk of the records on February 14, 2011.

[26] There are several e-mails between the Applicant and the Department's Access and Privacy Coordinator dealing with how the records were to be provided to the Applicant. The Applicant requested that the records be sent to him electronically. The Department agreed to do this and because of the limited capacity of the Applicant's e-mail account the records were sent in several e-mails with PDF attachments of restricted size.

[27] Having reviewed the correspondence between the Applicant and the Department, I am satisfied that the Department assisted the Applicant in the early stages of the process and attempted to develop a working relationship with the Applicant, thus fulfilling the first component of the duty to assist.

[28] The second component of the duty to assist requires the Department to conduct a reasonable search for the requested records. The Applicant has stated on many occasions and maintains in his submission that the Department is not providing him with all records responsive to his request. He

alleges that records are being withheld by the Department because these records would establish his belief that the Department is "legally liable". I have reviewed the correspondence between the Applicant and the Department (which amount to, as the Applicant has indicated in his submission, "hundreds of emails") and all the circumstances of this matter. In my opinion, there is no evidence that the Department is deliberately withholding responsive records from the Applicant. On the contrary, the voluminous correspondence between the Applicant and the Department demonstrates that the Department has conducted several additional searches for records at the Applicant's request and has provided the Applicant with further records (some of which may not have been strictly covered by the wording of the Applicant's initial access request).

[29] The Applicant specifically alleges that the Department was not being truthful when it provided the explanation regarding the additional records "contained on a server that was not searched during the original gathering of records". The Department subsequently provided these records to the Applicant, gave an explanation as to why they were not initially provided and apologized to the Applicant, but in the opinion of the Applicant this explanation "would have originated with [the Departmental Employee] and I believe it was false". In my view, there is no evidence to indicate that the failure to provide these additional records was anything more than a misunderstanding on the part of the Department. There is nothing to demonstrate that the Department was deliberately withholding these records from the Applicant. Therefore, I accept the Department's reason for the initial failure to provide the records.

[30] The Applicant also takes issue with the fact that the Departmental employee against whom he has made "serious allegations" was involved in his access request. My review of the circumstances of this matter reveals that it was necessary for this Departmental employee to be involved in the access request in order to ensure that there was a search conducted "by knowledgeable staff in locations where the records might reasonably be located".

[31] Having reviewed all of the circumstances of this matter, it is my determination that the Department conducted a reasonable search for the records responsive to the Applicant's access request, thereby fulfilling the second component of the duty to assist.

[32] In relation to the third component of the duty to assist, the Applicant has made allegations suggesting that the Department has not responded to him in an "open, accurate and complete

manner". The Applicant has alleged that the Department has deliberately provided him with false information and has altered documents. The Applicant has not offered evidence to demonstrate that any of the information in the records provided is false. In relation to his allegation that records have been altered, the Applicant has attached to his written submission two documents which in his opinion have been altered. Both these documents contain a line drawn through information which is still clearly legible and also contain handwritten notations. Neither of these documents, in my opinion, can be said to have been falsely altered such that information contained in them has been changed or disguised.

[33] I note that there were frequent e-mail exchanges between the Applicant and the Department's Access and Privacy Coordinator throughout the entire process of this matter: in the early stages of the process, during the course of the Department's responding to the access request, and following the filing of the Request for Review with this Office (both throughout the informal resolution process and during the formal investigation stage). There is nothing in these e-mail interactions that indicates that the Department responded other than in an "open, accurate and complete manner" as required by section 9.

[34] In the circumstances described, it is my view that the Department has fulfilled the duty to assist imposed upon it by section 9 of the *ATIPPA*.

[35] I will note here that the Applicant in his frequent correspondence with the Department and with this Office often confuses the obligations imposed on a public body in relation to responding to an access request with his perception that the Department has not treated him properly in relation to other matters. This Report deals with the manner in which the Department responded to the access request submitted to it by the Applicant. It does not deal with or make any comment on any other relations between the Applicant and the Department.

(2) Does section 20 (policy advice or recommendations) apply to any of the information withheld by the Department?

[36] The Request for Review in this matter was received in this Office on March 1, 2011. Therefore, the version of section 20 which is applicable is the provision as it existed before it was amended by *Bill 29* on June 27, 2012. This former provision read in part as follows:

20. (1) The head of a public body may refuse to disclose to an applicant information that would reveal

(a) advice or recommendations developed by or for a public body or a minister; or

(b) draft legislation or regulations.

(2) The head of a public body shall not refuse to disclose under subsection (1)

(a) factual material;

[37] I discussed the meaning of the phrase "advice or recommendations" in Report A-2009-007 at paragraph 14, as follows:

[14] . . . I have reached the following conclusions on the meaning of the phrase "advice or recommendations" found in section 20(1)(a):

1. *The statement by my predecessor in Report 2005-005 that "the use of the terms 'advice' and 'recommendations' . . . is meant to allow public bodies to protect a suggested course of action" does not preclude giving the two words related but distinct meanings such that section 20(1)(a) protects from disclosure more than "a suggested course of action."*
2. *The term "advice or recommendations" must be understood in light of the context and purpose of the ATIPPA. Section 3(1) provides that one of the purposes of the ATIPPA is to give "the public a right of access to records" with "limited exceptions to the right of access."*
3. *The words "advice" and "recommendations" have similar but distinct meanings. The term "recommendations" relates to a suggested course of action. "Advice" relates to an expression of opinion on policy-related matters such as when a public official identifies a matter for decision and sets out the options, without reaching a conclusion as to how the matter should be decided or which of the options should be selected.*
4. *Neither "advice" nor "recommendations" encompasses factual material.*

[38] I have reviewed the instances where the Department has claimed the section 20 exception to disclosure and I have determined that in all but one occurrence the information constitutes advice or recommendations. The redacted information in the one exceptional case contains factual information and a request for advice but does not include advice or recommendations. Section 20(2)(a) provides that a public body shall not refuse to disclose "factual material". Because this severed information does not contain advice or recommendations, the Department is not entitled to rely on section 20 to deny access to it.

(3) Does section 21 apply to any of the information withheld by the Department?

[39] Section 21 sets out the solicitor and client privilege exception to disclosure as follows:

> *21. The head of a public body may refuse to disclose to an applicant information*
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> *(a) that is subject to solicitor and client privilege; or*
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> *(b) that would disclose legal opinions provided to a public body by a law officer of the Crown.*

[40] I discussed the requirements to be met for a valid claim of solicitor and client privilege in Report A-2012-006 at paragraph 20:

> *[20] . . . this Office has adopted a three-part test for determining when information is protected by solicitor and client privilege. In previous Reports this office has relied on the test set out by the Supreme Court of Canada in Solosky v. The Queen, which requires that there must be:*
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> *(i) a communication between solicitor and client;*
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> *(ii) which entails the seeking or giving of legal advice; and*
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> *(iii) which is intended to be confidential by the parties.*

[41] As indicated earlier, the Department has released certain information that was previously withheld under section 21 but maintains that other information is subject to solicitor and client privilege and access is being denied to that information in accordance with section 21. *Bill 29* removed the ability of this Office to review claims of solicitor and client privilege. As mentioned earlier, this Review has been conducted using the *ATIPPA* as it was prior to the *Bill 29* amendments because the Request for Review was filed prior to those amendments coming into force. Therefore, I have reviewed all the information for which section 21 has been claimed and have determined that it meets the test set out in *Solosky v. The Queen*. Thus, this information has been properly withheld under section 21.

(4) Does section 23 (disclosure harmful to intergovernmental relations or negotiations) apply to any of the information withheld by the Department?

[42] Section 23 deals with disclosures harmful to intergovernmental relations or negotiations as follows:

> *23. (1) The head of a public body may refuse to disclose information to an applicant if the disclosure could reasonably be expected to*
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> *(a) harm the conduct by the government of the province of relations between that government and the following or their agencies:*
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> > *(i) the government of Canada or a province,*
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> > *(ii) the council of a local government body,*
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> > *(iii) the government of a foreign state,*
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> > *(iv) an international organization of states, or*
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> > *(v) the Nunatsiavut government; or*
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> *(b) reveal information received in confidence from a government, council or organization listed in paragraph (a) or their agencies.*

[43] I discussed the section 23 exception to disclosure in Report A-2010-002 at paragraphs 68 and 69, as follows:

> *[68] Section 23 contains two distinct exceptions to disclosure. The first, paragraph 23(1)(a), requires the public body to prove a reasonable expectation of probable harm to a specific intergovernmental relationship. The second, paragraph 23(1)(b), requires the public body to show that the information in question was "received in confidence" but does not require proof of harm. These two exceptions have been discussed in detail in previous reports (see for example Reports 2005-002, 2006-006 and A-2008-012). I will not repeat that discussion in the present Report because the Department has not taken any of the necessary steps to demonstrate that section 23 applies.*
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> *[69] In each file, subsection 23(1) is cited in relation to a few partial lines of text on one page of that record. The Department has not stated whether it is paragraph 23(1)(a) or paragraph 23(1)(b) that is referred to, and it has made no argument in its written submissions in support of it. After reviewing the record, it is not evident to me how either of those paragraphs might apply. Accordingly, I conclude that the Department has not met the burden imposed on it by the ATIPPA and consequently it cannot rely on section 23 to withhold any information.*

[44] I recently discussed the burden of proof required when a public body relies on section 23 (and also section 24) to deny access to information. In Report A-2013-015 at paragraphs 10, 13 and 14, I stated:

> *[10] As my predecessor discussed in Report 2007-004, the ATIPPA does not set out a level or standard of proof that has to be met by a public body under subsection 64(1) in order to prove that an applicant has no right of access to a record. After a review of reports from other jurisdictions and relevant case law from the courts, our Office has concluded that the standard to be met by the public body under this section is the civil standard of proof. This means that the public body must prove on a balance of probabilities (in other words, that it is more likely than not) that the applicant has no right to the record or part of the record.*
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> . . .
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> *[13] Further both sections 23(1) and 24(1) use the phrase "could reasonably be expected". The meaning of this phrase in relation to causing harm was explored extensively in Report A-2013-008. While only section 23(1)(a) requires harm, the use of the phrase "could reasonably be expected" in sections 23(1)(b) and 24(1) likewise requires detailed and convincing evidence to show why the exception applies and thus, the information withheld.*
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> *[14] Given the lack of evidence put forward . . . to support the application of either sections 23 and 24 to the requested information, I will not speculate about how or why these sections may apply. . . . Given the fact that there was no submission at all . . . to support its position, it is clear that the College has not met the burden of proof.*

[45] Likewise in this Request for Review, the Department has provided no evidence nor has it made any submission as to which of either section 23(1)(a) or section 23(1)(b) is applicable. The Department has not articulated what harm "could reasonably be expected" nor has it provided any evidence that the information was "received in confidence". Given the lack of evidence and argument in relation to section 23, I must conclude that the Department has not met the required burden of proof and is, therefore, not entitled to rely on section 23 to deny access to the information in question.

(5) Does section 30 (disclosure of personal information) apply to any of the information withheld by the Department?

[46] As noted above, the Request for Review in this matter was received in this Office on March 1, 2011. Consequently, the version of section 30 which is applicable is the provision as it existed before it was amended by *Bill 29* on June 27, 2012. The former section 30 prohibited the disclosure of personal information as follows:

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

(2) Subsection (1) does not apply where

(a) the applicant is the individual to whom the information relates;

(b) the third party to whom the information relates has, in writing, consented to or requested the disclosure;

(c) there are compelling circumstances affecting a person's health or safety and notice of disclosure is mailed to the last known address of the third party to whom the information relates;

(d) an Act or regulation of the province or Canada authorizes the disclosure;

(e) the disclosure is for a research or statistical purpose and is in accordance with section 41;

(f) the information is about a third party's position, functions or remuneration as an officer, employee or member of a public body or as a member of a minister's staff;

(g) the disclosure reveals financial and other details of a contract to supply goods or services to a public body;

(h) the disclosure reveals the opinions or views of a third party given in the course of performing services for a public body, except where they are given in respect of another individual;

(i) public access to the information is provided under the Financial Administration Act;

(j) the information is about expenses incurred by a third party while travelling at the expense of a public body;

(k) the disclosure reveals details of a licence, permit or a similar discretionary benefit granted to a third party by a public body, not including personal information supplied in support of the application for the benefit; or

(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 social assistance under the Social Assistance Act or to the determination of assistance levels.

[47] In the circumstances of this Request for Review it is necessary to look closely at the wording of section 30(1). In particular, it is important to determine what it means "to <u>disclose</u> personal information to an applicant". I discussed the meaning of "disclosure" in Report A-2009-002 at paragraphs 79 to 80:

> *[79] Additionally, upon close examination of the wording of section 30(1), it is my opinion that providing personal information to an Applicant where there is clear and objective evidence (for example, because the information was originally provided by the Applicant) that the information and the person to whom it pertains is already known to the Applicant is not a "disclosure". Therefore, there is no violation of section 30(1) in cases such as these. In Report 2007-003, my predecessor stated as follows:*
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> > *[136] Another point that I believe to be relevant to the case at hand deals with the specific language of section 30(1). This provision states that a public body shall not "disclose" personal information to an Applicant. Black's Law Dictionary, Eighth Edition, defines disclosure as:*
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> > > ***1. The act or process of making known something that was previously unknown; a revelation of facts…2. The mandatory divulging of information to a litigation opponent according to procedural rules…***
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> > *[137] While the second part of this definition defines the term in its legal context, the first part provides a more general understanding of how the term should be interpreted. The Concise Oxford English Dictionary, 10th Edition, provides a similar definition: "make (secret or new information) known."* ***A necessary component of a disclosure of information, therefore, is that the information was not previously known to the intended recipient. By association, I do not believe that providing personal information to an Applicant where that information is already known to the Applicant, or that is readily available to the Applicant, is actually a disclosure as anticipated by section 30(1)…***
>
> *[80] I agree with this statement, however, I am cognizant of the fact that it is often difficult to know or to make a judgment with respect to exactly what information an applicant is aware of. Therefore, it is my opinion that the personal information of another individual can only be released to an applicant where there is objective, concrete, and clear evidence that the information is already known to an applicant, or is readily available to an applicant. In this case, the applicant has provided the information to the public body and thus already knows the information and the individual(s) involved. . . .*
>
> [Emphasis in original]

[48] Related to the discussion of when there is a disclosure within the meaning of section 30(1) is the principle of absurd result. In Report A-2009-002 at paragraph 76 I referred to the absurd result

principle in relation to the application of section 30(1) and quoted from Ontario Order M-444, as follows:

> *. . . However, it is an established principle of statutory interpretation that an absurd result, or one which contradicts the purposes of the statute in which it is found, is not a proper implementation of the legislature's intention. In this case, applying the presumption to deny access to information which the appellant provided to the Police in the first place is, in my view, a manifestly absurd result. . . .*

[49] There are numerous reports and orders of Information and Privacy Commissioners from other jurisdictions in Canada that have applied the absurd result principle to allow applicants access to information that is clearly within their knowledge.

[50] In Order PO-3073 the Ontario Information and Privacy Commissioner dealt with an access request in which the applicant sought access to records compiled during an investigation of her daughter's death. The Ontario Commissioner stated at paragraphs 69 and 72 as follows:

> *[69] Despite my findings above with respect to the application of sections 21(1) and 49(b), my review of the information at issue reveals that the absurd result principle might apply to at least some of the remaining personal information. This principle states that where the requester originally supplied the information or the requester is otherwise aware of it the information may be found not to be exempt because to find otherwise would be absurd and inconsistent with the purpose of the exemption.*
>
> . . .
>
> *[72] In previous orders, this office has emphasized that the absurd result principle ought not to be applied beyond the clearest of cases. In my view, with respect to some of the information that that has been at issue, it is clear that the absurd result principle should be applied. . . .*

[51] The Ontario Commissioner also applied the absurd result principle in Order PO-2582, which dealt with an access request to Ontario's Chief Firearms Office for all information with respect to the requester. The Commissioner commented on the principle at page 13, as follows:

> *Where the requester originally supplied the information, or the requester is otherwise aware of it, the information may be found not exempt under section 49(b), because to find otherwise would be absurd and inconsistent with the purpose of the exemption [Orders M-444, MO-1323].*
>
> *The absurd result principle has been applied where, for example:*
>
> > *the requester sought access to his or her own witness statement [Orders M-444, M-451]*

> *the requester was present when the information was provided to the institution [Orders M-444, P-1414]*
>
> *the information is clearly within the requester's knowledge [Orders MO-1196, PO-1679, MO-1755]*

[52] The Nova Scotia Freedom of Information and Protection of Privacy Review Officer relied on Ontario Order PO-2582 in her Review Report FI-07-72, in which she stated at page 18:

> *The final issue is with respect to the information in the Record that was supplied to the Society by the Applicant. The following Ontario case under the equivalent exemption provides authority with respect to information clearly within the Applicant's knowledge or that has been supplied to him or her . . .*

[53] Following her quotation of the above passage from Ontario Order PO-2582, the Nova Scotia Review Officer stated at page 18:

> *Self-generated information already known to the Applicant should not be severed from the Record as to do so would lead to an absurd result.*

[54] In the responsive records that are the subject matter of this Request for Review there is much information that has been severed under section 30 which would clearly be within the knowledge of the Applicant, including:

1. The name of a creditor to whom the Applicant owes money,
2. Information contained in correspondence sent to the Applicant or in correspondence written by the Applicant,
3. The name of the other party in a court proceeding in which the Applicant was a party,
4. Information contained in a separation agreement to which the Applicant was a party and which agreement was signed by the Applicant,
5. Information in a form completed by and signed by the Applicant,
6. Information in an affidavit sworn to by the Applicant,
7. Information that is contained in a letter summarizing evidence that was provided by the Applicant as a witness in a court proceeding, and
8. Information that is about the Applicant.

[55] Having reviewed the information redacted under section 30 and the circumstances of this Request for Review, I have determined that "there is objective, concrete, and clear evidence" that certain information severed in reliance on section 30 is already known to the Applicant and the release of such information would not constitute a disclosure of personal information within the meaning of section 30. Because the Applicant is clearly aware of this information, to withhold it would lead to an absurd result. Therefore, this information cannot be withheld under section 30.

[56] In addition, there is certain information that has been severed in reliance on section 30 which does not fit the definition of personal information set out in section 2(o) which defines personal information as "recorded information about an identifiable individual". This information should be released to the Applicant.

[57] Therefore, there is information severed under section 30 that I will recommend for release to the Applicant.

V CONCLUSION

[58] I have concluded that the Department has fulfilled the duty to assist imposed upon it by section 9 of the *ATIPPA*.

[59] In relation to the information severed in accordance with section 20 as advice or recommendations, I have determined that in all but one instance the Department has properly relied on section 20.

[60] I have reached the conclusion that the Department has appropriately applied section 21 to sever information.

[61] I have determined that the Department is not entitled to rely on section 23 to deny access to the information severed under that section.

[62] I have concluded that there is information severed by the Department in accordance with section 30 that will be recommended for release to the Applicant.

VI RECOMMENDATIONS

[63] Under the authority of section 49(1) of the *ATIPPA*, I recommend that the Department of Justice release to the Applicant the information highlighted on a copy of portions of the record that are enclosed with this Report.

[64] Under the authority of section 50 of the *ATIPPA*, I direct the head of the Department to write to this Office and to the Applicant within 15 days after receiving this Report to indicate the final decision of the Department with respect to this Report.

[65] Please note that within 30 days of receiving the decision of the Department 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*.

[66] Dated at St. John's, in the Province of Newfoundland and Labrador, this 5th day of March, 2014.

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