OFFICE OF THE INFORMATION AND PRIVACY COMMISSIONER
NEWFOUNDLAND AND LABRADOR

Report A-2018-022

September 5, 2018

Town of Paradise

Summary: The Town of Paradise (the "Town") received an access request seeking records, including, the minutes of a public meeting approving a legal settlement, a list of all active lawsuits against the Town and a list of all settled lawsuits against the Town for the past two years and all minutes approving the settlements. The Town provided access to the public minutes that it located. The Town also withheld privileged minutes relying on section 28(1)(c) of the *ATIPPA, 2015*. The Town provided the active lawsuit information requested but denied access to the settlement amounts, claiming section 30(1) (legal advice) and section 35(1)(f) and (g) (disclosure harmful to the financial or economic interests of a public body) of the *ATIPPA, 2015*. The Town also relied on settlement privilege to withhold the settlement amounts. The Commissioner determined that the Town conducted a reasonable search for the minutes even though not all minutes were located. The Commissioner further determined that the Town could not rely on section 35(1)(f) or (g) to withhold the settlement amounts. The Commissioner also found that section 30(1) does not contain an exception for settlement privilege and that the Town could not rely on common law settlement privilege as the *ATIPPA, 2015* is an exhaustive code. The Commissioner recommended that the Town disclose the settlement amounts to the Applicant.

Statutes Cited: *Access to Information and Protection of Privacy Act*, *2015, SNL 2015, c A-1.2*, sections 3, 5(1), 6, 7, 8, 9, 28(1)(c), 30(1), 35(1)(f), 35(1)(g), and 38(1); Municipalities Act, 1999, SNL 1999, Chapter M-24, section 213; Freedom of Information and Protection of Privacy Act, SNS 1993 c 5. section 16; Freedom of Information and Protection of Privacy Act, RSO 1990 c F-31, section 19; Freedom of Information and Protection of Privacy Act, RSA 2000 c F-25; Freedom of Information and Protection of Privacy Act, RSBC 1996 c 165.

File #: 0025-096-18-016

Authorities Relied On:

Sable Offshore Energy Inc. v. Ameron International Corp., [2013] 2 SCR 623, 2013 SCC 37; Liquor Control Board of Ontario v. Magnotta Winery Corporation, 2010 ONCA 681; Alberta (Information and Privacy Commissioner) v. University of Calgary, [2016] 2 SCR 555, 2016 SCC 53; Lizotte v. Aviva Insurance Company of Canada, [2016] 2 SCR 521, 2016 SCC 52; Richmond (City) v. Campbell, 2017 BCSC 331; Newfoundland and Labrador (Attorney General) v. Newfoundland and Labrador (Information and Privacy Commissioner) 2010 NLTD 19; NL OIPC Reports A-2018-021, A-2018-008, A-2017-003, A-2017-015; NS OIPC Report 16-12 Southern Shore Regional School Board.

Other Resources:

OIPC NL Practice Bulletin Reasonable Search, March 2017; Hansard, Newfoundland and Labrador Legislature, April 23, 2015; Report of the 2014 Statutory Review: Access to Information and Protection of Privacy Act; News Release, Executive Council, Government of Newfoundland and Labrador, March 3, 2015; Ruth Sullivan, Sullivan on the Construction of Statutes, 5th ed. (Lexis Nexis Canada Inc., 2008).

I BACKGROUND

[1] The Town of Paradise (the "Town") received an access to information request from the Applicant seeking records, including the following:

> ...
> 2. *Was the* [named company] *settlement approved in a public meeting? Please provide me with the public meeting minutes when it was approved.*
> 3. *Give me a list of lawsuits presently active against the Town of Paradise. Who are the plaintiffs and how much is the claim for and for what?*
> 4. *A list of all settlement lawsuits for the past two years. Who were the Plaintiffs? The nature of the claim. How much was each settlement? A copy of the minutes where these amounts were approved in a public meeting.*
> ...

[2] The Town responded to the Applicant and provided some of the information requested but withheld the settlement amounts based on section 30(1)(a) (legal advice) and section 35(1)(f) (disclosure harmful to the financial or economic interests of a public body) of the *ATIPPA, 2015*.

[3] With respect to item #2, the Town provided the Applicant with a list of all invoices owing by the Town as of November 1, 2016 entitled "Bills for Payment". This list included the deductible the Town paid for the [named company] settlement. The Town also provided a corresponding public meeting minute that recorded the approval for paying the total of the invoices owing. The Town did not provide any specific public meeting minute recording the approval of the full amount of the [named company] settlement.

[4] With respect to item #3, the Town provided the Applicant with a list of the information requested, however under "the amounts claimed per statement of claim" column, the Town listed many of the amounts as "not specified" as they did not have a dollar amount. The Town also claimed section 30(1)(a) but there was no information withheld under this section that the Applicant had requested.

[5] With respect to item #4, the Town provided the Applicant with a list of lawsuits settled over the past two years, the Plaintiffs, the Defendants and a description of the claims. The

Town provided the Applicant with one settlement amount that had been previously disclosed but withheld the remaining settlement amounts based on section 30(1)(a) and section 35(1)(f). The Town provided no minutes approving these settlements to the Applicant.

[6] The Applicant was not satisfied with the Town's response and filed a complaint with this Office with respect to items #2, 3 and 4 above.

[7] Although the Town provided the requested information with respect to item #3, the Applicant questioned the amounts as many of them were listed as "not specified". In an effort to resolve this issue, the Town provided the Applicant with the Statements of Claim, even though these records were available at the Court registry. The Applicant then agreed to resolve this issue informally.

[8] During the informal resolution stage, the Town conducted a second search for records of a public meeting approving the [named company] settlement, as well as a search for the settlement minutes. The Town did not locate any public or privileged minutes for the [named company] settlement, other than what it provided initially. The Town located some public and privileged minutes with respect to the settlement amount and provided the public minutes to the Applicant but withheld the privileged minutes based on section 28(1)(c) (local public body confidences) of the *ATIPPA, 2015*.

[9] As informal resolution was unsuccessful for items #2 and #4, these issues proceeded to formal investigation in accordance with section 44(4) of the *ATIPPA, 2015*.

II PUBLIC BODY'S POSITION

[10] The Town's position with respect to the public minutes of the [named company] settlement is that it searched for a responsive record and provided the Complaint with what it located. The Town conducted a second search encompassing both public and privileged minutes for minutes approving the full amount of the [named company] settlement but did not locate any record.

[11] During our investigation, the Town searched both the public and privileged minutes for any settlement amounts but did not locate minutes for all of the settlements. The Town provided the Complainant with three public meeting minutes that it located. The Town also located two privileged meeting minutes but withheld these records based on section 28(1)(c) of the *ATIPPA, 2015*.

[12] The Town relies on section 30(1) as well as settlement privilege to withhold the settlement amounts. The Town's position is that privilege under section 30(1) should expand to protect settlement privilege.

[13] The Town relies on *Sable Offshore Energy Inc. v. Ameron International Corp.* ("*Sable*") stating that settlement privilege extends to settlement amounts even after reaching settlement and successful negotiations are entitled to the same protection as those yielding no settlement. The Town relies on *Sable* for its position that settlement privilege is a class privilege that promotes settlements.

[14] The Town stated that while the public may have an interest in the expenditure of public funds, the potential harm associated with the release of the information prevails over that interest. The Town argues that the harm would undermine the very protection that settlement privilege affords, as parties may be less willing to settle if their negotiations and results are subject to disclosure.

[15] The Town believes that disclosure of settlement amounts will set unrealistic expectations about the value of claims and as a result, the Town will face similar expectations in negotiations of future settlements, expectations that may harm the public at large. They stated, "Put bluntly, disclosure is adverse to the effective administration of justice. By way of contrast, withholding the information maintains settlement privilege and protects the effective administration of justice."

[16] The Town also relies on *Liquor Control Board of Ontario v. Magnotta Winery Corporation* ("Magnotta") for the premise that the public interest in transparency succumbs to the public interest in encouraging the settlement of litigation.

[17] The Town argues alternatively that in the event that section 30 does not encompass settlement privilege, it is a common law privilege that is not abrogated by the *ATIPPA, 2015*.

[18] The Town relies on *Magnotta* in support of its position that settlement privilege is not abrogated absent "clear and explicit statutory language". The Town states that this is consistent with the Supreme Court of Canada's approach to solicitor-client privileged records in *Alberta (Information and Privacy Commissioner) v. University of Calgary* and its approach to litigation privileged records in *Lizotte v. Aviva Insurance Company of Canada*. The Town's position is that there must be clear, explicit and unequivocal language in the *ATIPPA, 2015* to preclude reliance on settlement privilege. The Town also cites the *Richmond (City) v. Campbell* case from British Columbia in support of its position.

[19] The Town also relied on sections 35(1)(f) and (g) of the *ATIPPA, 2015* to withhold the settlement amounts. In the Town's response to the Applicant, it only cited section 35(1)(f), however, in its response to our Office it also relied on section 35(1)(g). The Town's position is that due to many litigious individuals, releasing the amounts of settlements negotiated by the Town puts the Town at risk of increased claims and increased legal costs. The Town also believes that releasing the information could complicate and infringe future settlement negotiations of the Town. The Town also added that there were settlement agreements with confidentiality clauses included for a number of the settled files.

III COMPLAINANT'S POSITION

[20] The Complainant's position is that a public minute should exist for the full amount of the [named company] settlement, as it should have been approved in a public meeting. The Complainant therefore believes that the minute should have been located and disclosed.

[21] It is the Complainant's position that the settlement amounts should be disclosed and be available publically as it is money the Town is paying out. It is also the Complainant's position that the settlement amounts require approval in a public meeting and therefore the minutes should exist and should have been located.

[22] The Complainant maintains privileged minutes should not be withheld under the *ATIPPA, 2015*. The Complainant also believes that the Town has not been approving all relevant minutes.

IV DECISION

Reasonable Search

[23] Previous reports address the issue of reasonable search, including Report A-2018-008. Our guidance document, *Practice Bulletin on Reasonable Search*, states that a reasonable search is one conducted by knowledgeable staff in locations where the records in question might reasonably be located.

[24] No record was located for the public meeting minutes approving the full amount of the [named company] settlement. Similarly, no records were located for public meeting minutes for some of the other settlements. The Complainant believes that the full amount of the [named company] settlement as well as the other settlements should have been approved in a public meeting and therefore that minutes should exist.

[25] The Town provided information regarding the locations searched, the timeframe searched, the search terms used, and who conducted the search. Even though not all minutes were located, based on the information provided by the Town we are satisfied that the Town conducted a reasonable search for the records in question.

[26] Whether the specific minute approving the full amount of the [named company] settlement or minutes approving the other settlements should exist is not for this Office to determine, only whether the Town conducted a reasonable search for the records.

Section 28(1)(c)

[27] During the search for minutes approving the settlements, the Town located some public and some privileged meeting minutes. The Town disclosed the public minutes to the Complainant but withheld the privileged minutes relying on section 28(1)(c) of the *ATIPPA, 2015*. Section 28(1)(c) states:

> *28.(1) The head of a local public body may refuse to disclose to an applicant information that would reveal*
>
> *...*
>
> *(c) the substance of deliberations of a meeting of its elected officials or governing body or a committee of its elected officials or governing body, where an Act authorizes the holding of a meeting in the absence of the public.*

[28] Section 213 of the *Municipalities Act* authorizes a privileged meeting in the absence of the public. This section states:

> *213.(1) A meeting of a council shall be open to the public unless it is held as a privileged meeting or declared by vote of the councillors present at the meeting to be a privileged meeting.*
>
> *(2) Where a meeting is held as a privileged meeting or declared to be a privileged, all members of the public present at the meeting shall leave.*
>
> *(3) A decision of the councillors made at a privileged meeting shall not be valid until that decision has been ratified by a vote of the councillors at a public meeting.*

[29] The minutes in question were minutes of a privileged meeting, therefore the Town can rely on section 28(1)(c) of the *ATIPPA, 2015* to withhold these minutes as it is authorized by the *Municipalities Act*.

Sections 35(1)(f) and (g)

[30] Sections 35(1)(f) and (g) state as follows:

> *35.(1) The head of a public body may refuse to disclose to an applicant information which could reasonably be expected to disclose*
>
> *...*

> *(f) positions, plans, procedures, criteria or instructions developed for the purpose of contractual or other negotiations by or on behalf of the government of the province or a public body, or considerations which relate to those negotiations;*
>
> *(g) information, the disclosure of which could reasonably be expected to prejudice the financial or economic interest of the government of the province or a public body; or*

[31] Reports A-2017-003 and A-2017-015 discuss sections 35(1)(f) and (g). Section 35(1)(f) is categorical in nature, meaning that if the record is of the kind described in that provision it may be withheld without any need to prove that harm will result from disclosure. Section 35(1)(g), however, requires the public body to provide evidence of harm.

[32] The Town provided no basis for its reliance on section 35(1)(f) other than quoting the section. The settlement amount is part of the outcome of a settlement and does not fit within the categories described in that section. There are no ongoing negotiations as the matters are settled, therefore the Town is unable to rely on this section to withhold the settlement amounts.

[33] The Town provided insufficient evidence of the prospect of harm arising from disclosure, as required under section 35(1)(g).. The Town argued that releasing negotiated settlements in claims against the Town could put the Town at risk of increased claims, resulting in increased legal costs. The Town further argued that releasing this information could complicate and infringe future settlement negotiations of the Town.

[34] The settlements relate to claims against the Town involving different scenarios and the Town acknowledged that the settlement amounts are for closed files. The Town has not advised of any ongoing settlement negotiations that are similar to any of the previously settled claims or why releasing settlement amounts would put the Town at risk for increased claims. The Town has not substantiated its statements above with evidence of harm. The Town may believe that these things "could" happen however, it must provide evidence of harm in order to rely on section 35(1)(g) of the *ATIPPA, 2015* to withhold the settlement amounts. Under different circumstances, 35(1)(g) can be used to withhold information

related to settlement and settlement negotiations, as was found in our recent Report A-2018-021. Here the Town relies generally on speculation and as such is unable to rely on section 35(1)(g) to withhold the settlement amounts.

Section 30(1)(a) and Settlement Privilege

[35] The intersection of common law settlement privilege and access to information legislation is the subject of several decisions by Canadian courts and commissioners. The mixed results turn largely on the wording of each province's legislation. This complaint represents the first requirement for my Office to decide whether public bodies can rely on settlement privilege to withhold records pursuant to the *ATIPPA, 2015*.

[36] The Town's argument is that "… section 30(1) should extend to protect settlement privilege. Alternatively … settlement privilege is a common law right that has not been abrogated…" by *ATIPPA, 2015*. In its primary argument, the Town is not arguing that settlement privilege falls within either of the privileges in section 30 (legal advice privilege and litigation privilege), rather that settlement privilege is an additional privilege that is captured by the language in section 30(1). It would not assist the Town in any event to invoke litigation privilege as that privilege ends with the conclusion of related litigation, and this complaint involves records associated with concluded matters.

[37] As for its alternative argument, the Town references *Sable* to demonstrate the Supreme Court of Canada's recognition of the important status of settlement privilege as a class-based privilege at common law.

[38] The following analysis will draw on that of Commissioner Catherine Tully in *Review Report 16-12 Southern Shore Regional School Board* where she addressed the same issue starting at paragraph 103. Although there are some differences between the *ATIPPA, 2015* and Nova Scotia's *Freedom of Information and Protection of Privacy Act (FOIPOP)*, there are many similarities making a comparison relevant and useful.

Does Section 30 Encompass Settlement Privilege As An Exception To The Right of Access?

[39] Commissioner Tully's decision addresses whether section 16 of Nova Scotia's FOIPOP includes settlement privilege as an express exception. To do this, she begins by discussing a decision of the Ontario Court of Appeal which found that settlement privilege was included within section 19 of Ontario's *FIPPA*:

> *[103] … [T]he Ontario Court of Appeal determined that based on the wording of s. 19 of the Ontario law, settlement privilege was an express exemption under Ontario's law. With respect to the potential that a free-standing exemption for settlement privilege might exist, the Court of Appeal had this to say:*
>
> *[48] Having concluded that the Disputed Records fall within the second branch of s. 19, it is unnecessary to decide this issue. Whether common law settlement privilege is a free-standing exemption under FIPPA or whether FIPPA is a complete code is a complex, serious question that is better decided in a case that depends on the answer to that question.*
>
> *[104] Section 19 of the Ontario legislation reads, as follows:*
>
> > *19. A head may refuse to disclose a record that is subject to solicitor-client privilege or that was prepared by or for Crown counsel for use in giving legal advice or in contemplation of or for use in litigation.*
>
> *[105] By contrast, the privilege exemption in Nova Scotia's FOIPOP simply reads:*
>
> > *16. The head of the public body may refuse to disclose to an applicant information that is subject to solicitor-client privilege.*
>
> *[106] The Ontario Court of Appeal determined that settlement privilege was included in s. 19 of the Ontario law based on the following reasons. First, it noted that* s.19 *has two branches. The first branch is the exemption for records that are subject to solicitor-client privilege. The second branch is for records that were prepared by or for Crown counsel for use in giving legal advice or in contemplation for use in litigation. Next the Court notes that the dispute is over whether documents prepared for mediation and settlement have been prepared for use in "litigation". The Court concludes that the word "litigation" in the second branch of the* s.19 *test encompasses mediation and settlement discussions.*
>
> *[107] With respect to the significance of the specific wording found in Ontario's access law, the Court specifically notes that:*

> *The IPC would limit the second branch to documents that fall within the ambit of litigation privilege. With respect, a plain reading of the second branch does not support such an interpretation. When the legislature wished to exempt records based on privilege, it did so using clear language. Witness the first branch of* s. 19*, which permits a head to refuse to disclose a record that is "subject to solicitor-client privilege". The words of the second branch follow immediately afterwards in the same provision and* ***they do not use the words "litigation privilege". Rather, the second branch governs records "prepared by or for Crown Counsel…for use in litigation". Therefore, the second branch should not be taken to be limited to documents that fall within the common law litigation privilege****.*
>
> *[108] Two important points arise from this. First, the decision that settlement privilege was included in Ontario's* s.19 *was very specific to the broad wording of Ontario's Act not found in Nova Scotia's FOIPOP* s. 16*. Second, had the words only included the expression "solicitor-client privilege", that privilege would not have included settlement privilege.* [emphasis added]

[40] In this case, one of the Town's arguments is that settlement privilege is subsumed within the exception in section 30(1), however, as with Nova Scotia's *FOIPOP*, there are material differences between Ontario's section 19 and the language found in section 30(1) of *ATIPPA, 2015*. Section 19 of Ontario's legislation includes the words "a record … prepared by or for Crown counsel for use in giving legal advice or in contemplation of or for use in litigation". This is a broad provision that the Ontario Court of Appeal found was expansive enough to incorporate settlement privilege. In contrast, the *ATIPPA, 2015* is more concise:

> *30.(1) The head of a public body may refuse to disclose to an applicant information*
>
> *(a) that is subject to solicitor and client privilege or litigation privilege of a public body; or*
> *(b) that would disclose legal opinions provided to a public body by a law officer of the Crown.*

[41] Regarding the language in section 30(1)(b) a "legal opinion" is a discrete and distinct subset of the work of a lawyer, whereas the Ontario provision is much broader: "a record … prepared by or for Crown counsel for use in giving legal advice or in contemplation of or for use in litigation." The broad scope of this provision was highlighted by the Ontario Court of Appeal in *Magnotta*:

> *When the legislature wished to exempt records based on privilege, it did so using clear language. Witness the first branch of s. 19, which permits a head to refuse to disclose a record that is "subject to solicitor-client privilege". The words of the second branch follow immediately afterwards in the same provision and* ***they do not use the words "litigation privilege"****. Rather, the second branch governs records "prepared by or for Crown counsel . . . for use in litigation". Therefore, the second branch should not be taken to be limited to documents that fall within the common law litigation privilege.* [emphasis added]

[42] A key distinction is that section 30(1)(a) limits the exception to solicitor-client privilege and "litigation privilege". Litigation privilege is a well-established and defined common law privilege. In contrast, the Ontario provision references a broad variety of records prepared "for use in litigation", and the court in *Magnotta* found that it is not limited to what is understood as encompassing "litigation privilege". In *Newfoundland and Labrador (Information and Privacy Commissioner) v. Eastern Regional Integrated Health Authority,* Justice Orsborne describes litigation privilege as follows:

> *[25] The principles may be briefly stated:*
>
> 1. *The purpose of litigation privilege is to provide a protected private zone of communication and work in order to facilitate investigation and preparation for a proceeding in the adversarial system.*
>
> 2. *The litigation which establishes the boundaries of the privilege may extend to proceedings related to the 'primary' litigation.*
>
> 3. *The privilege expires with the litigation although it may continue if related litigation remains pending or may reasonably be apprehended.*
>
> 4. *To enjoy litigation privilege, it is not necessary that a communication be either confidential or be between a solicitor and client; indeed, it is not necessary that a solicitor client relationship exist. The privilege is available to all litigants, whether or not represented by counsel, and extends to communications with third parties.*
>
> 5. *Two requirements are necessary to establish a privilege over any particular document:*
>
>   i. *The dominant purpose for the preparation of the document must be the litigation in question. This requires an assessment of the context and circumstances in which the document was created.*

> *ii. Litigation must have been in reasonable contemplation at the time of preparation of the document. This requires an objective assessment of the circumstances at the time – it is not a matter of opinion.*

[43] While there will be some overlap in that some records protected by litigation privilege may also be protected by settlement privilege, other kinds of records will not be found in both. The "private zone of communication" referenced above is intended to shield information of one litigant from the opposing party. Communications *with* the other party for the purpose of settlement are shared for the purpose of arriving at a resolution, and clearly the settlement itself, should one be reached, is something that both parties are privy to and is not encompassed within litigation privilege.

[44] The expansive language of section 19 of Ontario's *FIPPA* allowed the Court to interpret the exception as being broader than litigation privilege and to encompass settlement privilege. The language in section 30 of *ATIPPA, 2015* is much narrower, utilizing the term "litigation privilege", which is not found in section 19 of *FIPPA*. As section 30 of the *ATIPPA, 2015* is distinct from section 19 of Ontario's *FIPPA, Magnotta* does not assist the Town in its argument that section 30 should be interpreted to include settlement privilege as part of the exceptions to access in section 30.

Is Settlement Privilege A Free-Standing Exception Under ATIPPA, 2015?

[45] Deciding whether common law settlement privilege is a freestanding exception under *ATIPPA, 2015,* without being part of the legislative scheme, requires review and assessment of the statute's characteristics in order to determine whether it constitutes a complete or exhaustive code.

[46] In examining any statute, one must begin with its purpose. The *ATIPPA, 2015* purpose section is expansive:

> *3. (1) The purpose of this Act is to facilitate democracy through*
>
> *(a) ensuring that citizens have the information required to participate meaningfully in the democratic process;*

> *(b) increasing transparency in government and public bodies so that elected officials, officers and employees of public bodies remain accountable; and*
>
> *(c) protecting the privacy of individuals with respect to personal information about themselves held and used by public bodies.*
>
> *(2) The purpose is to be achieved by*
>
> *(a) giving the public a right of access to records;*
>
> *(b) giving individuals a right of access to, and a right to request correction of, personal information about themselves;*
>
> *(c) specifying the limited exceptions to the rights of access and correction that are necessary to*
>
> *(i) preserve the ability of government to function efficiently as a cabinet government in a parliamentary democracy,*
>
> *(ii) accommodate established and accepted rights and privileges of others, and*
>
> *(iii) protect from harm the confidential proprietary and other rights of third parties;*
>
> *(d) providing that some discretionary exceptions will not apply where it is clearly demonstrated that the public interest in disclosure outweighs the reason for the exception;*
>
> [...]

[47] The language in the purpose section includes the goal of "facilitating democracy" through the provision of access to information, and it provides for an increase in transparency so that elected officials, officers and employees of public bodies remain accountable. Section 3(2) says this goal is to be achieved through the provision of a public right of access to records. Critically, 3(2)(c) states that the purpose of the *Act* is to be achieved by **specifying the limited exceptions to the right of access** necessary to preserve the ability of government to function efficiently as a cabinet government in a parliamentary democracy and "**accommodate established and accepted rights and privileges of others**...".

[48] To summarize, while the purpose of the *Act* is expansive, the means of achieving this purpose are clear and explicit. Among other things, it explicitly states that the *Act* is specific with regard to the **limited exceptions** to the right of access. It also says that the *Act* **accommodates the rights and privileges** of others. This language militates in favour of a finding that the *Act* is an exhaustive code governing access to information for the public bodies subject to it.

[49] Another relevant provision is section 5(1), which states that "this Act applies to all records in the custody of or under the control of a public body but does not apply to…", followed by a list of specific types of records to which the *ATIPPA, 2015* does not apply. Furthermore, sections 6 and 7 clearly outline the relationship between the *ATIPPA, 2015* and other statutes. With the exception of the *Personal Health Information Act*, and any provisions of other statutes or regulations listed in Schedule A, *ATIPPA, 2015* is paramount over other statutes in the event of a conflict. This further militates in favour of the *ATIPPA, 2015* being a complete code, in that its place in the context of all other statutes is firmly fixed.

[50] Section 9 of *ATIPPA, 2015* contains the public interest override provision. It provides that even when the enumerated exceptions apply to a particular record, "that discretionary exception shall not apply where it is clearly demonstrated that the public interest in disclosure of the information outweighs the reason for the exception." Solicitor-client privilege and litigation privilege are included within the scope of the public interest override provision. The fact that solicitor-client privilege is subject to the public interest override provision is significant in this override provision's impact on a substantive right. Accepting settlement privilege as a free-standing exception to access would create an exception that is not subject to the public interest override. This is contrary to the express language in section 3 of *ATIPPA, 2015* indicating that the *Act* grants a right of access that is subject only to the limited and specific exceptions enumerated therein.

[51] A number of indicators point to the fact that information or records relating to settlement were considered when the *ATIPPA, 2015* was created. Section 38(1) clearly provides for a discretionary exception to disclosure involving labour relations information "**prepared by or**

for the public body in contemplation of litigation or arbitration or in contemplation of a settlement offer." Records relating to forms of settlement received consideration during the drafting process. Furthermore, by naming litigation, arbitration and settlement separately, the legislature clearly intended different treatment.

[52] The most obvious place one would expect to find a reference to settlement privilege, if it was intended for inclusion within the *ATIPPA, 2015,* would be section 30. The Court in *Magnotta* determined that Ontario's broader language allowed an interpretation capturing settlement privilege, while the comparable provisions in two other Canadian access to information statutes are **broader** still:

[53] Saskatchewan's comparable *Freedom of Information and Protection of Privacy Act* (*FOIP*) privilege exception is worded as follows:

> *22. A head may refuse to give access to a record that:*
>
> *(a) contains any information that is subject to* ***any privilege that is available at law, including solicitor-client privilege****;*
>
> *(b) was prepared by or for an agent of the Attorney General for Saskatchewan or legal counsel for a government institution in relation to a matter involving the provision of advice or other services by the agent or legal counsel; or*
>
> *(c) contains correspondence between an agent of the Attorney General for Saskatchewan or legal counsel for a government institution and any other person in relation to a matter involving the provision of advice or other services by the agent or legal counsel.*
>
> [emphasis added]

[54] In Alberta, the comparable provision is worded as follows:

> *27 (1) The head of a public body may refuse to disclose to an applicant*
>
> *(a) information that is subject to* ***any type of legal privilege, including solicitor-client privilege or parliamentary privilege****,*
> *(b) information prepared by or for*
>
> *(i) the Minister of Justice and Solicitor General,*
> *(ii) an agent or lawyer of the Minister of Justice and Solicitor General, or*

> *(iii) an agent or lawyer of a public body,*
>
> *in relation to a matter involving the provision of legal services, or*
>
> *(c) information in correspondence between*
>
> *(i) the Minister of Justice and Solicitor General,*
> *(ii) an agent or lawyer of the Minister of Justice and Solicitor General, or*
> *(iii) an agent or lawyer of a public body, and any other person in relation to a matter involving the provision of advice or other services by the Minister of Justice and Solicitor General or by the agent or lawyer.*
>
> *(2) The head of a public body must refuse to disclose information described in subsection (1)(a) that relates to a person other than a public body.*
>
> *(3) Only the Speaker of the Legislative Assembly may determine whether information is subject to parliamentary privilege.*
>
> [emphasis added]

[55] Clearly, the language included in these statutes is meant to incorporate other legal privileges. These provisions existed prior to the enactment of the *ATIPPA, 2015* but were not adopted. Section 3 of *ATIPPA, 2015* makes it clear that it is a statute with a broadly worded purpose, and achievement of that purpose is limited only by specifically enumerated exceptions.

[56] Further indication of the legislative intent to create a complete, exhaustive code is also available. Remarks in Hansard after tabling a statute in the legislature can be relevant and useful as an aid to interpretation. On April 23, 2015 Hon. Steve Kent, Minister of Health and Community Services and Minister Responsible for the Office of Public Engagement, introduced debate on the bill establishing the *ATIPPA, 2015*:

> *The committee was given a mandate to conduct a* ***comprehensive review*** *of the provisions and operations of the act which included: […]* ***assessing the Right of Access (Part II) and Exceptions to Access provisions (Part III) to determine whether these provisions support the purpose and intent of the legislation or whether changes to these provisions should be considered****;*
>
> *[…]*
>
> *On March 2 of this year, the committee presented government with its two-volume report on the independent statutory review.* ***The report contains a total of ninety recommendations including draft legislation and policy and***

> ***procedural changes designed to be user friendly, and to provide legislation that when compared with international standards will rank among the best in the world.***
> *[…]*
> *Mr. Speaker, the decision* ***to accept all recommendations in the report*** *and to move quickly on bringing this legislation forward is more evidence of this government's commitment to increasing transparency and accountability. It is also consistent with government's broader commitment to open government. The act is not intended to simply address amendments that we made in 2012; rather, it is a new approach to access to information and protection of privacy not only in Canada, but internationally.*
> *[…]*
> *Now, Mr. Speaker, I would like to focus on a critical component of the bill: the access to information provisions. While the act provides for the right to access information held by public bodies, this right has some* ***specific and limited exceptions****. Most exceptions to disclosure are discretionary, meaning the head of a public body can chose whether to release information. Whereas other exceptions are mandatory, meaning the head of the public body has no discretion to release information but is instead required to withhold information.*
> *[…]*
>
> [emphasis added]

[57] Typically, a Minister's comments in Hansard during debate would be the most relevant source when attempting to peer behind the legislative intent, however in this unusual instance, it was announced in a news release on March 3 of that year, several weeks before the bill was introduced in the House, that Government accepted all of the Committee's recommendations. What makes this even more distinct, is that the Committee not only published a report with all of its analysis and recommendations, but it also drafted an entirely new *Act* which government accepted, albeit with two minor (and unrelated) drafting edits. As the *Act* mirrored the Review Committee's recommendations, its perspective is also of value in interpreting the *ATIPPA, 2015*.

[58] Page 3 of the Report includes the Terms of Reference guiding the Committee, indicating that they were required to consider the right of access and exceptions to access "to determine whether these provisions support the purpose and intent of the legislation or whether changes to these provisions should be considered". Clearly, the intent was to tie the exceptions and the purpose closely together.

[59] At page 6 the Committee's outlines its comprehensive approach to the review:

> *The Committee concluded that we had to go beyond simply examining legislation respecting the right to access and exceptions to access in this province.* ***We needed to look at exceptions to access generally accepted in the other jurisdictions of Canada,*** *as well as in democracies of the Western world that are politically and culturally similar to our own. These considerations would have to be weighed in the context of the representations from the people who would make written or oral submissions to the Committee. The Committee interpreted all of this to mean that every record in the custody of public bodies should be presumed to be accessible, except to the extent necessary*
>
> - *to avoid interfering with protected personal privacy*
> - *to avoid demonstrable harm to third parties*
> - *to conform to long-established and well-recognized legal principles*
> - *to avoid unduly interfering with the ability of the Executive Government, its agencies, and other institutions involved in the process of government, to function as they should in a free and open parliamentary democracy*
> - *to be reasonably consistent with principles and best practices reflected in other Canadian and in international legislation*
>
> [emphasis added]

[60] The Committee clearly embarked on a comprehensive review examining and comparing access to information statutes from across Canada and around the world. This would certainly have included all Canadian jurisdictions, including Alberta and Saskatchewan, where the comparable privilege exceptions are markedly broader.

[61] Although the Committee does not explicitly indicate that it chose to exclude settlement privilege, solicitor client privilege and settlement privilege were discussed and examined at length, and other privileges were referenced elsewhere in the report. Records relating to settlement privilege were only discussed in relation to the fact that they should not be withheld on the basis of personal information, and in the context of municipal transparency, the Committee appeared to support disclosure of such information. Regarding the potential applicability of section 30 of the previous *ATIPPA* (now section 40 of *ATIPPA, 2015*) to the release of information about payments made to settle legal disputes, the Committee wrote at **page 282: "[Citizens] are also entitled to know full details of payments to or by a citizen in respect of these matters."**

[62] The Committee references another type of privilege that it decided not to recommend for inclusion in the *ATIPPA, 2015*. At page 304 of the Committee's Report: "She discussed how an older notion of peer privilege, sometimes referred to as the Wigmore privilege, developed in the common law. In Canada, it was replaced by legislation in many provinces during the 1980s and 1990s."

[63] In *Richmond (City) v. Campbell* the court found that the solicitor-client exception in BC's *FIPPA* should not be interpreted to include litigation privilege, and in fact it goes into some detail in analyzing how litigation privilege is separate and distinct from settlement privilege. The court found however that in the case of BC's *FIPPA*, common law settlement privilege was not abrogated by the statute. The following is the extent of the court's analysis and decision with respect to its finding that settlement privilege is applicable to records subject to BC's *FIPPA* even though it is not found among the exceptions listed in the statute:

> *[70]* Section 4 *of FIPPA gives an individual a right of access to a record in the custody of a public body, but that does not extend to information excepted from disclosure under Division 2 of that Part of FIPPA. That Division includes sections 12 through 22.1.*
>
> *[71] As discussed in para. 38 of Magnotta OCA, settlement privilege is a fundamental common law privilege, and it ought not to be taken as having been abrogated absent clear and explicit statutory language. There is an overriding public interest in settlement. It would be unreasonable and unjust to deprive government litigants, and litigants with claims against government or subject to claims by government, of the settlement privilege available to all other litigants. It would discourage third parties from engaging in meaningful settlement negotiations with government institutions.*
>
> *[72] FIPPA does not contain express language that would abrogate settlement privilege and, accordingly, it should not be interpreted to have done so.*

[64] **Other than the three paragraphs quoted above, the Court offered no analysis and there is no evidence that the Court took into account the many factors relevant to statutory interpretation, some of which are enumerated in *Sullivan on the Construction of Statutes*** (addressed below). For example, the Court offered no analysis or consideration of the purpose of the statute. Even if the Court had done so in *Richmond*, the purpose section of BC's *FIPPA* is a much-abbreviated version of that found in the *ATIPPA, 2015*, without

reference to facilitating democracy, participating in the democratic process, or many of the other elements in the purpose section of the *ATIPPA, 2015*.

[65] There are a number of specific factors to consider when assessing whether a statute operates as an exhaustive code, such that the common law cannot override or interfere with its operation. As noted, *Sullivan on the Construction of Statutes* addresses these, and I will adopt Commissioner Tully's concise summary of these factors, with further evidence from this jurisdiction:

> ***Is resort to the common law for the purpose of an exemption based on settlement privilege permissible in this case?***
>
> *[116] The starting point to answering this question is that there is a presumption against changing the common law. That presumption may be rebutted by evidence that the legislature intended its law, or some aspect of it, to be an exhaustive code. In my opinion, there are six core considerations that lead to the conclusion that FOIPOP is intended to be an exhaustive code of exemptions and so resort to the common law for this purpose is not permitted:*
>
> *i. The legislature expressly indicated this intent;*
>
> *ii. The legislation implements a specific policy choice;*
>
> *iii. To permit a common law exemption would defeat the intention of the legislature;*
>
> *iv. The legislation offers a comprehensive scheme;*
>
> *v. The legislation offers an adequate solution; and*
>
> *vi. Specific provisions displace the general common law.*

i. <u>Express indication of legislative intent</u>

[66] As discussed above, section 3 is an expansive purpose section. It grants to the public a broad-based set of rights in order to facilitate democracy, allowing citizens to participate meaningfully in the democratic process and to hold public officials accountable. This is achieved through establishing a public right of access to information, and this right is only limited by specific exceptions enumerated in the *Act*. Most of the provisions listed as

exceptions to this right do not also operate as common law privileges, except solicitor–client privilege and litigation privilege, which are explicitly included in section 30.

[67] In addition to the purpose provision, there are a number of other indicators demonstrating the intention that the *ATIPPA, 2015* must be an exhaustive code. Section 2 defines public bodies that are subject to it; section 5 explicitly lists those classes of records that are exempt from its coverage, section 6 establishes its relationship with the *Personal Health Information Act*, and section 7 states that *ATIPPA, 2015* takes precedence in the event of a conflict between it and any other statute or regulation, with the exception of those listed in its Schedule A.

ii. Legislation implements a specific policy choice

[68] Page 444 of *Sullivan on the Construction of Statutes* states that "resort to the common law is considered inappropriate if it would interfere with the policies or balance of interest embodied in legislation." The comments of the Minister in Hansard, the Terms of Reference provided to the *ATIPPA* Review Committee, and the draft bill written by the Committee and passed by the House, all point to a clear policy choice that the *Act* was intended to serve as a comprehensive, exhaustive and complete code governing access to information.

[69] In *Newfoundland and Labrador (Attorney General) v. Newfoundland and Labrador (Information and Privacy Commissioner)* the Court recognized predecessor legislation as a complete code in deciding whether the Commissioner had the authority to compel production of and review records that are listed in section 5 and therefore not subject to the *Act*. The Court determined that the *Act* did not specifically include provision for the Commissioner to do so, and therefore such a power or authority could not be implied. The parties were referred to the legislature to address any perceived shortcomings in the *Act*:

> *[47] I accept that in the instant case there are difficulties in determining how the Commissioner can gain access to certain information deemed to be outside the Act as defined by section 5(1). However, as the Act is presently configured, it would require a legislative amendment to rectify this unfortunate circumstance. As in the Canoe case, I am satisfied that for the ATIPPA to achieve its full purpose or objects, the Commissioner should be able to determine his own jurisdiction. This would not require complex*

> *measures to safeguard those special areas where access is off limits. However, it is not for this court to rewrite any provision of the Act.*
>
> *[…]*
>
> *[49] **While it is highly desirable that the Commissioner be empowered to recognize the parameters or jurisdiction of his authority, the Act is clear that this is not unlimited. I agree that this weakens the power of the Act; however, it is only the legislature that can change that.***
>
> *[…]*
>
> *[56] **The legislature of this province is the author of this Act and if a solution is required it is for that branch of government to create it. It is not within the authority of the court to rewrite any section of the Act. If the legislature determines that the Act does not apply to certain situations; that is simply the law on that matter.***
>
> [emphasis added]

[70] Commissioner Tully's Report includes a reference to the Supreme Court of Canada's findings on access to information legislation which further supports the position that the *ATIPPA, 2015* reflects a specific policy choice:

> ***[123] The Supreme Court of Canada has made two significant findings relevant to this matter. First, the Court has clearly found that access to information laws are quasi-constitutional. Therefore, like human rights codes for example, access laws attract broad, goal promoting interpretations. Second, the Supreme Court of Canada has indicated that it is only exemptions specified within the Access to Information Act that are permitted. In analyzing arguments by the federal Information Commissioner regarding why ministers' offices should be considered to be "government institutions" under the federal law, the Court notes that this would mean political documents would then become subject to the law because there is no political class exemption provided under the Act.*** *Such a result was not acceptable and formed one of the reasons the Court determined that for the purposes of the federal law, ministers' offices were not government institutions.*
>
> [emphasis added]

iii. <u>To permit a common law exemption would defeat the intention of the legislature</u>

[71] Settlement privilege is a class-based privilege. Some exceptions in *ATIPPA, 2015* are harms-based, while others are class-based. This is an important element of *ATIPPA, 2015*

and it represents a clear legislative choice. Rather than exempt a record from disclosure because it fits into a certain class of records, harms-based exceptions apply when disclosure can reasonably be expected to cause harm.

[72] Certain records, including records of communications between the public body and the opposing party, whether in the course of litigation or settlement negotiations, might be exempt in accordance with section 35(1)(g) on the basis that disclosure could prejudice the financial or economic interests of the pubic body. Depending on the content of an individual record, this could encompass all such information, up to and including a final settlement amount. For this reason, 35(1)(g) is the exception that is most relevant to situations where common law settlement privilege might otherwise apply.

[73] The key difference with the operation of common law settlement privilege is that 35(1)(g) is a **harms-based exception**. This means records withheld citing 35(1)(g) are not exempt unless the public body can establish a reasonable prospect of suffering financial or economic prejudice arsing from disclosure. This is in accordance with the purpose of the *ATIPPA, 2015* in two ways: first, it ensures that only information that is subject to the limited and specific exceptions listed in the *Act* is exempt from disclosure. Secondly, section 35 is subject to the public interest override in section 9. This means that even if the public body could establish a reasonable prospect of economic or financial prejudice, the *Act* does not permit withholding information the disclosure of which would be in the public interest. Examples could include gross negligence, mismanagement, or fraud by public officials that may have resulted in a settlement with a third party. The purpose of the public interest override is to ensure that accountability is always within reach when circumstances require it.

[74] Context is critical in that here a public body is involved, not a business or other entity outside of the ATIPPA, 2015. Transparency and accountability are the foundations of participatory democracy. Public bodies expending public funds are accountable for their expenditures. Exceptions to accountability are in the *Act's* exemptions, the only limits permitted to lessen the ability of citizens to participate meaningfully in the democratic process. Accepting settlement privilege as a freestanding exception, irrespective of the fact

that it is not an exception in the *Act*, would violate a clear legislative intention of moving towards a harms-based statutory exception rather than a class-based common law privilege. Further, it would directly conflict with the purposes of the *Act* stated in section 3.

iv. Legislation offers comprehensive scheme

[75] Many aspects of *ATIPPA, 2015* demonstrate that it is a comprehensive scheme, including the various legislative provisions referenced above, supported by the Minister's comments in Hansard and the Review Committee's report. Additional support is found in section 8:

> *8. (1) A person who makes a request under section 11 has a right of access to a record in the custody or under the control of a public body, including a record containing personal information about the applicant.*
>
> *(2) The right of access to a record does not extend to information* ***excepted from disclosure under this Act****, but if it is reasonable to sever that information from the record, an applicant has a right of access to the remainder of the record.*
>
> [emphasis added]

[76] This provision operationalizes the right of access discussed in section 3, and quite plainly and without ambiguity provides that the public right of access is only infringed by an exception from disclosure "under this Act." This further demonstrates the intent that the *Act* is an exhaustive code. It is impossible to comply with section 8(2) while at the same time recognizing a free-standing settlement privilege that is not listed in the *Act*.

v. Legislation offers an adequate solution

[77] Some of the same evidence which supports (iii) above also applies here. The *ATIPPA, 2015* is a public interest, rights-based statute. As Commissioner Tully notes in her decision, settlement privilege has been recognized in law for centuries. Based on the comprehensive review conducted by the Review Committee, including the examination of comparable statutes across Canada and internationally, it is unlikely that this was simply forgotten. Rather, the scheme of the *Act* supports disclosure with limited exceptions. Some or all (or

none) of the information that might be covered by the common law settlement privilege can potentially be withheld from disclosure under the *ATIPPA, 2015*. This depends on the applicability of the various exceptions listed in the *Act*, all or some or none of which might apply depending on the circumstances, including advice and recommendations (section 29), solicitor-client privilege or litigation privilege (section 30), or harm to the financial or economic interests of a public body (section 35).

[78] In fact, as noted above, this Office recently issued Report A-2018-021 in which the Commissioner determined that records relating to a lawsuit, a settlement agreement, and related correspondence were exempt from disclosure because the public body advanced sufficient evidence to discharge its burden of proof with respect to the potential for harm associated with disclosure of the requested records. The applicable exceptions in that case were sections 28, 30, 35 and 40. Information generated in the settlement process is subject to the *ATIPPA, 2015* if it is in the control or custody of a public body and the legislation operates in such a way that only information that falls under one of the listed exceptions is exempt from disclosure. This ensures that an essential purpose of settlement privilege is effectively recognized through a combination of other exceptions within the *Act*, but only to the extent necessary to prevent harm to the public body, an approach consistent with the purpose of the *Act*.

vi. Specific provision displaces general common law

[79] As discussed above, section 3(1)(c) mandates that the public right of access should only be infringed by limited and specific exceptions listed in the *Act*. As noted in (iv) above, section 8 goes even further in specifically operationalizing this, and together they leave no room for a common law provision not listed in the *Act*. Commissioner Tully's remarks regarding the Nova Scotia law are equally applicable here:

> *[132] Section 16 of FOIPOP authorizes an exemption based on one common law privilege – solicitor-client privilege. The legislature chose to only include solicitor-client privilege. By enacting a specific provision addressing privilege, the legislature indicated that it had considered the matter but was not satisfied to leave it to the common law; it wished to deal with the matter as set out in the legislation. This specific provision would be superfluous if the general law applied. By listing some common law restrictions, the legislature*

> *created an expectation that these would be expressly set out in the Act. Restrictions not mentioned were impliedly excluded.*

[80] Commissioner Tully then discusses the mischief that would be created by recognizing an exception to the right of access that is not explicitly part of the *Act*:

> *[135] With respect to whether or not such an interpretation is efficacious, it does not, in my respectful opinion, promote the purposes of FOIPOP. It creates a non-specific exemption: one that is not specified in the legislation. The whole statutory scheme of FOIPOP is to grant access to "any record in the custody or control of a public body" and to provide "disclosure of all government information with necessary exemptions that are limited and specific".*
>
> […]
>
> *[137] If a public body proposes to withhold information based on common law settlement privilege, what provision of FOIPOP will it cite in keeping with its s. 7(2) obligations? There is no provision and so s. 7(2) cannot be complied with. If the public body is not applying an exemption specified in FOIPOP, do the FOIPOP procedural requirements in terms of a timely response with reasons apply? Does the right to review apply? This creates uncertainty where none exists now.*

V CONCLUSIONS

[81] While the Town has not located a public meeting minute for the [named company] settlement, it conducted a reasonable search for this minute. Similarly, while the Town has not located public meeting minutes for all the settlements, it has conducted a reasonable search for these minutes and has provided the Complainant with the public minutes that it did locate.

[82] The Town located privileged minutes relating to the settlements, however, the Town is entitled to rely on section 28(1)(c) of the *ATIPPA, 2015* to withhold these privileged meeting minutes.

[83] The Town has not demonstrated how the settlement amounts meet section 35(1)(f) or provided any evidence of harm required to meet section 35(1)(g). As such, the Town is unable to rely on these sections to withhold the settlement amounts.

[84] The Town is unable to rely on section 30(1) or settlement privilege to withhold the settlement amounts. Section 30(1) of *ATIPPA, 2015* does not encompass settlement privilege. The six factors discussed above, as well as all the other evidence I have cited in relation to the statute and its purpose lead me to conclude that the *ATIPPA, 2015* is a complete, exhaustive code, and therefore common law settlement privilege does not exist as a free-standing exception overriding the *ATIPPA, 2015*. I have, however, concluded that other exceptions in *ATIPPA, 2015* such as section 35(1)(g), depending on the content of the records, can protect some of the same information that may otherwise be protected by settlement privilege. In this particular case, however, the Town has failed to discharge its burden of proof with regard to those exceptions.

[85] The decision in Sable is a binding authority where disputes are between entities that are all outside of the ATIPPA, 2015. This matter, however, must be decided within the context of the ATIPPA, 2015, which serves as an exhaustive code in all matters relating to access to information requests involving records in the control or custody of public bodies.

VI RECOMMENDATIONS

[86] Under the authority of section 47 of the *ATIPPA, 2015*, I recommend that the Town of Paradise continue to withhold the privileged meeting minutes based on section 28(1)(c) of the *ATIPPA, 2015*. I also recommend that the Town of Paradise disclose to the Applicant the settlement amounts.

[87] As set out in section 49(1)(b) of the *ATIPPA, 2015*, the head of the Town of Paradise 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 (in this case the Complainant) within 10 business days of receiving this Report.

[88] Please note that within 10 business days of receiving the decision of the Town of Paradise under section 49, the Complainant may appeal that decision to the Supreme Court of Newfoundland and Labrador in accordance with section 54 of the *ATIPPA, 2015*.

[89] Dated at St. John's, in the Province of Newfoundland and Labrador, this 5th day of September, 2018.

Donovan Molloy, Q.C.
Information and Privacy Commissioner
Newfoundland and Labrador