OFFICE OF THE INFORMATION AND PRIVACY COMMISSIONER
NEWFOUNDLAND AND LABRADOR

Report A-2016-014

June 23, 2016

Labrador-Grenfell Health

Summary: An Applicant requested from Labrador-Grenfell Health the name, job title and taxable income for the tax year 2015 for all employees who earned more than $100,000. Labrador-Grenfell Health sent all those employees a third party notice in accordance with section 19(5). A number of those employees filed third party complaints with this Office in accordance with section 42(3), requesting that their personal information not be released to the Applicant. The Commissioner found that the deeming provision in section 40(2)(f) applied to the requested information. Therefore, the disclosure of the requested information would not be an unreasonable invasion of the personal privacy of the employees. The Commissioner recommended release of the requested information.

Statutes Cited: *Access to Information and Protection of Privacy Act, 2015*, S.N.L. 2015, c. A-1.2, ss. 2(cc), 19(5), 19(6), 39, 40(1), 40(2), 42(4) and 43; *Access to Information Act,* R.S.C. 1985, c. A-1; *Freedom of Information and Protection of Privacy Act*, S.N.S. 1993, c. 5; *Freedom of Information and Protection of Privacy Act,* R.S.P.E.I. 1988, c. F-15.01; *Freedom of Information and Protection of Privacy Act,* R.S.A. 2000, c. F-25; *Freedom of Information and Protection of Privacy Act,* R.S.B.C. 1996, c. 165; *Right to Information and Protection of Privacy Act*, S.N.B. 2009, c. R-10.6.

Authorities Relied On: Prince Edward Island OIPC Order No. 03-004; Alberta OIPC Order 2001-020 and Order F2009-046; British Columbia OIPC Order F14-41 and Decision F06-10; *Merck Frosst Canada Ltd v. Canada (Health)* [2012] 1 S.C.R. 23; *Dickie v. Nova Scotia (Department of Health)*, 1999 CanLII 7239 (NS CA); *French v. Dalhousie University [2003] N.S.J. No. 44, (N.S.C.A.); Hans v. St. Thomas University,* 2016 NBQB 49 (CanLII); *MacNeil v. Privacy Commissioner*, 2004 PESCTD 69 (CanLII).

Business Interests of a Third Party (Section 39), found at:
http://oipc.nl.ca/pdfs/BusinessInterestsofaThirdPartySection39.pdf

Report of the 2014 Statutory Committee; Access to Information and Protection of Privacy Act, Newfoundland and Labrador, Volume II: Full Report, March 2015, found at:
http://ope.gov.nl.ca/publications/pdf/ATIPPA_Report_Vol2.pdf

I BACKGROUND

[1] Pursuant to the *Access to Information and Protection of Privacy Act , 2015* (the *ATIPPA, 2015*) an Applicant submitted an access to information request as follows:

> *The name, job title, and corresponding total taxable income for the 2015 tax year for all Labrador-Grenfell Health employees earning more than $100,000.*

[2] Pursuant to section 19(5) of the *ATIPPA, 2015*, Labrador-Grenfell Health sent a notice to all its employees included in the request. This notice advised the employees that the requested information would be released immediately to the Applicant but without the employee's name. The notice further indicated that the name of the employee would afterword be released unless within 15 business days the employee made a complaint to this Office or appealed to the Trial Division of the Supreme Court of Newfoundland and Labrador.

[3] In accordance with section 19(6) of the *ATIPPA, 2015*, the Applicant was advised that the responsive records would be released to him but that the employees involved would have 15 days to either file a complaint with our Office or appeal to the Trial Division. The Applicant was advised that if the Third Party employees did not file a complaint or an appeal the information would be released.

[4] In response to the notice sent to them by Labrador-Grenfell Health, a number of employees filed access complaints with our Office in accordance with section 42(3). This report deals with those third party access complaints. There were third party notices under section 19(5) sent by four other public bodies in relation to similar access requests made by the Applicant. In response to those third party notices this Office received other third party access complaints. Those complaints form the basis of four other similar reports that I am releasing simultaneously on this date.

[5] The issue in this Report is whether the disclosure of the name of each Third Party employee along with the other requested information would be an unreasonable invasion of a third party's personal privacy in accordance with section 40(1) of the *ATIPPA, 2015*.

II PUBLIC BODY'S POSITION

[6] Labrador-Grenfell Health did not outline its position regarding the release of the information but given that it sent out notices under section 19(5) its position can be inferred. A notice under section 19(5) is only sent where "the head of a public body decides to grant access to a record or part of a record." Given that Labrador-Grenfell Health has made a decision to grant access, then it is to be presumed that Labrador-Grenfell Health has concluded that section 40(1) is not applicable and the disclosure of the personal information would not be an unreasonable invasion of a third party's personal privacy. If Labrador-Grenfell Health had concluded that the information must be withheld then it need not have issued any notification to third parties but instead simply denied the Applicant access to the information.

III POSITIONS OF THIRD PARTIES

[7] The Third Parties who filed Complaints in response to the Third Party notices sent by the public bodies put forth various reasons as to why their names should not be released, including the following:

(a) There would be a risk of identity theft if their name, job title, and corresponding total taxable income were released;

(b) The amount of taxable income for 2015 does not reflect accurately their actual yearly salary because in the tax year 2015 the Third Party employee was in receipt of payments in addition to the regular salary, for such things as severance pay, overtime pay, retroactive pay, or deferred salary;

(c) The Third Party lives in a small community and if the amount of annual salary is known there is a risk of being the target of theft, vandalism, and solicitations from those looking for money;

(d) The Third Party has a therapeutic relationship with clients and revealing income could interfere with that relationship;

(e) The Third Party has concerns for family members who could become subject to ridicule and scorn and the target of thieves;

(f) The Third Party has concern for family members who live in a country where terrorists have been known to kidnap people and demand ransom. This risk would be increased if the Third Party's income was made known;

(g) The Third Party did not want income to become known to a former spouse;

(h) The Third Party is concerned that release of income would create animosity with co-workers;

(i) The Third Party stated that income should not be released because the Third Party does not work directly for the public body;

(j) The Third Party has a concern that release of income will affect future applications for employment with different employers;

(k) The Third Party expressed the view that the information being requested is employment history and in accordance with section 40(4)(c) its disclosure is presumed to be an unreasonable invasion of a third party's personal privacy;

(l) The Third Party stated that the Applicant making the access request is entitled to remain anonymous and the Third Party should have the same right;

(m) The Third Party stated that in accordance with section 40(4)(g) the release of the name along with the other information is presumed to be an unreasonable invasion of a third party's personal privacy;

(n) The Third Party expressed the view that section 40(2)(f) provides for the release of a third party's position, function, and remuneration but does not provide for the release of a third party's name;

(o) The Third Party stated that the release of an employee's name is not a useful factor in determining how public money is spent;

(p) The Third Party was a previous victim of stalking and is concerned that release of their name increases the risk of future stalking; and

(q) The Third Party expressed the view that release of the name and income of salaried physicians amounts to discrimination because the name and income of fee-for-service physicians who are paid through MCP is not being released.

IV DECISION

Discussion of Section 19

[8] In order to provide a comprehensive decision in this matter it is necessary to discuss the operation of section 19, which deals with the notification of a third party. The notices sent to the Third Party employees in this case were sent pursuant to section 19(5).

[9] A third party is, pursuant to section 2(cc), a person other than the person who made the access request or a public body. Section 19 deals with notification of third parties for disclosures of information which may be covered by section 39 (Disclosure harmful to business interests of a third party) or by section 40 (Disclosure harmful to personal privacy). The notices sent to the employees in this case in accordance with section 19(5) were in relation to section 40.

[10] The starting point for notification under section 19 is set out in section 19(1) which provides:

> *19. (1) Where the head of a public body intends to grant access to a record or part of a record that the head has reason to believe contains information that might be excepted from disclosure under section 39 or 40, the head shall make every reasonable effort to notify the third party.*

[11] This Office discussed the process of notification under section 19 in a guidance document entitled *Business Interests of a Third Party (Section 39)*, which can be found on our web site. The discussion in that document was in relation to third party notifications for the purpose of section 39, but the process is the same for the notification given in relation to section 40 in the present case.

[12] In the guidance document, there is a discussion of the notification under section 19(1) as follows:

> *A Section 19 notification ONLY comes into play when there is <u>an intention to release</u> because the Public Body is not certain that section 39 is applicable (those records in the "grey area"). These are records for which the public body does not believe it can discharge the burden of proof to withhold under*

> *section 39 but which hold enough of the characteristics of the three parts of the test that they "might" be excepted from disclosure.*
>
> [Emphasis in Original]

[13] As indicated, the process described in the guidance document is the same for giving a notification in relation to section 40. A notification is only given under section 19(1) where the public body is not certain that section 40 is applicable and, as the guidance document states: "Public Bodies may need assistance and input from the affected Third Party in order to effectively determine whether the requirements of section [40] can be met."

[14] The guidance document discusses when there is no requirement to give notice under section 19(1), as follows;

> *Notification of a third party does not occur automatically or just because the requested information fits into one of the categories in section 39(1)(a). If a Public Body is satisfied that section 39 is not applicable the Public Body should release the information and notification to or consultation with the Third Party is not necessary. Likewise, if a Public Body is satisfied that section 39 is applicable, that information can be withheld without notification to the Third Party . . .*

[15] The same process should be followed when the public body is determining whether to give notice under section 19 regarding section 40.

[16] In *Merck Frosst Canada Ltd v. Canada (Health)*, the Supreme Court of Canada discussed a provision similar to subsection 19(1) of *ATIPPA, 2015* found in the federal *Access to Information Act,* which is set out in paragraph 60 of the judgment as follows:

> *27. (1) Where the head of a government institution intends to disclose any record requested under this Act, or any part thereof, that contains or that the head of the institution has reason to believe might contain*
>
> *(a) trade secrets of a third party,*
>
> *(b) information described in paragraph 20(1)(b) that was supplied by a third party, or*
>
> *(c) information the disclosure of which the head of the institution could reasonably foresee might effect a result described in paragraph 20(1)(c) or (d) in respect of a third party, the head of the institution shall, subject to subsection (2), if the third party can reasonably be located, within thirty days after the request is received, give written notice to the third party of*

> *the request and of the fact that the head of the institution intends to disclose the record or part thereof.*

[17] In *Merck Frosst*, the Supreme Court of Canada set out the process to be followed for section 27(1) of the federal *Act* in paragraph 84 as follows:

> *{84] To sum up my conclusions on:*
>
> *(i) With respect to third party information, the institutional head has equally important duties to disclose and not to disclose and must take both duties equally seriously.*
>
> *(ii) The institutional head:*
>
> *should disclose third party information without notice only where the information is clearly subject to disclosure, that is, there is no reason to believe that it is exempt;*
>
> *should refuse to disclose third party information without notice where the information is clearly exempt, that is, where there is no reason to believe that the information is subject to disclosure.*
>
> *(iii) The institutional head must give notice if he or she:*
>
> *- is in doubt about whether the information is exempt, in other words if the case does not fall under the situations set out in point (ii);*

[18] This brings us to section 19(5) of *ATIPPA, 2015*, which becomes operable once the public body has reviewed all of the circumstance (including any input from the Third Party) and has made a decision to grant access to the requested information. Section 19(5) provides as follows:

> *(5) Where the head of a public body decides to grant access to a record or part of a record and the third party does not consent to the disclosure, the head shall inform the third party in writing*
>
> *(a) of the reasons for the decision and the provision of this Act on which the decision is based;*
>
> *(b) of the content of the record or part of the record for which access is to be given;*
>
> *(c) that the applicant will be given access to the record or part of the record unless the third party, not later than 15 business days after the head of the public body informs the third party of this decision,*

> *files a complaint with the commissioner under section 42 or appeals directly to the Trial Division under section 53 ; and*
>
> *(d) how to file a complaint or pursue an appeal.*
>
> [Emphasis added]

[19] When a public body has decided to grant access and gives notification to a third party, it is also required to give the access to information applicant a notice in accordance with section 19(5), which provides as follows:

> *(6) Where the head of a public body decides to grant access and the third party does not consent to the disclosure, the head shall, in a final response to an applicant, state that the applicant will be given access to the record or part of the record on the completion of the period of 15 business days referred to in subsection (5), unless a third party files a complaint with the commissioner under section 42 or appeals directly to the Trial Division under section 53.*

[20] In the present case, Labrador-Grenfell Health has given notice to the employees as third parties in accordance with section 19(5). Therefore, it has already decided that the information is not excepted from disclosure under section 40 and was required to notify the Applicant that the information will be released unless the third parties filed a complaint or an appeal.

Discussion of Section 40(2) – Deeming Provision

[21] With that background on section 19 in mind, I will discuss the main issue in this Report, which is the interpretation of section 40 of the *ATIPPA, 2015* and how that interpretation is to be applied in relation to the information requested by the Applicant. Section 40 provides as follows:

> *40. (1) The head of a public body shall refuse to disclose personal information to an applicant where the disclosure would be an unreasonable invasion of a third party's personal privacy.*
>
> *(2) A disclosure of personal information is not an unreasonable invasion of a third party's personal privacy 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 given in the form appropriate in the circumstances to the third party to whom the information relates;

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

(e) the disclosure is for a research or statistical purpose and is in accordance with section 70 ;

(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;

(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 income or employment support levels; or

(m) the disclosure is not contrary to the public interest as described in subsection (3) and reveals only the following personal information about a third party:

(i) attendance at or participation in a public event or activity related to a public body, including a graduation ceremony, sporting event, cultural program or club, or field trip, or

(ii) receipt of an honour or award granted by or through a public body.

(3) The disclosure of personal information under paragraph (2)(m) is an unreasonable invasion of personal privacy where the third party whom the information is about has requested that the information not be disclosed.

(4) A disclosure of personal information is presumed to be an unreasonable invasion of a third party's personal privacy where

(a) the personal information relates to a medical, psychiatric or psychological history, diagnosis, condition, treatment or evaluation;

(b) the personal information is an identifiable part of a law enforcement record, except to the extent that the disclosure is necessary to dispose of the law enforcement matter or to continue an investigation;

(c) the personal information relates to employment or educational history;

(d) the personal information was collected on a tax return or gathered for the purpose of collecting a tax;

(e) the personal information consists of an individual's bank account information or credit card information;

(f) the personal information consists of personal recommendations or evaluations, character references or personnel evaluations;

(g) the personal information consists of the third party's name where

(i) it appears with other personal information about the third party, or

(ii) the disclosure of the name itself would reveal personal information about the third party; or

> *(h) the personal information indicates the third party's racial or ethnic origin or religious or political beliefs or associations.*
>
> *(5) In determining under subsections (1) and (4) whether a disclosure of personal information constitutes an unreasonable invasion of a third party's personal privacy, the head of a public body shall consider all the relevant circumstances, including whether*
>
> *(a) the disclosure is desirable for the purpose of subjecting the activities of the province or a public body to public scrutiny;*
>
> *(b) the disclosure is likely to promote public health and safety or the protection of the environment;*
>
> *(c) the personal information is relevant to a fair determination of the applicant's rights;*
>
> *(d) the disclosure will assist in researching or validating the claims, disputes or grievances of aboriginal people;*
>
> *(e) the third party will be exposed unfairly to financial or other harm;*
>
> *(f) the personal information has been supplied in confidence;*
>
> *(g) the personal information is likely to be inaccurate or unreliable;*
>
> *(h) the disclosure may unfairly damage the reputation of a person referred to in the record requested by the applicant;*
>
> *(i) the personal information was originally provided to the applicant; and*
>
> *(j) the information is about a deceased person and, if so, whether the length of time the person has been deceased indicates the disclosure is not an unreasonable invasion of the deceased person's personal privacy.*

[22] The interpretation and application of section 40(2)(f) is relevant in determining whether the names of the employees involved should be released to the Applicant. Other Canadian jurisdictions have a similar provision within their respective legislation. A review of the analysis and findings of these similar deeming provisions will guide my interpretation.

[23] The Nova Scotia Court of Appeal discussed section 20(4)(e) of that province's *Freedom of Information and Protection of Privacy Act* in *Dickie v. Nova Scotia (Department of Health)*. The section considered in *Dickie* is comparable to section 40(2)(f) of the *ATIPPA, 2015,* as can be seen in the reference by Justice Cromwell in *Dickie*:

> *[14] Subsection 20(4) sets out circumstances which are <u>not</u> to be considered unreasonable invasions. These include:*
>
> > *(4) A disclosure of personal information is not an unreasonable invasion of a third party's personal privacy if*
> > *.....*
> >
> > *(e) the information is about the 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;*
>
> [Emphasis in original]

[24] Justice Cromwell outlined the process for applying section 20 of the Nova Scotia *Act* as follows:

> *[15] As noted earlier, the application of the Act in this case involves three steps. It is helpful to review them in more detail.*
>
> *[16] The first step is to determine whether the requested information is personal information within the meaning of the Act. . . . As noted above, personal information is defined in the Statute and so this step involves applying the statutory definition to the particular record under consideration.*
>
> *[17] The second step is to determine whether disclosure of the personal information would constitute an unreasonable invasion of privacy. All relevant circumstances must be considered and, in particular, the matters set out in s. 20(2). At the second stage, the presumption under s. 20(3) may come into play. If the information falls into one of those categories, there should be no disclosure unless the presumption of unreasonable invasion set up by that sub-section is rebutted having regard to all the relevant circumstances including those set out in s. 20(2). On the other side of the coin, the list of situations which do not constitute unreasonable invasions may also come into play at the second step. As noted, s. 20(4) sets out a list of such circumstances. <u>This subsection does not set up a rebuttable presumption but is instead a deeming provision.</u> In other words, if it applies, the case is governed by its operation without regard to countervailing arguments under s. 20(2). The third step is reached if a s. 20(3) presumption operates and s. 20(4) does not apply. In those situations, it must be determined if the presumption is rebutted.*

[Emphasis added]

[25] I adopt the approach of Justice Cromwell in *Dickie*. I find that the information requested by the Applicant contains the personal information of the employees of Labrador-Grenfell Health. Additionally, I find that the personal information is covered by section 40(2)(f) in that "the information is about a third party's position, functions or remuneration as an … employee" of Labrador-Grenfell Health. Following the approach of Justice Cromwell, I find that the disclosure of the requested information would not constitute an unreasonable invasion of the privacy of the employees involved because it is deemed not to be so by section 40(2)(f).

[26] In Order F14-41, the Information and Privacy Commissioner for British Columbia has also dealt with its deeming provision in section 22(4)(e) of that provinces Freedom of Information and Protection of Privacy Act. The deeming provision is set out at paragraph 9 of the Order:

> *[9] The relevant portions of s. 22 of FIPPA for this inquiry state:*
>
> > *22(1) The head of a public body must refuse to disclose personal information to an applicant if the disclosure would be an unreasonable invasion of a third party's personal privacy.*
> > *. . .*
> >
> > *(4) A disclosure of personal information is not an unreasonable invasion of a third party's personal privacy if*
> > *…*
> > *(e) the information is about the 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,*

[27] An important aspect of British Columbia Order F14-41 is that the access request under consideration was for records about an employee of the public service who was named in the request. The British Columbia Commissioner noted the significance of this fact at paragraph 36 as follows:

> *[36] In Order F12-12, Adjudicator Boies Parker observed that one of the ways previous orders have dealt with the tension between ss. 22(4)(e) and 22(3)(d) described in Order F08-04 has been to require the release of information about the activities of public employees, while requiring the withholding of information that would identify those specific employees. However, that would not work in this case because the request is about a specific named employee, so it will be clear to the applicant that any information released relates to the employee named in the*

applicants request for information. Further, notwithstanding the way the tension between ss. 22(4)(e) and 22(3)(d) can be addressed as described above, releasing information about an individual employee is not inconsistent with the correct operation of s. 22(4)(e), which contemplates the release of personal information. As stated in Order 00-1325, s. 22(4)(e) must be given its full effect:

> *The very essence of s. 22(4) is the fact that it is, statutorily, not an unreasonable invasion of a third party's personal privacy if the information is about that person's position, functions or remuneration as an officer or employee of a public body. "Personal information" is, by definition, "recorded information about an identifiable individual".*
>
> *To say that s. 22(4)(e) covers general information regarding public service job descriptions and qualifications but that it does not extend to information about position, functions or remuneration "which is private to a public servant" is, with respect, to rob s. 22(4)(e) of its efficacy.*
>
> *Section 22(4)(e) deals with information that by definition includes private information of a public servant relating to the listed subjects.*
>
> [Emphasis added]

[28] I agree with the reasoning of the British Columbia Commissioner in Order F14-41. It is my conclusion that section 40(2)(f) of the *ATIPPA, 2015* operates in the same manner as section 22(4)(e) of the British Columbia legislation. Section 40(2)(f) contemplates the release of personal information which by the definition set out in section 2(u) "means recorded information about an identifiable individual". To suggest that the phrase "the information is about a third party's position, functions and remuneration" means the release of the specified information about the third party but not the name of the third party is, to use the words of the British Columbia Commissioner, to rob section 40(2)(f) of its efficacy. There is no "disclosure of the personal information", as contemplated by section 40(2), if the name of the third party is not released. There is just the release of general information about the position, functions, or remuneration of an unidentified public servant. Such a release is not what is contemplated by the deeming provision in section 40(2)(f).

[29] The Alberta Commissioner in Order F2009-046 discussed its deeming provision, section 17(2)(e) of Alberta's *Freedom of Information and Protection of Privacy Act* [formerly 16(2)(e)], cited at paragraph 25 of Order F2009-046:

> *[para 25] Section 17(2) of the Act reads, in part, as follows:*
>
> *17(2) A disclosure of personal information is not an unreasonable invasion of a third party's personal privacy if*
> *…*
> *(e) the information is about the third party's classification, salary range, discretionary benefits or employment responsibilities as an officer, employee or member of a public body or as a member of the staff of a member of the Executive Council,*
> *…*

[30] The Alberta Commissioner in Order F2009-046 had this to say with regard to whether a third party's name is covered under the deeming provision in section 17(2)(e) of Alberta's legislation:

> *[para 65] I have said above that information about who is entitled to a discretionary benefit falls under section 17(2)(e). In making this comment, I have noted that other Orders from this Office found, by contrast, that the names of third parties receiving a discretionary benefit did not fall under section 17(2)(e) (Order 2001-020 at paras. 45 and 46; Order F2003-002 at para. 26; Order F2004-028 at para. 19). However, in my view, the information identifying an individual as the recipient of a discretionary benefit is precisely the information contemplated under section 17(2)(e), the disclosure of which is not an unreasonable invasion of personal privacy. The identifying information is what makes the information in question about an identifiable third party, and therefore what gives rise to third party personal information to be considered under section 17 in the first place. . . .*

[31] I agree with the rationale of the Alberta Commissioner in Order F2009-046. In my view the name of the each Third Party employee is the identifying information that makes the other information about an identifiable individual. In other words, the name of each employee is essential to creating personal information which is the type of information contemplated to be released in accordance with section 40(2)(f) of *ATIPPA, 2015* because it is deemed not to be an unreasonable invasion of a third party's personal privacy.

[32] I find that the disclosure of the name of the Third Party employees of Labrador-Grenfell Health along with their job title and salary would not be an unreasonable invasion of their privacy because the information being disclosed is about their position and remuneration and in accordance with the deeming provision in section 40(2)(f) a disclosure of such personal information is not an unreasonable invasion of a third party's personal privacy.

Discussion of Contrary Interpretations of Deeming Provisions

[33] I am aware that other Information and Privacy Commissioners in Canada have taken a different approach to the interpretation and application of sections in their legislation comparable to the deeming provision in section 40(2)(f) of *ATIPPA, 2015*. As an example, in Order No. 03-004 the Information and Privacy Commissioner for Prince Edward Island dealt with a request for the names, job title and salary for all employees with a particular public body. The Commissioner was dealing with section 15(4)(e) of that province's *Freedom of Information and Protection of Privacy Act*, which provides as follows:

> *15(4) A disclosure of personal information is not an unreasonable invasion of a third party's personal privacy if*
>
> *...*
>
> *(e) the information is about a third party's classification, salary range, discretionary benefits or employment responsibilities as an officer, employee or member of a public body or as a member of the staff of a member of the Executive Council;*

[34] In conducting her analysis the Prince Edward Island Commissioner referred to the process described in *Dickie* (which was discussed above), at page 5:

> *I have relied on the guidance set out by the Nova Scotia Court of Appeal in French v. Dalhousie University [2003] N.S.J. No. 44, (N.S.C.A.), and Dickie v. Nova Scotia [1999] N.S.J. No. 116 (N.S.C.A.). Nova Scotia's legislation sets out a similar process to ours, with a deeming provision, a presumption provision, and a balancing provision.*

[35] The Prince Edward Island Commissioner set out the process to be followed when applying the deeming provision in section 15(4)(e) (comparable to the deeming provision in section 40(2)(f) of the *ATIPPA, 2015*), at page 4:

> *Section 15(1) of the Act contains a mandatory exception, so that the Public Body must not disclose personal information to an applicant if it would be an unreasonable invasion of a third party's personal privacy. As I have advised the parties previously, before reaching a conclusion under this section, the public body should follow a process with two distinct steps:*
>
> 1. *First, the Public Body should determine whether the requested information is personal information within the meaning of section 1(i) the Act.*

> *2. Secondly, the Public Body should determine whether disclosure of the personal information will constitute an unreasonable invasion of privacy. This step may involve two separate analyses:*
>
> *(a) If the Applicant wishes to raise Section 15(4), it should be dealt with first. This is, in essence, a deeming provision so that certain circumstances are deemed not to be an unreasonable invasion of a third party's personal privacy. If one of the exceptions in section 15(4) is found to apply, the analysis need go no further and the information should be disclosed. There would be no further step.*
>
> *(b) The next analysis is only reached if section 15(4) does not apply. . .*

[36] Using the analysis describe above, the Prince Edward Island Commissioner reached the following conclusion:

> *The Public Body cites Alberta Order 2001-020. I agree with the Alberta Commissioner in that Order that one of the purposes of section 16(2)(e) [our section 15(4)(e)] is to allow the release of information about the employment benefits and responsibilities of public employees, allowing a degree of transparency in relation to the compensation and benefits provided to public employees. [paragraph 20]*
>
> *I conclude that the Applicant has not met the burden of proving that disclosure of the employee name and specific salary are not an unreasonable invasion of the employee's personal privacy. The level of transparency and accountability achieved by the Public Body in disclosing the employee's job title and salary range is sufficient to promote the objectives of the Act while still protecting some privacy of the employees.*
> *. . .*
>
> *Based on the foregoing reasons, I find that the Public Body properly applied section 15 of the Act in its decision to disclose job titles and salary ranges of its employees, and in its decision not to disclose employees' names and exact salaries.*

[37] With the greatest respect, I believe the Prince Edward Island Commissioner was incorrect in her interpretation of the deeming provision in her legislation. I am aware that in *MacNeil v. Privacy Commissioner* the Trial Division of the Prince Edward Island Supreme Court on a judicial review found that the Commissioner was correct in her application of section 15 of the Prince Edward Island legislation. However, for the reasons that follow, the decision of

the court in *MacNeil* does not change my view that a different approach to the deeming provision in section 40(2)(f) of *ATIPPA, 2015* is required.

[38] The Prince Edward Island Commissioner stated that she was relying on the guidance set out by the Nova Scotia Court of Appeal in *French* and *Dickie* and then proceeded to adopt the process outlined by Justice Cromwell in *Dickie*. However, she also made the following statement on page 10:

> *The Applicant relies on the practice of Alberta and Nova Scotia with regard to release of salary information. The Public Body urges caution with this approach, as the legislation of these provinces differs from ours.*
>
> *Nova Scotia's Act differs from ours with regard to release of this type of information. The subsection similar to our 15(4)(e) states as follows:*
>
> > *20.(4) A disclosure of personal information is not an unreasonable invasion of a third party's personal privacy if*
> > *…*
> >
> > *(e) the information is about the 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;*
>
> *"Remuneration", and not "salary range" is referred to in the above section. Therefore, it is not helpful to look to Nova Scotia for interpretation of this particular subsection.*
> *. . .*
> *Our Act is based on that of Alberta, whose section 17(2)(e) (formerly section 16(2)(e)) is identical to our section 15(4)(e). Therefore, cases which have considered this section in Alberta are instructive.*

[39] Therefore, as indicated by the Prince Edward Island Commissioner, the approach by the Nova Scotia Court of Appeal, although not helpful in interpreting the Prince Edward Island deeming provision, is the preferred approach by this Office, given the similarity of our deeming provision to that in the Nova Scotia legislation.

[40] The reliance by the Prince Edward Island Commissioner on the cases from Alberta is also noteworthy. In Prince Edward Island OIPC Order No. 03-004, the public body cited Alberta Order 2001-020 and the Prince Edward Island Commissioner followed the reasoning in that

Order acknowledging the similarity between the Prince Edward Island deeming provision and that in the Alberta legislation.

[41] In Alberta Order 2001-020, the Alberta Commissioner was dealing with a request for information related to discretionary buyouts for City managers at the City of Calgary. The Alberta Commissioner identified the relevant provision at paragraph 14:

> *[para. 14.] Section 16(2) sets out the circumstances in which disclosure of third party personal information is not an unreasonable invasion of personal privacy. The relevant provisions read:*
>
> *16(2) A disclosure of personal information is not an unreasonable invasion of a third party's personal privacy if*
> *…*
> *(e) the information is about the third party's classification, salary range, discretionary benefits or employment responsibilities as an…employee…of a public body…*
> *…*

[42] The Alberta Commissioner stated a conclusion in paragraphs 43 to 45:

> *[para. 43.] Section 67(3) sets out the burden of proof in this inquiry:*
>
> > *67(3) If the inquiry relates to a decision to give an applicant access to all or part of a record containing information about a third party,*
> >
> > *(a) in the case of personal information, it is up to the applicant to prove that disclosure of the information would not be an unreasonable invasion of the third party's personal privacy*
>
> *[para. 44.] Since section 16(2) applies to the job titles or positions, and the basic terms of the severance agreement, including precise sums, I find that it has been established that disclosure of that personal information would not be an unreasonable invasion of the third parties' personal privacy under section 67(3).*
>
> *[para. 45.] I have examined the Applicant's arguments and find that he has failed to prove that disclosure of any of the third parties' personal information to which section 16(4)(d) or (g) applies would not be an unreasonable invasion of the three third parties' personal information. Therefore, the Applicant has failed to discharge the burden of proof in relation to that information under section 67(3): i.e. each third party's name, signature, employee number, the date the employee's employment with the City was to end, and the date the employee was to retire. Disclosure of that personal*

> *information would be an unreasonable invasion of the third parties' personal privacy.*

[43] It will be noted that both the Prince Edward Island legislation and that of Alberta place the burden of proof on the Applicant to prove that the disclosure of a third party's personal information would not be an unreasonable invasion of privacy. Such a burden is not placed on an Applicant under the *ATIPPA, 2015*. The burden of proof is set out in section 43 of *ATIPPA, 2015*:

> *43. (1) On an investigation of a complaint from a decision to refuse access to a record or part of a record, the burden is on the head of a public body to prove that the applicant has no right of access to the record or part of the record.*
>
> *(2) On an investigation of a complaint from a decision to give an applicant access to a record or part of a record containing personal information that relates to a third party, the burden is on the head of a public body to prove that the disclosure of the information would not be contrary to this Act or the regulations.*
>
> *(3) On an investigation of a complaint from a decision to give an applicant access to a record or part of a record containing information, other than personal information, that relates to a third party, the burden is on the third party to prove that the applicant has no right of access to the record or part of the record.*

[44] Section 43(2) sets out the applicable burden of proof for the Complaints filed in this matter. Labrador-Grenfell Health has made a decision to give the Applicant access to records that contain the personal information of the third parties who have filed complaints in relation to that decision. By operation of section 43(2), the burden of proof is on Labrador-Grenfell Health (as the public body involved) to prove that the disclosure of the personal information of the third parties would not be contrary to *ATIPPA, 2015*, that is, to prove that the disclosure of the personal information would not be an unreasonable invasion of privacy within the meaning of section 40(1) of *ATIPPA, 2015*.

[45] Therefore, I have taken a different approach than the Prince Edward Island Commissioner (and different from some of the earlier Orders in Alberta) due to the differences in the wording of the deeming provision in the Prince Edward Island legislation

(and that of Alberta's) and because of the difference in the onus of proof in the Prince Edward Island (and Alberta) legislation.

[46] My reluctance to follow the decisions of other Commissioners whose deeming provision is different in wording from that found in section 40(2)(f) of *ATIPPA, 2015* was similarly expressed by Mr. Justice Morrison of the New Brunswick Court of Queen's Bench in *Hans v. St. Thomas University*. In that case, Justice Morrison was considering the application of the deeming provision found in section 21(3) of New Brunswick's *Right to Information and Protection of Privacy Act.* In commenting on the reliance on decisions from other jurisdictions, Justice Morrison stated as follows at paragraph 19:

> *[19] Other privacy commissioners have applied a similarly broad interpretation to the term "benefits" when dealing with severance information . . . While the statutory language of the statutes considered in these cases appears similar to the wording in RTIPPA it is not identical. I agree with counsel for the respondent when she urges caution in relying upon decisions interpreting legislation from other jurisdictions with different provisions and context. She refers to the case of Ukrainian Greek Catholic Parish of St. Michael's, Re (1957), 22 WWR 666 (Man. Q.B.) at paragraph 7 relying upon Winnipeg v. Brian Investments Limited [1953] 1 DLR 270 at paragraph 31: Numerous cases have been cited to us. But a case on one lengthy and somewhat complicated statute which has different provisions and uses different words, even in similar or somewhat similar provisions,* ***is a poor guide in respect of a different statute of a different jurisdiction, even when dealing with the same sort of subject-matter there-particularly where the words in the latter are not the same as in the former.***
>
> *[Emphasis in Original]*

[47] I agree with the comments of Justice Morrison in *Hans v. St. Thomas University*. Those comments support my position to take a different approach than the Prince Edward Island Commissioner in Order No. 03-004 and the Alberta Commissioner in Order 2001-020 because of the different wording in the legislation in Prince Edward Island and Alberta.

Comments of the ATIPPA 2015 Review Committee

[48] My determination that the release of the requested information would not be an unreasonable invasion of personal privacy is in line with the findings of the *Report of the 2014 Statutory Review of the Access to Information and Protection of Privacy Act*. In that Report, the Review Committee stated at page 191:

> *The privacy of public employees needs to be balanced against the public's right to know how their tax dollars are spent. Contemporary values of transparency and accountability for public funds tip the balance in favour of disclosure.*

[49] It is important to note that the Government of Newfoundland and Labrador accepted all of the recommendations of the Review Committee. In addition, as part of its Report the Review Committee included a draft bill which was enacted by the House of Assembly in its entirety to become the *Access to Information and Protection of Privacy, 2015* (including of course the deeming provision in section 40(2)(f)).

Remaining Issues

[50] As noted above, the Third Parties who filed access complaints with this Office raised a number of issues relating to why their personal information should not be released. The issues raised by the Third Parties may require consideration of other exceptions to disclosure set out in the *ATIPPA, 2015*. This Report has only dealt with those issues raised which relate to the interpretation and application of section 40. I have taken this position based on my interpretation of how section 19 of the *ATIPPA, 2015* is intended to operate. As pointed out above, the notice provided to the Third Parties in this case was given under section 19 because their personal information might be excepted from disclosure under section 40. The Third Parties who filed access complaints in response to the notices under section 19 did so pursuant to section 42(3) which provides:

> *(3) A third party informed under section 19 of a decision of the head of a public body to grant access to a record or part of a record in response to a request may file a complaint with the commissioner respecting that decision.*

[51] Therefore, any access complaint filed in response to the section 19 notice deals with "a decision of the head of a public body to grant access" to the personal information of the Third Party employees following a consideration of the applicability of section 40. The issue to be determined in this Report is whether section 40 is applicable to prohibit release of the information on the basis that the disclosure would be an unreasonable invasion of a third party's personal privacy. None of the other discretionary exceptions to disclosure are at issue.

[52] The approach I have taken regarding the consideration of other discretionary exceptions on a Third Party access complaint was also taken by the British Columbia Information and Privacy Commissioner in Decision F06-10. In that Decision, the Commissioner was dealing with a notice given to third parties under section 23(1) of the *Freedom of Information and Protection of Privacy Act* advising them that the public body intended to give access to records that may contain information excepted from disclosure under section 22 (comparable to section 40 of the *ATIPPA, 2015*). The third parties who received the notices asked the Commissioner to consider the applicability of two discretionary exceptions found in section 13 and 15 of the British Columbia legislation.

[53] In refusing to consider the two exceptions the British Columbia Commissioner stated at paragraphs 37 to 39:

> *[37] I agree with Adjudicator Francis's conclusion in Order 04-04 and Order 04-05 and with her conclusion and expanded analysis in Order F05-02. Unlike s. 21 and s. 22, to which the s. 23 and 24 regime for public body notice applies, FIPPA does not provide for a public body to give notice about its intentions to apply or not apply s. 13 or s. 15 to information in a requested record. . . . Section 52(2) creates a right to request a review for third parties who received notice under s. 24 in respect of s. 21 or s. 22. There is no right to request a review on the basis that the public body ought to rely on s. 13 or s. 15 to deny access to information. Determination of this issue is a matter of respecting the visible and logical design features in FIPPA that clearly assign notice and request for review rights that are limited to certain types of persons and interests.*
>
> *[38] The Teacher's request for review under s. 52(2) respecting the application of s. 22 to the Teacher's personal information therefore will not be expanded to consider whether the School District could or should have relied on s. 13 or s. 15 to withhold information in requested records. . . .*
>
> *[39] Given the design of the notice and right of review provisions in FIPPA, the nature of the s. 13 and s. 15 disclosure exceptions and, if necessary, also the foundations the Unions and Teacher have offered for seeking to argue that the School District could and should have applied those disclosure exceptions, I do not consider it appropriate for the applicability of those provisions to be raised on this review or for the Unions (or anyone else) to be provided with a copy of the request for review under s. 54(b) in order to permit them to raise the applicability of those provisions.*

[54] Likewise, I find that section 42(3) of the *ATIPPA, 2015* creates a right for third parties who receive a notice under section 19 in respect of either section 39 or section 40 to file a complaint with this Office. However, there is no right to file a complaint on the basis that the public body ought to deny access in reliance on any other discretionary exception. There is only a right to a determination whether either section 39 or section 40 is applicable to prohibit disclosure of the requested information. Of course, in the present case the Third Parties had a right to file a complaint to obtain from this Office a determination as to whether section 40 is applicable to prohibit the disclosure of the requested personal information.

Conclusion

[55] The information requested by the Applicant is clearly information about a third party's position, functions or remuneration within the meaning of section 40(2)(f). Under the approach I have taken to the application of section 40(2) (as set out by Justice Cromwell in *Dickie*), once it is established that information is covered by section 40(2) it is deemed to be information the disclosure of which would not be an unreasonable invasion of a third party's personal privacy. In the present case, the information requested is covered by the deeming provision in section 40(2)(f). Therefore, there is no requirement to apply section 40(4) or any other provision of section 40. The analysis under section 40 ends once it is established that the information is covered under the deeming provision in section 40(2).

V RECOMMENDATIONS

[56] Under the authority of section 47 of the *ATIPPA, 2015* I recommend that Labrador-Grenfell Health release the information requested by the Applicant, including the name of the employees involved.

[57] As set out in section 49(1)(b) of the *ATIPPA, 2015*, the head of Labrador-Grenfell Health must give written notice of his or her decision with respect to these recommendations to the

Commissioner and any person who was sent a copy of this Report within 10 business days of receiving this Report. I will note that a copy of this Report was sent to all the employees who filed Third Party complaints with this Office.

[58] Please note that within 10 business days of receiving the decision of Labrador-Grenfell Health under section 49, the Applicant and any Third Party may appeal that decision to the Supreme Court of Newfoundland and Labrador, Trial Division in accordance with section 54 of the *ATIPPA, 2015*. **No records should be disclosed to the Applicant until the expiration of the prescribed time for an appeal to the Trial Division as set out in the *ATIPPA, 2015*.**

[59] Dated at St. John's, in the Province of Newfoundland and Labrador, this 23rd day of June 2016.

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